

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Case No. 2008 - CP -10 - 1983

Hon. Mikell Scarborough, Master in Equity

RECEIVED

JUL 12 2013

ROOSEVELT SIMMONS
Plaintiff, Appellant

Vs.

BERKELEY ELECTRIC
COOPERATIVE, INC. and
ST. JOHNS WATER COMPANY, INC.)
Defendants, Respondents)

S.C. Supreme Court

RECORD ON APPEAL

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Roosevelt Simmons

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Attorneys for Respondent
St. John's Water Company, Inc.

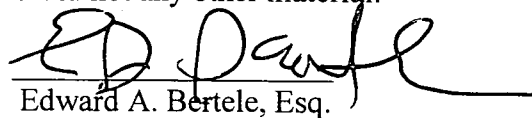
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CERTIFICATION

Counsel for appellant hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.


 Edward A. Bertele, Esq.

March 28, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NUMBER: 08-CP-10-1983

ROOSEVELT SIMMONS,
Plaintiff,

vs.

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

ORDER RELIEVING COUNSEL OF RECORD

FILED
2009 MAY -6 AM 9:00
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

THIS MATTER was before the Court pursuant to a Motion to be Relieved as Counsel of Record filed by Plaintiff's counsel on December 9, 2008. The Court finds that Plaintiff was properly served with the Notice of Hearing on April 8, 2009 at his last known address in accordance with the South Carolina Rules of Civil Procedure; however, the Plaintiff did not appear before the Court. Counsel of record for Defendant Berkeley Electric Cooperative, Inc. was also present before the Court and expressed no objection to Plaintiff's Motion. Counsel of record for Defendant St. John's Water did not have an objection to Plaintiff's Motion and waived his appearance at the hearing.

It appears that Plaintiff and his counsel have reached an impasse regarding the pursuit of his claim against the Defendants in this matter. It also appears that Counsel for Plaintiff filed this lawsuit to protect the Plaintiff's claim and Plaintiff will not be prejudiced by granting this Motion.

#1
T.L.H.
This Court finds that Plaintiff's counsel provided Plaintiff with a copy of relevant documents in his file and notice to secure alternative counsel for pursuit of this lawsuit by

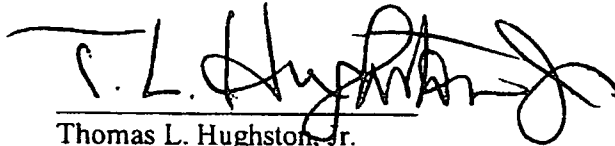
certified mail on November 25, 2008 as evidenced by return receipt dated November 26, 2008.

THEREFORE, IT IS ORDERED THAT:

- A) Counsel for Plaintiff's Motion to be Relieved as Counsel of Record is hereby granted;
- B) Pierce, Hems, Sloan & McLeod, LLC nor any attorneys employed by same shall have any further legal obligation concerning the above-captioned matter; and
- C) Plaintiff has thirty (30) days from the date this Order is signed to secure alternative counsel or make a pro se appearance in this matter; and

AND IT IS SO ORDERED.

#2


Thomas L. Hughston, Jr.
Circuit Court Judge

4/17, 2009
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO 08-CP-10-1983

ROOSEVELT SIMMONS,)
Plaintiff,)
Vs.)

CONSENT ORDER OF
REFERENCE

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

FILED
2009 OCT 13 PM 12:13
CLERK OF COURT

It appears that this matter involves a dispute regarding real property which is in part an equitable matter which should be heard by the Master In Equity. Now, therefore, upon motion of John B. Williams, Esquire, attorney for the Defendant, Berkeley Electric Cooperative, Inc. and with the consent of Edward Bertele Esquire, attorney for the Plaintiff, and Gaines W, Smith, attorney for the Defendant, St. John's Water Company, Inc., this action is a proper matter to refer to The Honorable Mikell R. Scarborough, as Master In Equity for Charleston County. Now, it is therefore

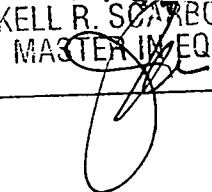
ORDERED that the above cause be, and the same hereby is, referred to The Honorable Mikell R. Scarborough, as Master In Equity for Charleston County to make appropriate findings of fact and conclusions of law regarding the issues of easements, both prescriptive and/or express, across lands of the Plaintiff. Once the

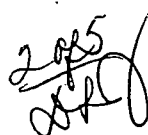
questions of easements have been resolved the Plaintiff reserves the right to return to the jury trial roster for the purpose of pursuing the question of damages.

IT IS SO ORDERED!

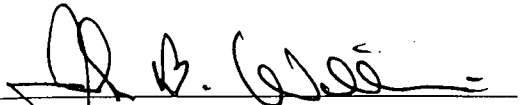

Clerk of Court/Administrative Judge
Ninth Judicial Circuit

This 7th day of October 2009.
Chris South Carolina.

PAID
DATE 9-29-09
AMOUNT \$50.00
MIKELL R. SCARBOROUGH
MASTER IN EQUITY
BY: 

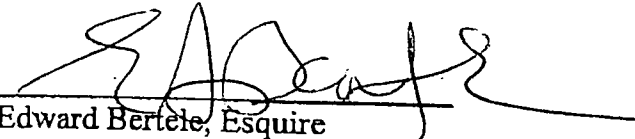
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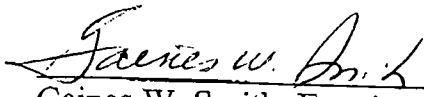
John B. Williams, Esquire
Attorney for the Defendant, Berkeley
Electric Cooperative, Inc.

I CONSENT:



Edward Bertele, Esquire
Attorney for Roosevelt Simmons

I CONSENT:


Gaines W. Smith, Esquire
Attorney for St. Johns Water Co.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

R. Simmons

Plaintiff(s),

-vs-

Berkley Elec. Co.

Defendant(s),

St. Johns Water

ORIGINAL

IN THE COURT OF COMMON PLEAS

CASE NO:

08-CP-10-1983

SCHEDULING ORDER

BY

JULIE A. ARISTON
CLERK OF COURT

2010 AUG 10 AM 9:13

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Pursuant to Rule 16 of the South Carolina Rules of Civil Procedure, the following schedule is established in this case based upon an in court and/or telephone conference.

1. All motions to amend the pleadings and to join additional parties shall be filed on or before

8/30/10

2. The plaintiff(s) must identify any experts on or before

9/18/10

3. The defendant(s) must identify any experts on or before

9/24/10

4. Discovery shall be completed on or before

11/5/10

All discovery requests must be served in time for the response thereto to be served within this deadline.

5. All dispositive motions shall be filed on or before

11/12/10

a. otherwise the parties agree any untimely motions shall be waived.

6. The parties shall mediate this case with

Dennis Cook Esq.

on or before

11/30/10

The mediator shall submit his written report to the court within 10 days of mediation.

AT 10:00 AM

7. This case is set for pre-trial hearing on

11/22/10

at 1:00 PM in ST. Johns

8. The party shall come to the pre-trial hearing with a pre-trial brief to be exchanged, a list of witnesses and a good faith estimate of time for trial.

9. Upon completion of all steps noted above, the matter shall be set for a day certain trial. (usually 30-60 days)

10. This order may not be amended except by order of the Honorable Mikell R. Scarborough, Master-In-Equity for Charleston County.

IT IS SO ORDERED.

8/9

2010

Charleston, SC

Mikell R. Scarborough
Master-In-Equity

Mikell R. Scarborough

cc: Dennis Cook Esq.

R 8

Case No.: 08-CP-10-1983

ROOSEVELT SIMMONS

versus

BERKELEY ELECTRIC, et al.

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.
- ☐ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. nonsuit)
☐ Rule 43(k), SCRPC (Settled); ☐ Other - _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding Arbitration,
Subject to right to restore to confirm, vacate or modify arbitration award: ☐ Other _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by Court

Δ BERKELEY ELECTRIC, Δ UT. JOHN'S WATER CO'S
MOTIONS FOR SUMMARY JUDGMENT are granted.

Dated at Charleston, South Carolina,

11/22/10
Date

Judge

This judgment was entered on the _____ Day of _____, 20____, and a copy mailed first class this _____ Day
of _____, 20____, to attorneys of record or to parties (when appearing pro-se) as follows:

Attorney(s) for Plaintiff(s)

Attorney(s) for Defendant(s)

FILED
2010 NOV 24 AM 8:52
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
ROOSEVELT SIMMONS)
Plaintiff,)
)
-versus-)
)
BERKELEY ELECTRIC COOPERATIVE)
INC., and ST. JOHN'S WATER)
COMPANY, INC.)
Defendants.)
)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2008-CP-10-1983

ORDER GRANTING SUMMARY
JUDGMENT

to St. John's Water Co., Inc.

FILED
2010 DEC 22 AM 10:33
JULIE R. JONES, CLERK
COURT REPORTER

THIS MATTER COMES BEFORE THE COURT pursuant to Defendants' Berkeley Electric Cooperative's and St. John's Water Company's Motions for Summary Judgment. Plaintiff has brought suit against Defendants relating to power and water lines located on Plaintiff's property. Plaintiff has alleged that the power and water lines constitute a trespass on Plaintiff's land, and brings this action for damages. After hearing arguments from the parties and after full consideration of the evidence submitted, for the reasons set forth herein, it is the Order of this Court that Defendant's St. John's Water Company Inc.'s Motion for Summary Judgment be GRANTED.

SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C 58, 580 S.E.2d 433 (2003). Summary judgment is proper where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). Summary judgment is appropriate where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ. Rothrick v. Copeland, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991). Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment shall be



rendered if the movant shows that there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. While v. J.M. Brown Amusement Co., 360 S.C 366, 601 S.E.2d 342 (2004).

FINDINGS OF UNDISPUTED FACTS

1. Roosevelt Simmons, the Plaintiff herein, acquired a parcel of property (hereinafter "subject property") along Kitford Road in Johns Island SC, with a TMS# of 283-00-00-498, in 1992 as trustee, and Plaintiff acquired full title in 2003 in an inter-family transaction.

2. Defendant St. John's Water Company obtained an express easement to install water lines along Kitford Road in 1977. Said easement was obtained from the County of Charleston, and granted Defendant St. John's Water Company the right to install water lines along Kitford Road, which included a portion of the road extending north from the main portion of Kitford Road to residences along said roadway.

3. Defendant St. John's Water Company began installing the water lines along Kitford Road in 1977, and construction was completed in early 1978.

4. For over twenty years, Defendant St. John's Water Company has continuously and without interruption used and enjoyed the underground lines for the purpose of supplying water to customers' residences, which are located to the north across the subject property. This use has been open and obvious due to the fact that there has been continuous water service without the use of any wells by those customers, and is under the original claim of right granted by the 1977 easement. As such, to the extent that the express easement is silent as to the specific location of the water lines, Defendant St. John's Water Company holds a prescriptive easement to maintain those lines in their current position.

5. The affidavits that Defendant St. John's Water Company submitted attest to the fact that the water lines under the subject property have been in use uninterruptedly for a period in excess of twenty years.

[Handwritten signatures]

6. Plaintiff lost title to the subject property in 2010 due to a Sheriff's sale, and the current owner is Mase and Company, LLC.

CONCLUSIONS OF LAW

The Court finds as a matter of law that there is no genuine issue as to any material fact, and Defendant St. John's Water Company is entitled to judgment as a matter of law based on the following:

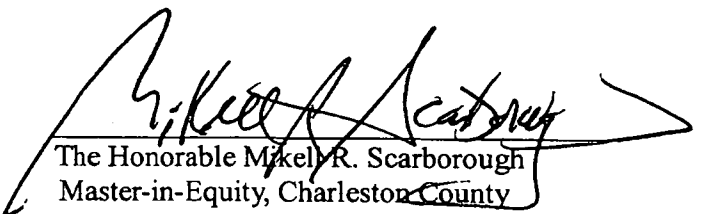
1. Defendant St. John's Water Company has an express written easement, obtained in 1977, to install and maintain water lines under the subject property.

2. Defendant St. John's Water Company has a valid prescriptive easement to maintain the water lines in their current position under the subject property.

3. Plaintiff Roosevelt Simmons is no longer the owner of the subject property, and therefore lacks standing to pursue this claim.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that St. John's Water Company's Motion for Summary Judgment is hereby granted, and that judgment should be entered in favor of the Defendant St. John's Water Company, Inc., and against the Plaintiff, Roosevelt Simmons.

IT IS SO ORDERED!


The Honorable Mikel R. Scarborough
Master-in-Equity, Charleston County

Dated: 12/21, 2010
Charleston, SC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 08-CP-10-1983

ROOSEVELT SIMMONS,)
Plaintiff,)
vs.)
BERKELEY ELECTRIC)
COOPERATIVE, INC., and)
ST. JOHN'S WATER)
COMPANY, INC.,)
Defendants.)

ORDER GRANTING SUMMARY
JUDGMENT TO BERKELEY
ELECTRIC COOPERATIVE, INC.

2011 JAN 18 PM 2:27
JULIE J. ARISTRONG
CLERK OF COURT

FILED

THIS MATTER COMES BEFORE ME on November 22, 2010, upon motion by Defendant Berkeley Electric Cooperative, Inc. ("BEC") in the above-captioned matter seeking summary judgment as to all causes of action asserted in a complaint filed by Plaintiff Roosevelt Simmons. Counsel for BEC and counsel for Plaintiff appeared. Plaintiff has brought three causes of action against BEC relating to power lines, poles, and equipment located on Plaintiff's property alleging trespass and unjust enrichment and seeking damages and declaratory relief. After considering the record before this Court, the memoranda submitted by the parties, the oral arguments of counsel, and for the reasons set forth below, Defendant BEC's Motion for Summary Judgment is hereby GRANTED.

SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 237 S.C.

R13

386, 390, 593 S.E.2d 789, 791 (Ct. App. 2003.) Summary judgment is proper where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997). Summary judgment is appropriate where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ. *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991). The party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Once the party moving for summary judgment meets this initial burden, the non-moving party cannot simply rest on the mere allegations or denials contained in the pleadings. Rule 56(e), SCRCF. Rather, the non-moving party must respond by offering affidavits or other evidence demonstrating a genuine issue of material fact for trial. *Kippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 129, 399 S.E.2d 163, 164 (Ct. App. 1990).

FACTUAL FINDINGS

1. The property at issue concerns two parcels of property located on Kitford Road, Johns Island, South Carolina, presently identified in Charleston County as TMS 2820000135 and TMS 2830000498.
2. These parcels were previously part of larger tracts belonging to Plaintiff's predecessors in title, Edward Heyward and Edward C. Brown.
3. On July 10, 1956, the heirs of Edward Heyward granted to BEC the following easement covering his tract of land on Johns Island:

A perpetual easement for the construction and maintenance of an electric transmission line or lines, towers, poles, anchors and necessary fixtures and wires attached thereto, counterpoise underground wires, and all structures and appliances necessary or with, together with all rights and privileges incident to the use and enjoyment thereof, the right of ingress and egress to and along the said line and the right to clear and keep clear all brush, timber and tree tops along the right-of-way which might endanger any of the works thereon, over and upon that certain tract situated in Johns Island, Charleston

As indicated above, the parcel identified as TMS 2820000135 was part of the tract owned by Edward Heyward and is therefore subject to the terms of the above easement. The same kind of easement was also granted to BEC by the heirs of William Anderson on June 14, 1956 for a tract of land adjacent to the northern boundary of lands including TMS 2820000135.

4. On September 25, 1972, E. C. Brown granted BEC the following easement covering his 4.7 acre tract on Johns Island:

The right to enter upon the land of the undersigned ... and to place, construct, operate, repair, maintain, relocate, and replace thereon or upon all streets, road, or highways abutting and lands an electric transmission or distribution line or system, and to cut and trim trees and shrubbery to the extent necessary to keep them clear of said electric line or system and to cut down from time to time all dead, weak, leaning or dangerous trees that are tall enough to strike the wires in falling.

The parcel identified as TMS 2830000498 was part of the larger tract owned by Brown and is therefore subject to the terms of the above easement.

5. Plaintiff acquired ownership of TMS 2820000135 and TMS 2830000498 in 2003. The unimproved properties are separated by a now-abandoned 100 foot

right-of-way easement for the Seaboard Coastal Railroad.

6. TMS 2830000498 was held by Plaintiff in trust from 1993 to 2003.

7. Pursuant to a deed dated February 9, 2010, TMS 2830000498 was sold by Charleston County to Mase and Company, LLC on November 9, 2009, in order to satisfy an outstanding judgment against Plaintiff.

8. The power poles and power lines on or over Plaintiff's property provide electrical service to adjacent and neighboring properties in the area.

9. BEC's power poles, lines, and related equipment on both parcels at issue are open and obvious.

10. Power poles on the property display "birthmarks" indicating that they were placed on the property between 1984 and 1986.

11. The power lines and poles presently on Plaintiff's property were installed between 1984 and 1986 when the line was rebuilt; however BEC's power lines have existed on Plaintiff's property in that configuration and in those locations for over 30 years.

12. Plaintiff concedes that BEC has the authority to run its main transmission line bringing power to the area over his two parcels.

CONCLUSIONS OF LAW

Plaintiff alleges that BEC committed a trespass by placing and maintaining the power poles and lines on their property. Trespass is an intentional invasion of a plaintiff's interest in the exclusive possession of his property. *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct. App. 2001). In order to prevail on this cause of

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action, Plaintiff must prove that BEC's lines interfered with his prior peaceable possession of the property. *See Charleston Joint Venture v. McPherson*, 308 S.C. 145, 417 S.E.2d 544 (1992).

Plaintiff further alleges that Defendant BEC has been unjustly enriched by locating and maintaining its power lines on and across Plaintiff's property without paying reasonable value for such a benefit. Unjust enrichment is a term used in the law to characterize the result or effect of failure to make restitution where the circumstances indicate an equitable obligation to account therefore. *See South Carolina Requests to Charge – Civil*, §22-29, Tom Ervin (1994). If there is no basis for finding an unjust enrichment, there is no basis for restitution. *Id.*

I. THE POWER LINES AND POLES ON PLAINTIFF'S LAND ARE AUTHORIZED BY EXPRESS EASEMENTS.

Plaintiff does not deny the existence of two express easements granting BEC the right to place power lines on or over his property and to maintain those facilities and its right-of-way. Plaintiff no longer challenges BEC's right to run its main transmission line across his property. Rather, Plaintiff now argues that the written easements are too generalized and that it is unreasonable for BEC to run additional lines across his property—one along the west boundary of TMS 2830000498 and another line (or lines) which allegedly encroach on some portion of TMS 282000135.

BEC's power lines provide an essential service to residents in the area and to Plaintiff. The written easements have been in existence and of record for fifty-three years and thirty-seven years—long before Plaintiff ever came into the chain of title. The power lines did

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not suddenly appear when Plaintiff held the property in trust nor when he acquired the property in 2003. The lines had been on the property for years. Nobody in the chain of title has ever questioned BEC's use of the property under the easement or the particular configuration or placement of the lines. The terms of the easements might be broad in scope, but that is because most of the area was undeveloped when the easements were granted and property owners were not interested in incurring the cost of a survey in order to specifically locate the right-of-way. BEC's actual use of Plaintiff's property under the express easements is relatively limited, longstanding, and not unreasonable. There is certainly no evidence before the Court that BEC intends to increase its authorized use of Plaintiff's property under the terms of the easements.

Plaintiff has failed to establish that any of BEC's power lines on his property exceed the authority granted under the written easements. There is no trespass by BEC, and the company has not been unjustly enriched.

II. THE POWER LINES AND POLES ON PLAINTIFF'S LAND ARE AUTHORIZED BY A PRESCRIPTIVE EASEMENT.

Even if the express easements failed to authorize any particular power lines and poles as presently located and configured on Plaintiff's property, BEC has acquired a prescriptive easement for that equipment. The existence of a prescriptive easement is shown by: (1) continued and uninterrupted use or enjoyment of the right for a period of at least 20 years; (2) identity of the use or enjoyment must be proven; and (3) the use is either adverse or under a claim of right. *See Revis Barrett*, 321 S.C. 206, 209, 467 S.E.2d 460, 462 (Ct. App. 1996).

BEC has submitted affidavits from the current supervisor for the Johns Island District, Thomas Sweeny, and his predecessor in the position, Richard Frank. Both men have worked

R18
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for BEC for over 30 years. Both men observed that the power poles on Plaintiff's property have "birthmarks" which indicate that they were installed between 1984 and 1986. According to their affidavits, these poles were probably installed when the line was rebuilt. However, Sweeny and Frank are both certain that the power lines have been continuously operated on or above Plaintiff's property in essentially the same configuration without interruption since they began working in the area in 1978-79—well in excess of twenty years.

Mr. Sweeny and Mr. Frank further state that they believed BEC had an easement for the power lines on and across Plaintiff's property because that was the company's normal practice. They installed and maintained power lines and the right-of-way on Plaintiff's property because they believed that they had a legitimate right to do so.

In response to this, Plaintiff denies that all the power lines crossing his property have been in place for at least 20 years. According to his initial and supplemental affidavits, Plaintiff's denial is based on a plat prepared in 1981 by W. H. Gaillard which, according to Plaintiff, fails to show the BEC power line running along the west boundary of his property and across Kitford Road. Plaintiff's reliance on this plat is misplaced because it is not a plat of his property and it does not purport to depict all of the features on his property. The plat is merely intended to show the placement of a fifty foot right-of-way easement and drainage easement for a neighboring property. The Gaillard plat does not contradict the statements of BEC's district supervisors.

In his opposition, Plaintiff also argues that another plat of a neighboring property prepared by James E. Shuler in 1981 shows that BEC did not have lines running to Kitford Road

along the western boundary of Plaintiff's property. Again, this is not a plat of Plaintiff's property, it does not purport to show every feature on plaintiff's property, and it does not conflict with the statements of BEC's district supervisors.

Plaintiff further argues in his brief that BEC's "system maps" conflict with the representations of its supervisors but there is no evidence supporting this claim. Plaintiff failed to provide any affidavits or reference any testimony explaining what these maps depict, how accurate they are, or how they are to be properly interpreted. Plaintiff's theory that some of the power lines crossing his property might not have been there for at least twenty years remains just that—a theory. Reasonable inferences must be based on facts before the Court and not based on argument and speculation. Plaintiff has failed to produce any sufficient evidence to rebut BEC's showing of continuous and uninterrupted use of the property for at least twenty years.

BEC has established the continued and uninterrupted use of the power lines on Plaintiff's property under a claim of right by clear and convincing evidence. BEC has a prescriptive easement for the lines on Plaintiff's property. There is no trespass by BEC, and the company has not been unjustly enriched.

CONCLUSION

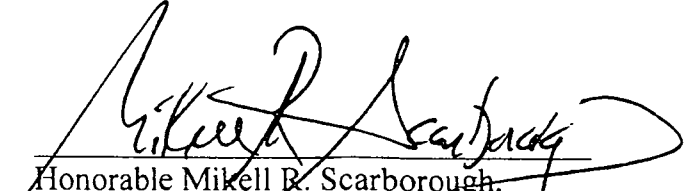
Based upon the record before this Court, Plaintiff cannot establish the essential elements of his claims for trespass and unjust enrichment because BEC's power lines, power poles, and equipment were erected and are maintained under the authority of both written and prescriptive

R 20
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easements. Accordingly, Defendant's motion for summary judgment is hereby GRANTED.

IT IS HEREBY ORDERED!


Honorable Mikell R. Scarborough,
Charleston County Master in Equity

Date: 1/13/2011

R⁹21

versus

Roosevelt Simmons
Plaintiff

Berkley Electric
Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and verdict has been rendered.
- ☐ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. no); ☐ Rule 43(k), SCRPC (Settled); ☐ Other - _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding Arbitration; ☐ Subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by Court

Plaintiff's motion to reconsider is denied.
59(e)

Dated at Charleston, South Carolina,

Date

4/11/11

Judge

[Signature]

This judgment was entered on the _____ Day of _____, 20____, and a copy mailed first class this _____ of _____, 20____, to attorneys of record or to parties (when appearing pro-se) as follows:

Attorney(s) for Plaintiff(s)

Attorney(s) for Defendant(s)

SCRP Form 4 (Rev. 2/96)

FILED
2011 APR 12
JULIE B. CLARK
CLERK OF COURT
PH 3:41

R22

Roosevelt Simmons

versus

Berkeley Electric Cooper
Inc. and St. John's Wat
Defendant Company, Inc.

Plaintiff

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and verdict has been rendered.
- ☐ DECISION BY COURT. This action came to trial or hearing before the court. The issues have been tried and heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. not
☐ Rule 43(k), SCRPC (Settled); ☐ Other - _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding Arbitr
Subject to right to restore to confirm, vacate or modify arbitration award: ☐ Other _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by Court

Plaintiff's 59(e) Motion to reconsider is denied

Dated at Charleston, South Carolina,

4/11/11
Date

Judge

This judgment was entered on the _____ Day of _____, 20____, and a copy mailed first class this _____
of _____, 20____, to attorneys of record or to parties (when appearing pro-se) as follows

Attorney(s) for Plaintiff(s)

Attorney(s) for Defendant(s)

FILED
2011 APR 18 PM 12:32
JILLIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 08-CP-10-

ROOSEVELT SIMMONS,)

Plaintiff,)

vs.)

BERKELEY ELECTRIC)
CORPORATION, INC.)
and ST. JOHN'S WATER)
COMPANY, INC.,)

Defendants.)

COMPLAINT
(Jury Trial Demanded)

FILED
2008 APR -9 PM 2:12
JULIE L. HARRIS, CLERK OF COURT
BY _____

Plaintiff Roosevelt Simmons, complains of the Defendants, Berkeley Electric Corporation, Inc. ("Berkeley Electric") and St. John's Water Company, Inc. ("St. John's Water") respectfully allege and show unto this Honorable Court:

1. Plaintiff Roosevelt Simmons is a citizen and resident of Charleston County, South Carolina and the owner of TMS Nos. 283-00-00-498 and 283-00-00-136 located on or near Kitford Road, Johns Island, South Carolina, 29455.

2. Defendant Berkeley Electric is a South Carolina corporation and regularly conducts business in Charleston County.

3. Defendant St. John's Water is a South Carolina corporation with its principal place of business in Charleston County, South Carolina.

4. This court has subject matter jurisdiction and proper venue.

FOR A FIRST CAUSE OF ACTION
(Trespass as to both Defendants)

5. Plaintiffs incorporate herein by reference the allegations of the preceding paragraphs.

6. Plaintiff has actual possession of and title to TMS Nos. 283-00-00-498 and 283-00-00-136 located on or near Kitford Road, Johns Island, South Carolina, 29455.

7. Defendants have interfered with Plaintiff's quiet and exclusive enjoyment of his property by constructing, placing, and/or maintaining unauthorized power and water lines on Plaintiffs' property.

8. Defendants' above described trespass has directly resulted in damages to Plaintiff's property.

9. Defendants' above described trespass has directly resulted in economic loss to Plaintiff.

10. As a result of the above described trespass, Plaintiff is entitled to a judgment requiring Defendants to remove any and all materials associated with the power and water lines from Plaintiff's property, as well as actual and punitive damages resulting from the trespass.

FOR A SECOND CAUSE OF ACTION
(Unjust Enrichment)

11. Plaintiff repeats and realleges herein the allegations set forth in the previous Paragraphs.

12. Defendants were furnished a nongratuitous and valuable benefit by using Plaintiff's land without paying for its reasonable value.

13. The benefits conferred upon Defendants by Plaintiff were realized, accepted, used and enjoyed by Defendant.

14 It would be inequitable for Defendants to use the unauthorized easements without paying for its reasonable fair market value.

15. Defendants received a valuable benefit when they used Plaintiff's land, and Defendants will be unjustly enriched at the Plaintiff's expense if they retain the benefit without paying for it.

16. Plaintiffs are entitled to a judgment against Defendants, jointly and severally, in an amount equal to the value of the benefit conferred upon them by Plaintiff.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

17. Plaintiff repeats and realleges herein the allegations set forth in the previous Paragraphs.

18. Plaintiff also brings an action for Declaratory Judgment pursuant to South Carolina Code Section 15-53-10 et seq. for the purpose of determining a question of actual controversy between the parties.

19. Defendant's continued possession and control of the unauthorized easement is in violation of Plaintiff's right to quiet and exclusive enjoyment of their property

20. As a result, Plaintiff is entitled to a declaratory judgment from this Court that Defendants have no property interests or rights in TMS Nos. 283-00-00-498 and 283-00-00-136 located on or near Kitford Road, Johns Island, South Carolina, 29455.

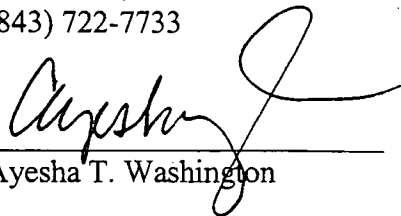
21. Plaintiff demands a jury trial.

WHEREFORE, Plaintiff prays:

- a) For judgment against the Defendants;
- b) For actual damages and incidental damages in an amount to be determined by the jury;

- c) For treble damages;
- d) For punitive damages in an amount to be determined by the jury;
- e) For attorney fees and costs incurred;
- f) For such other and further relief as this Court deems just and proper.

PIERCE, HERNS, SLOAN & MCLEOD, LLC
The Blake House
321 East Bay Street
Post Office Box 22437
Charleston, SC 29413
(843) 722-7733



Ayesha T. Washington

April 9, 2008
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 08-CP-10-1983

ROOSEVELT SIMMONS,)

Plaintiff,)

vs.)

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

Defendants.)

AMENDED COMPLAINT
(Jury Trial Demanded)

FILED
2008 APR 10 PM 2:50
JULIE S. HASTRONG
CLERK OF COURT
BY _____

Plaintiff Roosevelt Simmons, complains of the Defendants, Berkeley Electric Cooperative, Inc. ("Berkeley Electric") and St. John's Water Company, Inc. ("St. John's Water") respectfully allege and show unto this Honorable Court:

1. Plaintiff Roosevelt Simmons is a citizen and resident of Charleston County, South Carolina and the owner of TMS Nos. 283-00-00-498 and 283-00-00-136 located on or near Kitford Road, Johns Island, South Carolina, 29455.

2. Defendant Berkeley Electric is a South Carolina corporation and regularly conducts business in Charleston County.

3. Defendant St. John's Water is a South Carolina corporation with its principal place of business in Charleston County, South Carolina.

4. This court has subject matter jurisdiction and proper venue.

FOR A FIRST CAUSE OF ACTION
(Trespass as to both Defendants)

5. Plaintiffs incorporate herein by reference the allegations of the preceding paragraphs.

6. Plaintiff has actual possession of and title to TMS Nos. 283-00-00-498 and 283-00-00-136 located on or near Kitford Road, Johns Island, South Carolina, 29455.

7. Defendants have interfered with Plaintiff's quiet and exclusive enjoyment of his property by constructing, placing, and/or maintaining unauthorized power and water lines on Plaintiffs' property.

8. Defendants' above described trespass has directly resulted in damages to Plaintiff's property.

9. Defendants' above described trespass has directly resulted in economic loss to Plaintiff.

10. As a result of the above described trespass, Plaintiff is entitled to a judgment requiring Defendants to remove any and all materials associated with the power and water lines from Plaintiff's property, as well as actual and punitive damages resulting from the trespass.

FOR A SECOND CAUSE OF ACTION
(Unjust Enrichment)

11. Plaintiff repeats and realleges herein the allegations set forth in the previous Paragraphs.

12. Defendants were furnished a nongratuitous and valuable benefit by using Plaintiff's land without paying for its reasonable value.

13. The benefits conferred upon Defendants by Plaintiff were realized, accepted, used and enjoyed by Defendant.

14 It would be inequitable for Defendants to use the unauthorized easements without paying for its reasonable fair market value.

15. Defendants received a valuable benefit when they used Plaintiff's land, and Defendants will be unjustly enriched at the Plaintiff's expense if they retain the benefit without paying for it.

16. Plaintiffs are entitled to a judgment against Defendants, jointly and severally, in an amount equal to the value of the benefit conferred upon them by Plaintiff.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

17. Plaintiff repeats and realleges herein the allegations set forth in the previous Paragraphs.

18. Plaintiff also brings an action for Declaratory Judgment pursuant to South Carolina Code Section 15-53-10 et seq. for the purpose of determining a question of actual controversy between the parties.

19. Defendant's continued possession and control of the unauthorized easement is in violation of Plaintiff's right to quiet and exclusive enjoyment of their property

20. As a result, Plaintiff is entitled to a declaratory judgment from this Court that Defendants have no property interests or rights in TMS Nos. 283-00-00-498 and 283-00-00-136 located on or near Kitford Road, Johns Island, South Carolina, 29455.

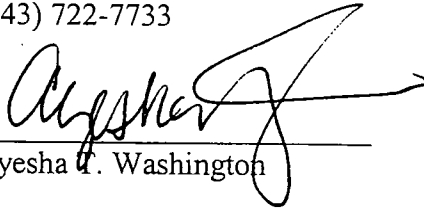
21. Plaintiff demands a jury trial.

WHEREFORE, Plaintiff prays:

- a) For judgment against the Defendants;
- b) For actual damages and incidental damages in an amount to be determined by the jury;

- c) For treble damages;
- d) For punitive damages in an amount to be determined by the jury;
- e) For attorney fees and costs incurred;
- f) For such other and further relief as this Court deems just and proper.

PIERCE, HERNS, SLOAN & MCLEOD, LLC
The Blake House
321 East Bay Street
Post Office Box 22437
Charleston, SC 29413
(843) 722-7733


Ayesha T. Washington

April 10, 2008
Charleston, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 08-CP-10-1983

ROOSEVELT SIMMONS,)
)
Plaintiff,)

SECOND AMENDED COMPLAINT
(Jury Trial Demanded)

vs.)

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

FILED
2008 SEP 24 AM 11:40
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Plaintiff Roosevelt Simmons, complains of the Defendants, Berkeley Electric Cooperative, Inc. ("Berkeley Electric") and St. John's Water Company, Inc. ("St. John's Water") respectfully allege and show unto this Honorable Court:

1. Plaintiff Roosevelt Simmons is a citizen and resident of Charleston County, South Carolina and the owner of TMS Nos. 283-00-00-498 and 282-00-00-135 located on or near Kitford Road, Johns Island, South Carolina, 29455.
2. Defendant Berkeley Electric is a South Carolina corporation and regularly conducts business in Charleston County.
3. Defendant St. John's Water is a South Carolina corporation with its principal place of business in Charleston County, South Carolina.
4. This court has subject matter jurisdiction and proper venue.

FOR A FIRST CAUSE OF ACTION
(Trespass as to both Defendants)

5. Plaintiffs incorporate herein by reference the allegations of the preceding paragraphs.

6. Plaintiff has actual possession of and title to TMS Nos. 283-00-00-498 and 282-00-00-135 located on or near Kitford Road, Johns Island, South Carolina, 29455.

7. Defendants have interfered with Plaintiff's quiet and exclusive enjoyment of his property by constructing, placing, and/or maintaining unauthorized power and water lines on Plaintiffs' property.

8. Defendants' above described trespass has directly resulted in damages to Plaintiff's property.

9. Defendants' above described trespass has directly resulted in economic loss to Plaintiff.

10. As a result of the above described trespass, Plaintiff is entitled to a judgment requiring Defendants to remove any and all materials associated with the power and water lines from Plaintiff's property, as well as actual and punitive damages resulting from the trespass.

FOR A SECOND CAUSE OF ACTION
(Unjust Enrichment)

11. Plaintiff repeats and realleges herein the allegations set forth in the previous Paragraphs.

12. Defendants were furnished a nongratuitous and valuable benefit by using Plaintiff's land without paying for its reasonable value.

13. The benefits conferred upon Defendants by Plaintiff were realized, accepted, used and enjoyed by Defendant.

14 It would be inequitable for Defendants to use the unauthorized easements without paying for its reasonable fair market value.

15. Defendants received a valuable benefit when they used Plaintiff's land, and Defendants will be unjustly enriched at the Plaintiff's expense if they retain the benefit without paying for it.

16. Plaintiffs are entitled to a judgment against Defendants, jointly and severally, in an amount equal to the value of the benefit conferred upon them by Plaintiff.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

17. Plaintiff repeats and realleges herein the allegations set forth in the previous Paragraphs.

18. Plaintiff also brings an action for Declaratory Judgment pursuant to South Carolina Code Section 15-53-10 et seq. for the purpose of determining a question of actual controversy between the parties.

19. Defendant's continued possession and control of the unauthorized easement is in violation of Plaintiff's right to quiet and exclusive enjoyment of their property

20. As a result, Plaintiff is entitled to a declaratory judgment from this Court that Defendants have no property interests or rights in TMS Nos. 283-00-00-498 and 282-00-00-135 located on or near Kitford Road, Johns Island, South Carolina, 29455.

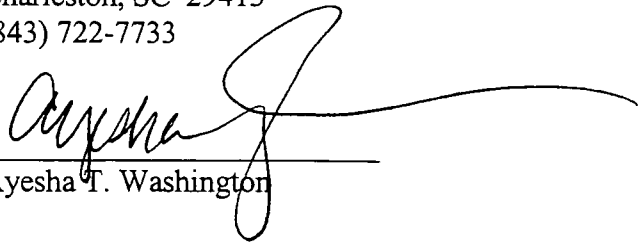
21. Plaintiff demands a jury trial.

WHEREFORE, Plaintiff prays:

- a) For judgment against the Defendants;
- b) For actual damages and incidental damages in an amount to be determined by the jury;

- c) For treble damages;
- d) For punitive damages in an amount to be determined by the jury;
- e) For attorney fees and costs incurred;
- f) For such other and further relief as this Court deems just and proper.

PIERCE, HERNS, SLOAN & MCLEOD, LLC
The Blake House
321 East Bay Street
Post Office Box 22437
Charleston, SC 29413
(843) 722-7733


Ayesha T. Washington

September 24, 2008
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2008-CP-10-1983

ROOSEVELT SIMMONS)

Plaintiff,)

vs.)

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

FILED

AUG 11 2008

W. J. ARMSTRONG
CLERK, CP & GS

ANSWER OF DEFENDANT
ST. JOHN'S WATER COMPANY, INC.
TO PLAINTIFF'S SECOND AMENDED
COMPLAINT

NOW COMES the Defendant, ST. JOHN'S WATER COMPANY, INC., by and through their undersigned attorney, answering the Second Amended Complaint of the Plaintiff herein, who would respectively show unto this Honorable Court as follows:

1. This Defendant denies each and every allegation contained in the Second Amended Complaint other than those modified herein.

2. Answering paragraph #1 of Plaintiff's Second Amended Complaint, this Defendant is without sufficient information of the allegations contained in said paragraph, and, therefore, denies the same.

3. Answering paragraphs number 2 and 3 of said Second Amended Complaint, ST. JOHN'S WATER COMPANY admits the same.

4. Answering paragraph number 4 of said Second Amended Complaint, this Defendant submits that the matter of jurisdiction and venue will be properly decided by the Court.

5. ST. JOHN'S WATER COMPANY responding to paragraph #5 of said Second Amended Complaint realleges its answers to the preceding paragraphs.
6. Answering paragraph number 6 of said Second Amended Complaint, this Defendant is without information as to the truth of said allegations contained in said paragraph, and, therefore, denies the same.
7. Answering paragraphs number 7, 8, 9 and 10 of said Second Amended Complaint, this Defendant denies the same.
8. Answering paragraph number 11, of said Second Amended Complaint, this Defendant realleges its answers to all of the preceding paragraphs.
9. Answering paragraphs number 12, 13 and 14, 15 and 16 of said Second Amended Complaint, the allegations are specifically denied by ST. JOHN'S WATER COMPANY.
10. Answering paragraph number 17 of said Second Amended Complaint, ST. JOHN'S WATER COMPANY realleges its answers to all of the preceding paragraphs.
11. Answering paragraph number 18 of said Second Amended Complaint, this Defendant submits that the same requires no affirmative answer by ST. JOHN'S WATER COMPANY.
12. Answering paragraphs number 19 and 20 of said Second Amended Complaint, this Defendant denies the same.
13. This Defendant joins with the Plaintiff herein in the demand for a jury trial.

FOR A FIRST AFFIRMATIVE DEFENSE

14. This Defendant reaffirms each answer contained within paragraphs # 1 through #13 above as if fully repeated verbatim herein.

FOR A SECOND AFFIRMATIVE DEFENSE

15. ST. JOHN'S WATER COMPANY alleges and will show unto this Court that the Plaintiff has failed to state a claim upon which relief may be granted.

FOR A THIRD AFFIRMATIVE DEFENSE

16. ST. JOHN'S WATER COMPANY will respectively show unto this Court that the applicable statutes of limitation bars the Plaintiff from any recovery.

FOR A FOURTH AFFIRMATIVE DEFENSE

17. ST. JOHN'S WATER COMPANY alleges and will show that the water line upon the property claimed by the Plaintiff has been at its present location for a period of twenty years and that the said company has a right to be on the property from the date of this installation to the present.

FOR A FIFTH AFFIRMATIVE DEFENSE

18. ST. JOHN'S WATER COMPANY has a prescriptive easement and claim of right to the water line and the property upon which it is located and that the Plaintiff has known of the existence of said water line for a period of at least twenty years.

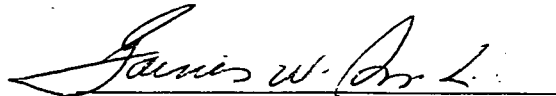
FOR A SIXTH AFFIRMATIVE DEFENSE

19. That the existence of the water line has been in place during a period of time to establish a prescriptive easement.

WHEREFORE, having fully answered the Second Amended Complaint of

the Plaintiff, Defendant prays that this Honorable Court inquire into the matters set forth in said Second Amended Complaint and for an Order dismissing Plaintiff's action and awarding to ST. JOHN'S WATER COMPANY attorney fees and costs involved herein.

RESPECTFULLY SUBMITTED,
LEGARE, HARE & SMITH



Gaines W. Smith, Esquire
Attorney for Defendant,
ST. JOHN'S WATER COMPANY
63 Broad Street – P.O. Box 578
Charleston, SC 29402
Telephone: (843) 722-7773
Facsimile: (843) 722-3417

Charleston, SC

Dated: Aug 11, 2008

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS
) IN THE NINTH JUDICIAL CIRCUIT
) CIVIL ACTION NUMBER: 08-CP-10-1983

ROOSEVELT SIMMONS,)

Plaintiff,)

Vs.)

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

Defendants.)

FIRST AMENDED ANSWER OF DEFENDANT
BERKELEY ELECTRIC COOPERATIVE, INC.

FILED
2008 OCT -6 PM 4:25
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Defendant, Berkeley Electric Cooperative, Inc. ("BEC") answering the
Second Amended Complaint of the Plaintiff, does hereby state as follows:

AS A FIRST AFFIRMATIVE DEFENSE

1. Each and every allegation not hereinafter specifically admitted is hereby
denied.

2. Defendant BEC has insufficient information regarding the first allegation
and, therefore, neither admits nor denies same but will demand strict proof thereof.

3. Defendant BEC admits the allegations contained in paragraphs 2, 3, and 4
of Plaintiff's Complaint.

4. Defendant BEC has insufficient information regarding the sixth allegation
and, therefore, neither admits nor denies same but will demand strict proof thereof.

5. Defendant BEC denies the allegations contained in paragraphs 7, 8, 9, and
10 of Plaintiff's Complaint.

6. Defendant BEC denies the allegations contained in paragraphs 12, 13, 14, 15, and 16 of Plaintiff's Complaint.

7. The allegation contained in paragraph 18 of Plaintiff's Complaint requires no response from Defendant BEC.

8. Defendant BEC denies the allegations contained in paragraphs 19 and 20 of Plaintiff's Complaint.

9. The allegation contained in paragraph 21 of Plaintiff's Complaint requires no response from Defendant BEC.

AS A SECOND AFFIRMATIVE DEFENSE

10. Plaintiff fails to state a claim upon which relief can be granted.

AS A THIRD AFFIRMATIVE DEFENSE

11. Plaintiff's claims are barred by the applicable statutes of limitations or statutes of repose.

AS A FOURTH AFFIRMATIVE DEFENSE

12. Plaintiff's rights in the subject property, if any, are subject to and limited by the terms of written easements or written rights-of-way held by Defendant BEC.

AS A FIFTH AFFIRMATIVE DEFENSE

13. The facilities at issue are open, obvious, and have been in place in excess of the time required to establish a prescriptive easement on and across Plaintiff's alleged property; accordingly, Plaintiff's rights in the subject property, if any, are subject to and limited by a prescriptive easement held by Defendant BEC.

AS A SIXTH AFFIRMATIVE DEFENSE

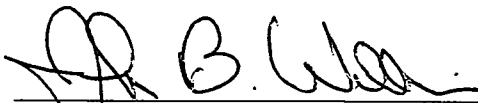
14. Plaintiff's claims are barred by the doctrines of laches, waiver, and/or estoppel.

AS A SEVENTH AFFIRMATIVE DEFENSE

15. Defendant reserves the right to raise additional affirmative defenses as the facts develop in this action.

WHEREFORE, having fully answered the Complaint of the Plaintiff, Defendant, Berkeley Electric Cooperative, Inc., does pray this Court inquire into the matters raised herein and issue an Order dismissing Plaintiff's action and awarding said Defendant attorneys fees and costs and such further relief as this Court may deem fair and equitable.

WILLIAMS AND HULST, LLC



John B. Williams, Esquire
P.O. Box 1288
209 East Main Street
Moncks Corner, SC 29461
(843) 761-8232
Facsimile (843) 899-5834

Attorney for Berkeley Electric Cooperative, Inc.

Dated: October 2, 2008

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 08-CP-10-1983

ROOSEVELT SIMMONS,)

Plaintiff,)

Vs.)

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

Defendants.)

NOTICE OF MOTION AND MOTION FOR
SUMMARY JUDGMENT BY DEFENDANT
BERKELEY ELECTRIC COOPERATIVE, INC.

2009 MAY - 7 PM 4: 24
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

TO: MR. ROOSEVELT SIMMONS, PLAINTIFF, PRO SE

09-71083
PLEASE TAKE NOTICE that Defendant Berkeley Electric Cooperative, Inc., by and though its undersigned attorneys, will and does move the Presiding Judge of the Court of Common Pleas, Circuit Court of the Ninth Judicial Circuit at Charleston County Courthouse, Charleston, South Carolina, within ten (10) days form the date hereof, or as soon thereafter as the Court may appoint, for summary judgment on the claims and causes of action in Plaintiff's complaint alleging trespass, unjust enrichment and seeking declaratory relief and damages.

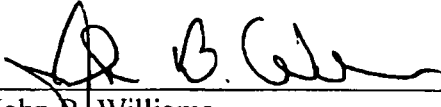
The grounds for this motion are that there are no genuine issues as to any material fact and that Defendant Berkeley Electric Cooperative, Inc., is entitled to judgment as a matter of law because the it has an easement by prescription to maintain its power lines on and over Plaintiff's property. Said prescriptive easement is based on the following undisputed facts: 1.) The power lines and supporting poles on Plaintiff's property

R43

constitute an open and obvious condition in existence prior to Plaintiff's acquisition of the property; 2.) the power lines were established to transmit electrical power to the surrounding properties and have been maintained under a claim of right by Defendant; and 3.) the power lines and support poles have been located on his property in excess of 20 years.

Said motion is based on this notice the accompanying affidavits in support, the pleadings and any exhibits in the Court's file, and any memorandum of law or further supporting documentation provided to this Court.

WILLIAMS & HULST, LLC



John B. Williams
Attorneys For Defendant
P.O. Box 1288
Moncks Corner, South Carolina 29461
(843) 761-8232
Facsimile: (843) 899-5834

Dated: May 1, 2009

I HEREBY CERTIFY THAT I HAVE MAILED A
COPY OF THE ABOVE TO ALL PARTIES/COUNSELS OF
RECORD IN SAID PROCEEDING TO THEIR ADDRESS
WITH SUFFICIENT POSTAGE ATTACHED.
THIS 6th DAY OF MAY 2009
John B. Williams MONCK'S CORNER, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
1983

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 08-CP-10-

ROOSEVELT SIMMONS,)
)

Plaintiff,)
)

Vs.)
)

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

Defendants.)
)

AFFIDAVIT OF THOMAS SEELEY

2009 MAY -7 PM 4:25
JULIE J. ARNSTRONG
CLERK OF COURT

FILED

1. I am employed by Berkeley Electric Cooperative, Inc. (BEC) and have been since 1978.

2. I am the District Superintendent for the Johns Island District of BEC. Among my responsibilities are the construction and maintenance of the electrical distribution lines in the Johns Island area.

3. I am familiar with the age, configuration, features and characteristics of the utility line located at 3507 Kitford Road. The line is clearly visible from Kitford Road and is obvious to anyone inspecting the property.

4. To the best of my recollection this line has never been moved and has always been used to provide power to the residents in the area as long as I have worked for the Company. The poles on the property show birthmarks of 1984 and 1986 (Exhibit A). Based on the birthmarks and my own personal

R 45

recollection, I am reasonably certain that the pole was installed when the line was rebuilt. I believe that the line has been located on and across the subject property since at least 1980. However, I am certain that this utility line has been continuously operated on or above subject property in essentially the same configuration without interruption since I began working the area in 1978, well in excess of 20 years.

5. I always believed that BEC has an easement providing a right-of-way for this utility line because I am informed that is the company's normal practice. I entered the property to maintain the lines under the belief that BEC had a legitimate right to do so. Previous owners never objected to the operations or use of the property by BEC.

Thomas Seeney
Thomas Seeney

Sworn to before me this 6th
day of ~~February~~, 2009
March

Martha B. Harris
Notary Public for the State of South Carolina
My Commission Expires: 3/15/09

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
1983

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 08-CP-10-1983

ROOSEVELT SIMMONS,)

Plaintiff,)

Vs.)

BERKELEY ELECTRIC)

COOPERATIVE, INC., and)

ST. JOHN'S WATER)

COMPANY, INC.,)

Defendants.)

AFFIDAVIT OF RICHARD C. FRANK

FILED
2009 MAY - 7 PM 4:25
JULIE J. ARMSTRONG
CLERK OF COURT

1. I am employed by Berkeley Electric Cooperative, Inc. (BEC) and have been since 1979.

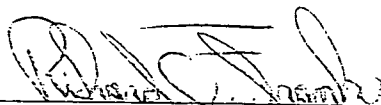
2. I was the District Superintendent for the Johns Island District of BEC. Among my responsibilities were the construction and maintenance of the electrical distribution lines in the Johns Island area.

3. I am familiar with the age, configuration, features and characteristics of the utility line located at 3507 Kitford Road. The line is clearly visible from Kitford Road and is obvious to anyone inspecting the property.

4. To the best of my recollection this line has never been moved and has always been used to provide power to the residents in the area as long as I have worked for the Company. The poles on the property show birthmarks of 1984 and 1986 (Exhibit A). Based on the birthmarks and my own personal

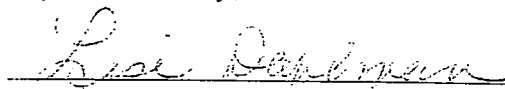
recollection, I am reasonably certain that the pole was installed when the line was rebuilt. I believe that the line has been located on and across the subject property since at least 1980. However, I am certain that this utility line has been continuously operated on or above subject property in essentially the same configuration without interruption since I began working the area in 1979, well in excess of 20 years.

5. I always believed that BEC has an easement providing a right-of-way for this utility line because I am informed that is the company's normal practice. I entered the property to maintain the lines under the belief that BEC had a legitimate right to do so. Previous owners never objected to the operations or use of the property by BEC.



Richard C. Frank

Sworn to before me this 2nd
day of ~~February~~ ^{March}, 2009


Notary Public for the State of South Carolina
My Commission Expires: 5/22/2013

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 08-CP-10-1983

ROOSEVELT SIMMONS)

Plaintiff)

Vs.)

BERKELEY ELECTRIC)
COOPERATIVE INC. and)
ST. JOHNS WATER)
COMPANY, INC.)

Defendants)

AFFIDAVIT OF
ROOSEVELT SIMMONS

2009 JUL -2 PM 2:51
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Roosevelt Simmons, of full age being duly sworn according to law upon his oath deposes and says:

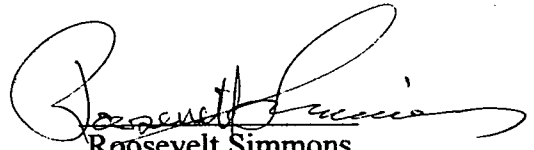
1. I am the plaintiff and submit this affidavit in opposition to the motion by Berkeley Electric Cooperative Inc. for summary judgment. I have personal knowledge of the facts set forth herein.

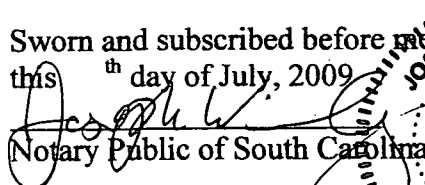
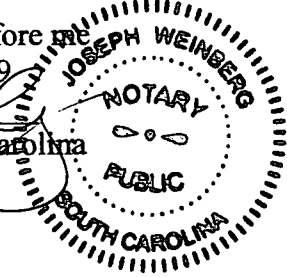
2. The property which is the subject of this action for trespass and other claims is located on Kitford Road on Johns Island. The property is undeveloped although there are homes in the area. I acquired ownership of this property in 2003 although it had been owned by my family ^{before} since the 1960's.

RS 3. In 2005, I hired a surveying company to prepare a plat of the property which I had been deeded by my family. Attached as Exhibit A is the plat prepared by Richard Lacey of HLA, dated May 12, 2005. The plat shows a Berkeley Electric power line easement located along the easterly side of my property 25' wide which was given by a prior owner in 1972. The power line

about which I filed this suit is shown on the westerly side of my property and no easement was ever given. Attached as Exhibit B is a true copy of a recorded plat dated October 7, 1981 prepared by W.L. Gaillard which shows the location of the Berkeley Electric Easement crossing the subject property then in the name of Edward Brown but does not show any other power lines. Mr. Frank and Mr. Seeney, employees of Berkeley claim in their affidavits that the poles have been in existence since "at least 1980." Their sworn statements are contradicted by Mr. Gaillard's plat. Neither of these employees has provided any business records to establish when the installation of these poles ^{or power lines} occurred or when they were rebuilt.

GS 4. I respectfully request that the Court reject Berkeley Electric's attempt to deprive me of property rights based upon the unsupported recollections of two of its employees about something that happened over twenty years ago and which is not consistent with a recorded plat.


Roosevelt Simmons

Sworn and subscribed before me
this 1st day of July, 2009

Notary Public of South Carolina


My Commission Expires 6-30-2018

REFERENCES

1. CHARLESTON COUNTY TMS # 283-00-00-115.
2. PLAT BY W.L. STEPHENS JR., DATED APRIL 26, 1972. RECORDED IN PLAT BOOK Q, PAGE 047. CHARLESTON COUNTY RMC.
3. PLAT BY W.L. GAILLARD, DATED OCTOBER 7, 1981. RECORDED IN PLAT BOOK AZ, PAGE 023. CHARLESTON COUNTY RMC.
4. PLAT BY W.L. GAILLARD, DATED OCTOBER 24, 1994. NOT RECORDED.
5. PLAT BY CHARLIE AYCOCK III, DATED JULY 8, 2002. RECORDED IN PLAT BOOK DD, PAGE 333. CHARLESTON COUNTY RMC.

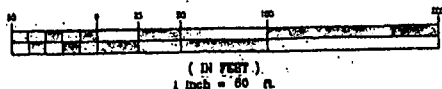
NOTES

1. AREA DETERMINED BY COORDINATE METHOD.
2. PORTIONS OF PROPERTY ARE LOCATED IN FLOOD ZONE X, ZONE SHADED X, AND FLOOD ZONE AE (EL. 11) AS PER FEMA MAP NUMBER 45019C0488J, COMMUNITY PANEL 455413 0488 J. EFFECTIVE NOVEMBER 17, 2004.
3. TOTAL NUMBER OF LOTS: 3.
SMALLEST LOT - B (.743 ACRES)
LARGEST LOT - C (1.375 ACRES)

LEGEND

- BOUNDARY LINE & CORNER FOUND (AS DESCRIBED)
- BOUNDARY LINE & CORNER SET (5/8" REBAR)
- BOUNDARY LINE & 4" x 4" CONC. MONUMENT FOUND
- ADJACENT BOUNDARY LINE
- RIGHT OF WAY LINE
- EASEMENT LINE (AS DESCRIBED)
- CENTERLINE
- OVERHEAD POWER LINE
- POWER POLE
- UTILITY POLE

GRAPHIC SCALE



I HEREBY STATE THAT TO THE BEST OF MY KNOWLEDGE INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE MINIMUM STANDARDS FOR THE PRACTICE OF LAND SURVEYING IN THE STATE OF SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS "A" SURVEY AS SPECIFIED THEREIN; ALSO THERE ARE NO VISIBLE ENCROACHMENTS OR PROJECTIONS OTHER THAN SHOWN.

RICHARD D. LACEY S.C.P.L.S. 18120

ELIJAH & SHIRLEY COMMODORE
TMS NO. 283-00-00-114

U.G. WILLIAMSON JR.
TMS NO. 283-00-00-492

ELDRINA JONES
TMS NO. 283-00-00-121

LOT B
TMS NO. 283-00-00-115
32380.24 SQ. FT.
.743 ACRES

CHRISTOPHER BROWN
TMS NO. 283-00-00-118

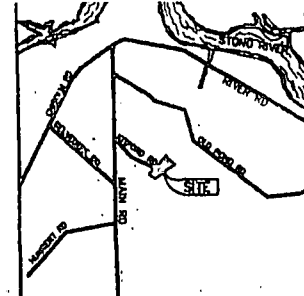
LOT A
TMS NO. 283-00-00-115
49627.91 SQ. FT.
1.139 ACRES

ROSEMARY RICHARDSON
TMS NO. 283-00-00-118

JAMES FRAZIER
TMS NO. 283-00-00-319

ESTATE OF WM ANDERSON
TMS NO. 283-00-00-132

GERARD MALLON
TMS NO. 283-00-00-120



LOCATION MAP
NOT TO SCALE

CURVE TABLE						
CURVE	RADIUS	DELTA	TANGENT	LENGTH	BEARING	CHORD
C1	1840.23	41°51'0"	69.90	121.74	N59°34'11"W	121.72
C2	1840.23	5°58'03"	85.49	170.83	N54°27'37"W	170.76
C3	1840.23	0°25'12"	6.01	12.02	N51°15'59"W	12.02
C4	1586.83	9°37'28"	133.58	268.53	N87°03'52"W	268.22

PLAT SHOWING
LOT A (1.139 ACRES)
LOT B (0.743 ACRES)
LOT C (1.375 ACRES)
CONTAINING 3.257 ACRES
PROPERTY OF
ROOSEVELT SIMMONS
LOCATED ON
JOHNS ISLAND CHARLESTON COUNTY
SOUTH CAROLINA

DATE: May 12, 2005

SCALE: 1" = 50'

HILAINC

LAND PLANNING LANDSCAPE ARCHITECTURE
CIVIL ENGINEERING SURVEYING

29 Lottbach Drive, A2, Charleston SC 29407-6988
tel 843.763.1166

RMC & PLANNING USE ONLY

REFERENCE: PLAT BOOK _____ T.M.S. 283.00.00-117

PAGE _____ R.M.C. OFFICE.

We hereby dedicate the 50' R/W easement and the 40' drainage easement to the use of the public forever.

Alma P. Frazier
Corine Frazier
Alphonse Frazier
Conrad Frazier
John Frazier
Robert Frazier
Albertha Frazier
Luther Frazier
Ronald Frazier

A2-023

Recorded this 19 day of _____
Copy No. _____ to _____
Original plat (and tracing) delivered to _____
Folger (and print) delivered to _____
1984

Robert M. King
Register Mesne Conveyance

APPROVED FINAL PLAT
Ernest R. B...
CLERK, CHARLESTON COUNTY COUNCIL
David J. F...
DIRECTOR OF PLANNING
CHARLESTON COUNTY PLANNING BOARD
May 19, 1983
9130-A

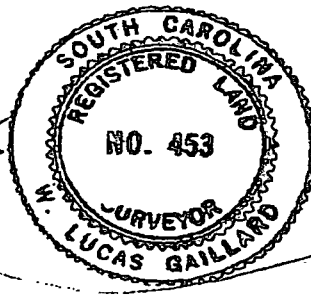
WARNING!

APPROVAL OF THIS PLAT BY THE PLANNING BOARD AND/OR COUNTY COUNCIL DOES NOT INDICATE APPROVAL NOR ADVERTISE TITLE OF THE ACCESS OR RIGHT-OF-WAY SHOWN HEREON.

PROPERTY

SIMMONS

Approval of this plat does not obligate the Co. of Charleston to maintain any of the easements shown hereon.



PLAT OF

Subdivision of Property on Johns Island, owned by -
Estate of James Frazier
Oct. 7, 1981

COUNTY OF CHARLESTON
STATE OF SOUTH CAROLINA
W. L. GAILLARD, REG. SUR. NO. 453
SCALE - 1 INCH = 100 FEET

I, W. L. GAILLARD, a registered surveyor of the State of South Carolina, do hereby certify that I have surveyed the property shown hereon, that this plat shows the true dimensions of the property, that all necessary markers have been located, and the precision is one: 10,000
W. L. Gaillard

R53 Exhibit R

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 08-CP-10-1983

ROOSEVELT SIMMONS)
Plaintiff)
Vs.)

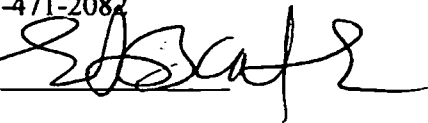
BERKELEY ELECTRIC)
COOPERATIVE INC. and)
ST. JOHNS WATER)
COMPANY, INC.)
Defendants)

Notice of Appearance

FILED
2009 JUL 23 PM 12:47
JULIE J ARMSTRONG
CLERK OF COURT
BY _____

Please be advised that the undersigned is representing the plaintiff, Roosevelt
Simmons in the captioned action.

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492
843-471-2082

By: 

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 08-CP-10-1983

ROOSEVELT SIMMONS,)

Plaintiff,)

v.)

NOTICE OF MOTION AND MOTION
FOR ORDER OF REFERENCE

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

Defendants.)

2009 SEP 15 PM 4:25
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

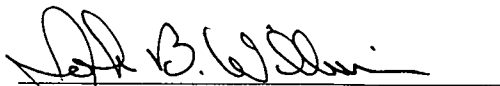
TO: EDWARD A. BERTELE, ATTORNEY FOR PLAINTIFF

PLEASE TAKE NOTICE that the Defendant, Berkeley Electric Cooperative, Inc., by and through its undersigned attorney, will move the Presiding Judge of the Court of Common Pleas, for the Ninth Judicial Circuit at the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina, within ten (10) days from the date hereof, or as soon thereafter as the Court may appoint, for an Order referring this action to the Master-in-Equity for Charleston County.

The grounds for this Motion are that this is an action in which there are certain issues that pertain to title to land and pursuant to Rule 16 of the South Carolina Rules of Civil Procedure, this is an action that can and should be referred to the Master-in-Equity for hearing.

This Motion is based on this Notice of Motion and Motion, the pleadings filed in this action and other documents on file in this matter, and such other materials as may be submitted to the Court hereafter.

WILLIAMS AND HULST, LLC



John B. Williams
P.O. Box 1288
209 East Main Street
Moncks Corner, SC 29461
(843) 761-8232
Facsimile (843) 899-5834

ATTORNEYS FOR BERKELEY
ELECTRIC COOPERATIVE, INC.

Dated: September 14, 2009
Moncks Corner, South Carolina

I HEREBY CERTIFY THAT I HAVE MAILED A
COPY OF THE ABOVE TO ALL PARTIES' COUNSELS OF
RECORD IN SAID PROCEEDING TO THEIR ADDRESSES
WITH SUFFICIENT POSTAGE ATTACHED.
THIS 14th DAY OF September 2009
Shane Gault MONCK'S CORNER, SC

STATE OF SOUTH CAROLINA,)
COUNTY OF CHARLESTON.)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 08-CP-10-1983

ROOSEVELT SIMMONS,)
Plaintiff,)
vs.)
BERKELEY ELECTRIC)
COOPERATIVE, INC., and)
ST. JOHN'S WATER COMPANY,)
INC.,)
Defendants.)

NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT BY
DEFENDANT, ST. JOHN'S WATER
COMPANY, INC.

2010 JUN -4 AM 10:56
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

TO EDWARD A. BERTELE, ESQUIRE, ATTORNEY FOR PLAINTIFF:

10-9525
PLEASE TAKE NOTICE that the Defendant, St. John's Water Company, Inc., by and through its undersigned attorneys, will and does move the Presiding Judge of the Court of Common Pleas, Circuit Court of the Ninth Judicial Circuit, at the Charleston County Courthouse, Charleston, South Carolina, within ten (10) days from the date hereof, or as soon thereafter as the Court may appoint, for summary judgment on the claims and causes of action in Plaintiff's complaint alleging trespass, unjust enrichment and seeking declaratory relief and damages.

The grounds for this motion are that there are no genuine issues as to any material fact and that St. John's Water Company, Inc. is entitled to judgment as a matter of law because it has an easement by prescription to maintain its water lines on and over Plaintiff's property. Said prescriptive easement is based on the following undisputed facts:

1) The water lines of the Defendant, St. John's Water Company, Inc., constitute an open and obvious condition and have been installed for a period in excess of twenty (20) years, and
2) the water lines of the Defendant, St. John's Water Company, Inc. were installed upon the property for which an easement had been obtained and are currently and have been used for a period as hereinabove stated of more than twenty (20) years.

This motion will be based upon this Notice and affidavits in support of this Defendant's motion, as well as the pleadings and any exhibits that may be available at the hearing.

LEGARE, HARE & SMITH



Gaines W. Smith, Esquire
Attorney for Defendant,
St. John's Water Company, Inc.
720 St. Andrews Blvd.
Charleston, SC 29407

Telephone (843) 722-7773
Facsimile (843) 722-3417

Charleston, SC

June 2, 2010.

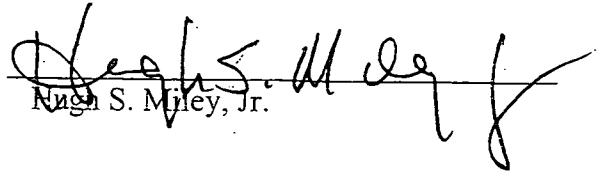
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2008-CP-10-1983
ROOSEVELT SIMMONS	)	
Plaintiff,	)	AFFIDAVIT OF
	)	HUGH S. MILEY, JR.
vs.	)	
	)	
BERKELEY ELECTRIC	)	
COOPERATIVE, INC., and	)	
ST. JOHN'S WATER	)	
COMPANY, INC.	)	
Defendants.	)	

PERSONALLY appeared before me, HUGH S. MILEY, JR., who, being duly sworn,
deposes and says:

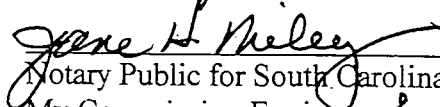
1. That he is a citizen and resident of the County of Florence, State of South Carolina; and that during the year 1970, he was employed within the LBC&W/Harwood Beebe Company as an Engineer, and as such was employed to study the financing, engineering, design, permitting, assistance and construction of projects for St. Johns Water Company on Johns Island, South Carolina.
2. That your Deponent was fully responsible for the design and installation of the water lines, pumps and other facilities necessary to provide water for the residences and businesses situate on Johns Island.
3. The first construction project began in 1977 and included the installation of a water line in and along Kitford Road. An Encroachment Permit for the placement of said water line was issued by Charleston County on February 21, 1977.
4. All phases of this project were performed under my direct supervision and approval and the water line along Kitford Road was completed in early 1978. To my knowledge and belief,

the said water line is currently in the same place and location as originally installed during this period of time.

5. To your Deponent's best recollection, this water line has never been removed or re-located and has been used continuously for a period in excess of twenty (20) years to provide water for the residences and businesses in the area of Kitford Road. This has been a continuous use of said water line without any interruption whatsoever.


Hugh S. Miley, Jr.

SWORN to before me this
16th day of June 2009

 (SEAL)
Notary Public for South Carolina
My Commission Expires: Sept. 1, 2009

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ROOSEVELT SIMMONS,

Plaintiff,

vs.

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

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 08-CP-10-1983

**DEFENDANT'S BRIEF IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGEMENT**

I. JURISDICTION

This matter is before the court on the Defendant's Motion for Summary Judgment.

II. APPLICABLE LAW

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). Rule 56(c) of South Carolina Rules of Civil Procedure provides that summary judgment shall be rendered if the movant shows that there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. While v. J.M. Brown Amusement Co., 360 S.C. 366, 601 S.E.2d 342 (2004).

St. John's Water Company is entitled to judgment as a matter of law on Plaintiff's claims because it has an easement by prescription to run and maintain water lines across the subject property. To establish an easement by prescription, St John's Water Company must show (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right. Loftis v. South Carolina Electric and Gas Company, 361 S.C. 434, 604 S.E.2d 714, 715 (2004).

R 61

III. ARGUMENT

A. St. Johns' Water Company has maintained its water lines on the subject property continuously and without interruption for over 20 years.

As indicated in the affidavit of Hugh S. Miley, Jr, the water line in question was installed over twenty years ago. The construction project which installed the water line under the subject property began in 1977 and was completed in 1978. [Miley Affidavit, ¶3, 4 .] It has been used ever since that time, and there has been no interruption of service whatsoever. [Miley Affidavit, ¶6.]

Further, there is evidence that the water line has been used to service customers of St. John's Water Company for well over the minimum twenty year period. [See attached Exhibit A.]

B. The right enjoyed by St. John's is the right to the continued use and maintenance of the lines located below the subject property.

The rights enjoyed by St. John's Water Company are the rights it has enjoyed since the installation of the water line in 1978: (1) to use the line for the delivery of water services to its customers; and (2) to enter the property in order to conduct necessary inspections, repairs, or improvements to the water lines.

C. St. John's use of Plaintiff's property is adverse or under a claim of right.

In Loftis, the Court confirmed that a prescriptive easement can be established either by adverse use or by a claim of right. Loftis, 604 S.E.2d at 717. St. John's Water Company can establish both an adverse use and a claim of right.

1. The use of the water lines is presumptively adverse.

“[W]hen it appears that that [a] claimant has enjoyed an easement openly, notoriously, continuously, and uninterruptedly, in derogation of another’s rights, for the full period of twenty years, the use will be presumed to have been adverse . . .” Poole v. Edwards, 197 S.C. 280, 15 S.E.2d 349, 350 (1941).

The continued and uninterrupted use can be demonstrated through the delivery of water service to customers dating back more than twenty years. [See attached Exhibit A.] While Plaintiff argues that the presence of the water lines underground prevented the use from being notorious and open, a minimum amount of diligence would have revealed the fact that Plaintiff’s neighbors received their water from St. John’s Water Company. This fact establishes the Plaintiff’s constructive notice of St. John’s use of the easement.

Since St. John’s use of the easement has been open, notorious, continuous, and uninterrupted, Poole provides a presumption that the use is adverse.

2. St. John’s use is under a claim of right.

“Our courts have held that a party may earn a prescriptive easement under a claim of right if he demonstrate[s] a substantial belief that he had the right to use the property in a manner consistent with the alleged easement.” Loftis, 604 S.E.2d at 714.

St. John’s applied for and received an Encroachment Permit from the County of Charleston in 1977. [See attached Exhibit B.] The permit expressly granted the right to install water mains along several roads in and around Johns Island, including the water line in question adjacent to Kitford Road.

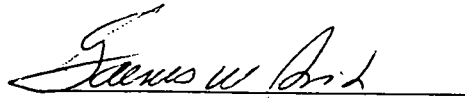
Because of this encroachment permit, St. John’s can establish that it had a substantial belief that its use of the subject property was under a claim of right.

IV. CONCLUSION

Based on the foregoing, Defendant St. John's Water Company respectfully requests that the Court grant its motion for summary judgment and dismiss Plaintiff's claims.

RESPECTFULLY SUBMITTED,

LEGARE, HARE & SMITH



Gaines W. Smith, Esquire
Attorney for Defendant,
ST. JOHN'S WATER COMPANY
720 St. Andrews Blvd.
Charleston SC, 29407
Office: (843) 722-7773
Fax: (843) 722-3417

Charleston, South Carolina
Dated: Aug 6, 2010

R64

Untitled

ACCT# 01-010842-00
CUSTOMER NAME- MASSENBURG CONSTRUCTION LT-A
SERVICE ADDRESS- 3527 KITFORD RD JOHNS ISLAND, S.C 29455
MAILING- SAME
PHONE NUMBER- 843-762-1124

2/16/07

ACCT# 01-010841-00
CUSTOMER NAME- MASSENBURG CONSTRUCTION LT-B
SERVICE ADDRESS- 3527 KITFORD RD JOHNS ISLAND, S.C 29455
MAILING- SAME
PHONE NUMBER- 843-762-1124

2/16/07

ACCT# 01-010866-00
CUSTOMER NAME- MARINE CONSTRUCTION LT-C
SERVICE ADDRESS- 3527 KITFORD RD JOHNS ISLAND, S.C 29455
MAILING- 7 CLAWSHELL ROW CHARLESTON, S.C 29412
PHONE NUMBER- 843-559-2224

2/12/7

✓ ACCT# 01-001599-00
CUSTOMER NAME- FRANCINE ANDERSON
SERVICE ADDRESS- 3470 KITT FORD RD JOHNS ISLAND, S.C 29455
MAILING- 3470 KITFORD RD JOHNS ISLAND, S.C 29455
PHONE NUMBER- 843-559-9034

8/28/87

ACCT# 01-008013-00
CUSTOMER NAME- IVORY OR DELORE TURNER
SERVICE ADDRESS- 3507 KITT FORD RD JOHNS ISLAND, S.C 29455
MAILING- 3507 KITTFORD RD JOHNS ISLAND, S.C 29455
PHONE NUMBER- 843-559-1163

8/1/03

✓ ACCT# 01-001600-00
CUSTOMER NAME- DENA MAE FRAZIER
SERVICE ADDRESS- 3508 KITT FORD RD JOHNS ISLAND, S.C 29455
MAILING- PO BOX 326 JOHNS ISLAND, S.C 29457
PHONE NUMBER- 843-377-6933

8/19/87

✓ ACCT# 01-001602-00
CUSTOMER NAME- JOYCE GORDON
SERVICE ADDRESS- 3510 KITT FORD RD JOHNS ISLAND, S.C 29455
MAILING- PO BOX 83 RAVENEL, S.C 29470
PHONE NUMBER- 843-889-2829

7/9/86

ACCT# 01-001598-00
CUSTOMER NAME- ELIJAH COMMODORE JR
SERVICE ADDRESS- 3519 KITFORD RD JOHNS ISLAND, S.C 29455
MAILING- 3519 KITFORD RD JOHNS ISLAND, S.C 29455
PHONE NUMBER- 843-559-1101

1575
3/15/79

ACCT# 01-009435-01
CUSTOMER NAME- JACOB HAMILTON
SERVICE ADDRESS- 3522 KITT FORD RD JOHNS ISLAND, S.C 29455
MAILING- 3522 KITT FORD RD JOHNS ISLAND, S.C 29455
PHONE NUMBER- 864-561-4078

10/1/07

ACCT# 01-001604-00
CUSTOMER NAME- JANIE OWNENS
SERVICE ADDRESS- 3524 KITFORD RD JOHNS ISLAND, S.C 29455

2605 9/21/75

R65 Exhibit A



Exhibit B.

County of Charleston
Charleston, South Carolina

PUBLIC WORKS DEPARTMENT
4350 AZALEA AVENUE
CHARLESTON HEIGHTS, S. C. 29405

April 26, 1977

Mr. Forrest M. Whittington
Harwood Beebe Company
Post Office Box 12060
Florence, SC 29504

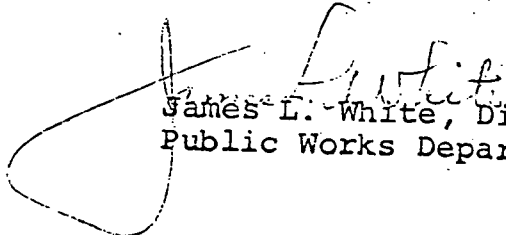
SUBJECT: Charleston County Encroachment Permit dated
2-21-77 to St. Johns Water Company

Dear Mr. Whittington:

The above listed encroachment permit has been amended to cover the installation of a water main along the County portion of River Road as shown on sheets U19 and U20 and as outlined in your letter of April 14, 1977 to me.

Please take all necessary precautions including the use of flagmen, barricades, lights, and the use of road signs to insure the safety of the motorists traveling River Road.

Very truly yours,


James L. White, Director
Public Works Department

JLW:m

Enclosure

CC Bill Mazyck
Maintenance Supervisor

St. Johns Water Company

R 66

APPLICATION FOR ENCROACHMENT PERMIT

COUNTY OF CHARLESTON

As shown on attached
drawings enumerated

Street or Road below:

Subdivision Johns Island Area Date 2-21-77

The undersigned applicant (owner) hereby applies to the County of Charleston for a permit for encroachment on Right-of-way of County Road or Street.

(Attach a print of the sketch plan to each copy of this form.)

1, U2, U12, U13, U14, U15, U17,
18, U21, U24, U25, U26, U27,
28, U29, U30, U31, U32, U33,
34

St. Johns Water Co.

James B. Seabrook Pres.

Applicant's (Owner's) Signature

2-24-77

Date

ENCROACHMENT PERMIT

Issued to:

As shown on

Name: St. Johns Water Company

Address: P.O. Box 72, Johns Island, S.C.

Telephone No.: 803/559-0186

Street or Road Name: attached drawings:
U1, U2, U12, U13, U14, U15, U17, U18, U2,
U24, U25, U26, U27, U28, U29, U30, U31,
U32, U33, U34

Subdivision:

Johns Island Area

In compliance with your request and subject to all the provisions, terms, conditions and restrictions written herein, you are authorized and permitted to: Install water mains as shown on the attached sheets. Drainage facilities are not to be blocked or obstructed in any way.

747-7335

COUNTY OF CHARLESTON

By: James L. White Date: 3-31-77
Director, Department of Public Works

(NOTE) This form is to be submitted in quadruplicate to the Director of the Department of Public Works. When submitting the form, the applicant shall sign the application for the encroachment permit and acceptance of the provisions, etc. on the back.

1267

PROVISIONS, TERMS, CONDITIONS AND RESTRICTIONS

1. **PERMITTEE:** The word "Permittee" used herein shall mean the name of the person, firm or corporation to whom this permit is issued, his, her, its heirs, successors and assigns.
2. **FUTURE MOVING OF ENCROACHMENT:** If, in the opinion of Charleston County, the S. C. State Highway Department or any other Public Agency, it should ever become necessary to relocate or remove the encroachment, or any part thereof, contemplated herein, on account of improvement, relocation or widening of the road or street, or for any other sufficient reason, such moving or removing shall be done on demand of the duly authorized representative of Charleston County at the expense of the Permittee.
3. **PROTECTION OF TRAVELING PUBLIC:** Adequate provisions shall be made for the protection of the traveling public at all times. That during the progress of the work all necessary detours, barricades, warning signs and watchmen shall be provided by and at the expense of the Permittee. The Permittee agrees to observe all rules and regulations of the Public Works Department while carrying on the work.
4. **RESPONSIBILITY:** The Permittee, its successors or assigns assumes full responsibility for any accidents to persons or damage to property, including the street or road, that may be caused by the construction, maintenance, use, moving or removing of the encroachment contemplated herein and agrees to indemnify the County of Charleston for any liability incurred or injury or damage sustained by reason of the past, present or future existence of said encroachment.
5. **PERMIT SUBJECT TO INSPECTION:** This permit shall be kept at the site of the work at all times while said work is underway and must be shown to any representative of the Public Works Department or Law Enforcement Officer on demand.
6. **STANDARDS OF CONSTRUCTION:** All work shall conform to recognized standards of construction and shall be performed in a workmanlike manner. No pavement shall be cut, no tunnelling shall be permitted and no excavation shall be made nearer than two feet to the edge of any type of pavement unless specifically authorized herein. All trenches within the limits of the Roadway shall be backfilled with suitable material and thoroughly tamped in layers not greater than six inches in thickness. All pipes, conduits, cables, etc., shall have a minimum cover of 30 inches. All work shall be subject to the supervision and satisfaction of the Public Works Department.

I, we, accept the permit herein granted and agree to comply with all the provisions, terms, conditions and restrictions set out herein.

Date: 2-24-77

St. John Water Co.
Permittee: Lewis B. Sealbrook Pres.

- Permitted to: Install water mains on the following property and streets in the Charleston County System.

Across the Boat landing <u>as</u> shown on sheet	U20
Along Nitsa Street as shown on sheet	U15
Along Exchange Landing Rd. as shown on sheet	U18
Along Eden Vail Rd. as shown on sheet	U21
Along Appaloosa Dr. as shown on sheet	U24
Along Point Park Drive as shown on sheet	U25
Along Brahams Dr. as shown on sheet	U25
Along Rasea Road as shown on sheet	U25
Along Overlook Rd. as shown on sheet	U25
Along Kitford Rd. as shown on sheet	U25
Along Walpole Way as shown on sheet	U27
Along Blanding St. as shown on sheet	U27
Along Kenswick Ave. as shown on sheet	U28
Along Southwick Dr. from Burnwick Ave to Dunwick Avenue as shown on sheet	U28
Along Painswick St. as shown on sheet	U28
Along Hobson Dr. as shown on sheet	U30
Along Auldreeke Rd. as shown on sheet	U33

These sheets are in a set of plans for job number J-039 dated January, 1977.

Pipe is to be installed according to the attached sheet.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 08-CP-10-1983

ROOSEVELT SIMMONS)

Plaintiff)

Vs.)

BERKELEY ELECTRIC)
COOPERATIVE INC. and)
ST. JOHNS WATER)
COMPANY, INC.)

Defendants)

2010 AUG -5 PM 4:36
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

PLAINTIFF'S OPPOSITION
TO ST. JOHNS WATER CO., INC.
MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Plaintiff filed this action for trespass and unjust enrichment against St. Johns Water Company, Inc. (St. Johns) and Berkeley Electric Cooperative Inc. due to the encroachment of their water and electric lines across property designated as TMS 283-00-00-498 and TMS 282-00-135 on Johns Island (collectively the subject property). The complaint was amended with consent to correct an erroneous identification of one of the lots. In its Answer, St. Johns asserted that it had acquired a prescriptive easement across both lots. The matter was referred to the Master in Equity for a determination as to the proper scope of Berkeley Electric Cooperative's easements. St. Johns now moves for summary judgment based upon its claim of a prescriptive easement allegedly derived from its prior installation of water lines.

Plaintiff contends that the material facts necessary to St. Johns claim of a prescriptive easement across plaintiff's property are in dispute and that St. Johns is not entitled to judgment as a matter of law.

FACTS RELEVANT TO THIS MOTION

The subject property consists of two parcels, **TMS 283-00-00-498** bordered by Kitford Road to the south and the Seaboard Coastline Railroad right of way to the east and TMS 283-00-00-118 owned by Gordon and TMS 283-00-00-319 owned by Frasier to the north; and **TMS 282-00-00-135**, bordered by TMS 282-00-00-136 to the north owned by Anderson and on the west by the Seaboard Coastline Railroad right of way. Both parcels are unimproved wooded acreage. According to information provided in discovery, St. Johns obtained an encroachment easement from Charleston County in 1977 to install a water main under Kitford Road as described in a survey prepared by its engineers, LBC&W Harwood Beebee. In support of its motion for summary judgment, St. Johns submitted an affidavit of an engineer, Hugh S. Miley, Jr. in which Mr. Miley states that “the water line along Kitford Road was completed in 1978.” According to St. John’s business records, its water line was connected to the Andersen property in August 1987. See Exhibit A attached to this Opposition. According to these same business records, St. Johns installed water service to Frazier and Gordon, property owners to the rear of TMS 283-00-00-498 in July 1986 and August 1987 respectively. See Exhibit A. It is not disputed that both water lines are underground across the subject property.

As stated in the affidavit of Roosevelt Simmons, in 2005, Simmons discovered a St. Johns water meter encroaching on TMS 282-00-00-135. When he asked St. Johns General Manager, Ava Robichaux to remove the water meter, she replied that a water line had been there for 20 years and that the property owners had granted permission for it. See Simmons Affidavit, Exhibit A. Simmons further stated that in 2006, St. Johns “blue flagged” its the water lines after Simmons retained an attorney Ayesha Washington, Esq. to protect his interests and had a survey prepared showing the location the water line under TMS 283-00-00-498. See Simmons

Affidavit , Exhibit B. This was the first time Simmons knew the location of the water lines on both parcels .

LEGAL ARGUMENT

SUMMARY JUDGMENT MUST BE DENIED BECAUSE THERE ARE DISPUTED ISSUES OF MATERIAL FACT

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 119, 542 S.E.2d 736, 738 (Ct. App. 2001), cert. denied; Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); see also Bruce v. Durney, 341 S.C. 563, 534 S.E.2d 720 (Ct. App. 2000) (a motion for summary judgment shall be granted if pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as a matter of law).

Under SC Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman v. A.T. & T., 306 S.C. 101, 115(1991). In order to establish a prescriptive easement, a party must show (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years ; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right.” Horry County v. Laychur, 315 SC 364, 367 (1993).

St. Johns must first establish that its use was adverse. “[W]hen it appears that claimant has enjoyed an easement openly, notoriously, continuously, and uninterruptedly, in derogation of another's rights, for the full period of twenty years, the use will be presumed to have been

adverse. . . . No adverse user can arise, until there is a distinct and positive assertion of a right hostile to the owner, and brought home to him." Williamson v. Abbott, 107 SC 397 (1917).

The claimant must show by "clear and convincing" evidence he has met the requirements for adverse possession. Davis v. Monteith, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986). St. Johns has failed to produce clear and convincing evidence that its use was open and notorious for the required period .

A. The water lines across both properties are concealed .

St. Johns water lines across both properties are concealed underground. Both properties are wooded and undeveloped. There was no indication that water lines were installed there in the past. The meter to the water line across TMS 282-00-00-135 was also concealed by underbrush. Neither line was previously " blue flagged" so as to make its location visible to the property owner until Simmons attorney demanded it in 2005.

Since both water lines are concealed and not being used openly adverse to the rights of the property owner, St. Johns has the burden to show that the location of the water lines on both parcels was "notorious". While the legal owner need not have actual knowledge the claimant is claiming property adversely, the hostile possession should be so notorious that the legal owner by ordinary diligence should have known of it. Graniteville Co. v. Williams, 209 S.C. 112, 120-21 (1946). St. Johns has not produced anything in discovery or in support of its summary judgment motion to meet its burden of proof that the location of its water lines was "notorious". According to Simmons, he and many other property owners in the area have well water and are not connected to the St. Johns system. Assuming but not conceding for the purpose of this motion that the fact that St. Johns installed its water main under Kitford Road in 1977 was well known, there is no evidence that it was well known that water lines were installed across the

subject property in subsequent years to the properties of Andersen and Frazier and Gordon. The houses on those properties are not readily visible from Kitford Road. There is no evidence that St. Johns sent any notice to prior owners or obtained their permission or was granted any easements by them. Simmons who lived there for many years was unaware of the water lines until 2005.

B. There are no reasonable inferences that the use was openly adverse

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn there from must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). If triable issues exist, those issues must be submitted to the jury. Young v. South Carolina Dep't of Corrections, 333 S.C. at 718, 511 S.E.2d at 415. The facts are clear. St. Johns has installed its lines underground, installed its meter on TMS 282-00-135 so that it was not readily visible and left no permanent evidence of the location of its lines. The reasonable inference from these facts is that its use was not openly adverse or notorious. There are triable issues of fact as to whether St. Johns use was open and notorious and the Court must deny its motion for summary judgment.

CONCLUSION

For the reasons presented above, Simmons respectfully requests that the Court deny St. Johns motion for summary judgment for a prescriptive easement.

August 5, 2010

Edward A. Bertele, Esq.



Attorney for Plaintiff,
Roosevelt Simmons

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 08-CP-10-1983

2010 AUG -5 PM 4:36
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

ROOSEVELT SIMMONS)

Plaintiff)

Vs.)

BERKELEY ELECTRIC)

COOPERATIVE INC. and)

ST. JOHNS WATER)

COMPANY, INC.)

Defendants)

AFFIDAVIT OF
ROOSEVELT SIMMONS

Roosevelt Simmons, of full age being duly sworn according to law upon his oath deposes and says:

1. I am the plaintiff and submit this affidavit in opposition to St. Johns Water Company, Inc. motion for summary judgment. I have personal knowledge of the facts set forth herein.

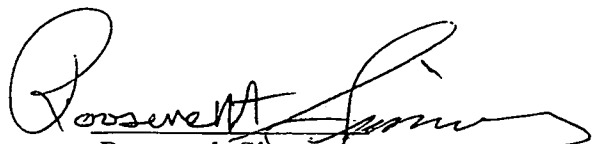
2. The two parcels involved in this suit on which St. Johns Water Company constructed their water lines are **TMS 282-00-00-135** which is bordered by the Seaboard Coastline Railroad right of way to the west, TMS 282-00-00-136 owned by Andersen to the north and TMS 282-00-00-138 where I live to the east; and **TMS 283-00-00-498** bordered by Kitford Road to the south, the abandoned Seaboard Coastline Railroad right of way to the east and TMS 283-00-00-118 owned by Gordon and TMS 283-00-00-319 owned by Frasier to the north. I acquired these parcels in 2003.

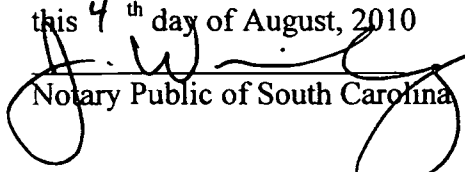
3. I discovered a St. Johns water meter on TMS 282-00-00-135 in 2005 while I was planting trees. When I questioned Ava Robichaux, the St. Johns general manager on Johns Island about the water meter on this parcel and asked them to remove it, she sent me a letter saying that they would not relocate the water line because it had been there for 20 years. Attached as Exhibit A is a true copy of the letter dated April 15, 2005 that I received.

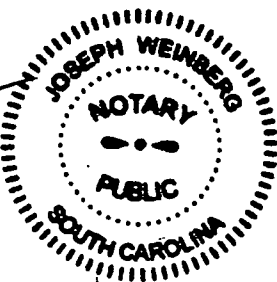
4. I hired an attorney, Ayesha Washington to protect my rights. At Ms. Washington's request, St. Johns marked the location of their water lines with blue flags that showed that they had crossed both TMS 282-00-00-135 and TMS 283-00-00-498. This was the first that I knew that there were water lines across both parcels. Attached as Exhibit B is a true copy of the St. Johns survey showing the location of the water line across TMS 283-00-00-498 under a dirt road.

5. The St. Johns water lines across my property are underground and there are no indications that they were installed 20 years ago. Both properties are undeveloped and TMS 282-00-00-135 is heavily wooded. I found the water meter there in 2005 by accident because the meter was hidden by underbrush.

6. The water company never obtained an easement to cross my property to hook up to Andersen or the property owners to the rear of TMS 283-00-00-498. I have well water and so do many other homes in this area. I had no reason to know that St Johns was providing water service to property owners using my land for access. The water company never marked the location of their lines or asked my permission or told me about the location of their lines until I told them about the water meter on TMS 282-00-00-135 in 2005. I ask the Court not to grant St. Johns Water Company any easement based upon 20 years passing because they installed their water lines underground without any notice to me or prior owners, they did not mark the location of their lines and concealed that they had done so.


Roosevelt Simmons

Sworn and subscribed before me
this 4th day of August, 2010

Notary Public of South Carolina



My Commission Expires 6-30-18

ST. JOHN'S WATER COMPANY, INC.

Post Office Box 629

John's Island, South Carolina 29457-0629

(843) 559-0186

April 15, 2005

Mr. Roosevelt Simmons
3416 Kitford Road
Johns Island, SC 29455

Re: Kitford Road Water Line

Dear Mr. Simmons,

It has been brought to my attention that a situation exists which involves a water line belonging to St. John's Water Company. You have indicated that the water line is on your property and you are requesting that the line be relocated. After carefully reviewing the facts and our records, we have determined that the water line has been in operation approximately 20 years and during that time the owners of the property granted easements to the Water Company. We understand your position; however, St. John's Water Company must leave the water line at its present location in order to serve the existing customers on Kitford Road.

If you have any questions, please contact Paula Weber, Office Manager or me at (843) 559-0186. Thank you.

Sincerely,



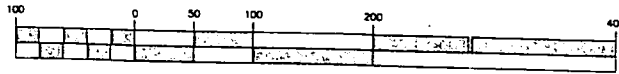
Ava Robichaux
General Manager

Gaines Smith

722-7773

Exhibit A
R 27

GRAPHIC SCALE



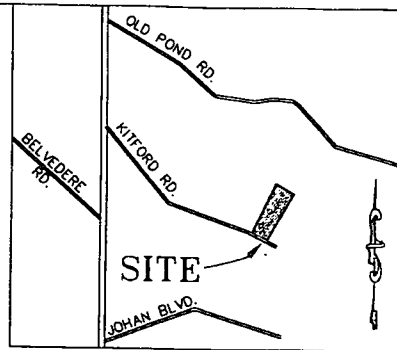
(IN FEET)
1 inch = 100 ft.

NOTES:

- 1.) BEARINGS SHOWN HEREON ARE MAGNETIC AND AS SUCH ARE SUBJECT TO LOCAL ATTRACTION.
- 2.) THIS PROPERTY IS LOCATED IN FLOOD HAZARD AREA ZONE "X" & "AE" (EL.11) AS PER F.I.R.M. PANEL #45019C 0488 J. DATED NOVEMBER 17, 2004
- 3.) AREA CALCULATED BY THE COORDINATE METHOD.
- 4.) THIS PLAT REPRESENTS A SURVEY BASED ON THE LISTED REFERENCES AND IS NOT THE RESULT OF A TITLE SEARCH.
- 5.) THE PRESENCE OR ABSENCE OF U.S. ARMY CORP OF ENGINEERS JURISDICTIONAL WETLANDS IS UNDETERMINED AS OF THE DATE OF THIS SURVEY.
- 6.) EXISTING DIRT ROAD IS BEING USED FOR INGRESS/EGRESS.

CHARLESTON CO. R.M.C. REFERENCES:

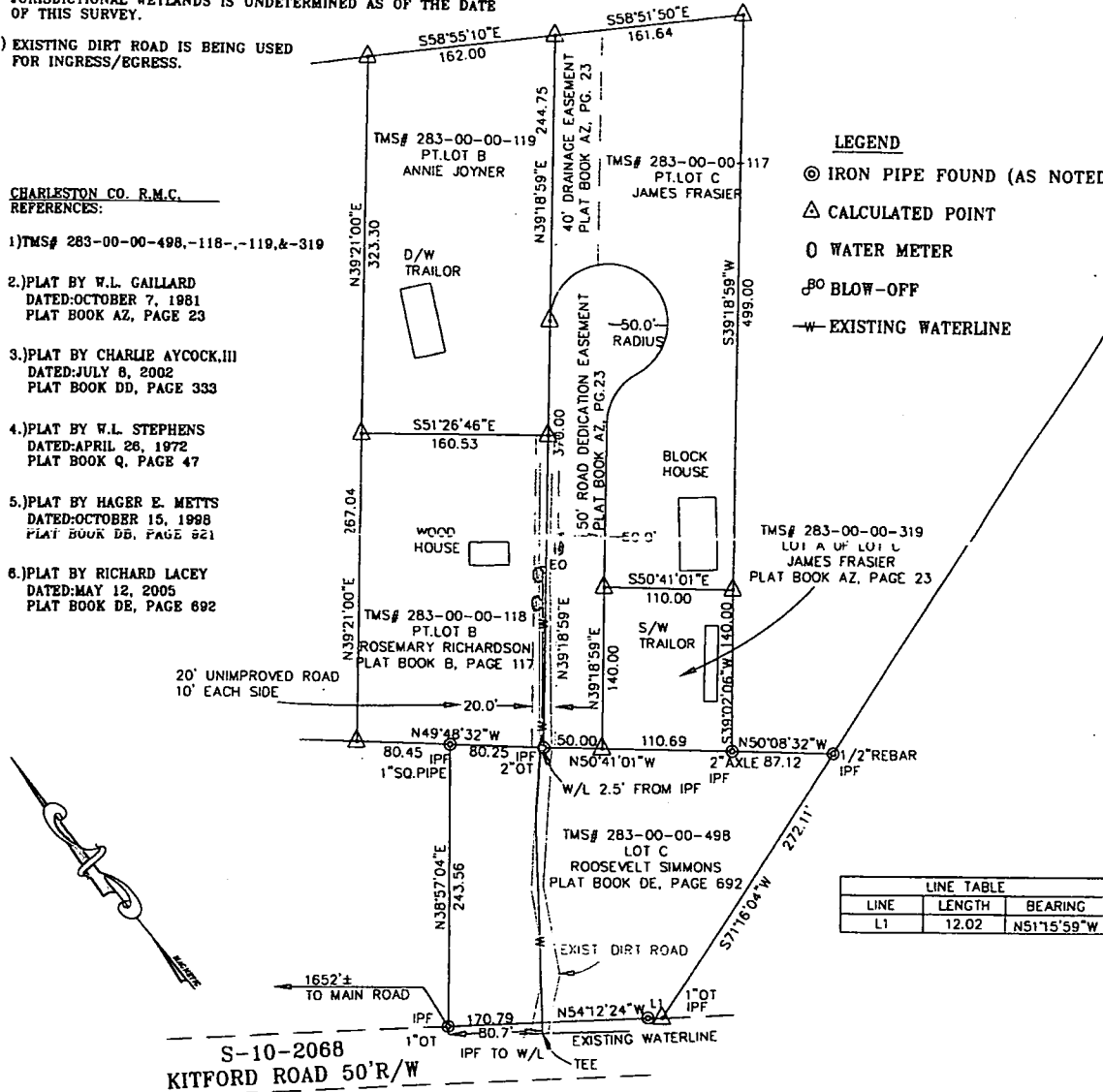
- 1) TMS# 283-00-00-498, -118, -119, & -319
- 2.) PLAT BY W.L. GAILLARD
DATED: OCTOBER 7, 1981
PLAT BOOK AZ, PAGE 23
- 3.) PLAT BY CHARLIE AYCOCK, III
DATED: JULY 8, 2002
PLAT BOOK DD, PAGE 333
- 4.) PLAT BY W.L. STEPHENS
DATED: APRIL 26, 1972
PLAT BOOK Q, PAGE 47
- 5.) PLAT BY HAGER E. METTS
DATED: OCTOBER 15, 1998
PLAT BOOK DB, PAGE 521
- 6.) PLAT BY RICHARD LACEY
DATED: MAY 12, 2005
PLAT BOOK DE, PAGE 692



LOCATION MAP (NOT TO SCALE)

LEGEND

- ⊙ IRON PIPE FOUND (AS NOTED)
- △ CALCULATED POINT
- WATER METER
- BO BLOW-OFF
- W- EXISTING WATERLINE



LINE TABLE		
LINE	LENGTH	BEARING
L1	12.02	N51°15'59"W

S-10-2068
KITFORD ROAD 50'R/W

SURVEY OF EXISTING 2.5" WATERLINE
KITFORD & BRONSON ROAD
PREPARED FOR
ST. JOHN'S WATER COMPANY
JOHNS ISLAND
CHARLESTON COUNTY SOUTH CAROLINA
DATE: MAY 13, 2008 SCALE: 1"=100'

I, HEREBY STATE THAT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE MINIMUM STANDARDS MANUAL FOR THE PRACTICE OF LAND SURVEYING IN SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS OF A CLASS A SURVEY AS SPECIFIED THEREIN; ALSO THERE ARE NO VISIBLE ENCROACHMENTS, PROJECTIONS, OR SETBACKS AFFECTING THE PROPERTY OTHER THAN THOSE SHOWN.

JAMES T. REID P.L.S. S.C. No. 17228
TOLTEC SURVEYING, LLC
887 JOHNNIE DODDS BLVD, SUITE 100
MT. PLEASANT, SOUTH CAROLINA 29464

(843) 881-6706 FAX (843) 972-0770



Exhibit B
PLAT 5-13-08

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ROOSEVELT SIMMONS)

Plaintiff,)

-versus-)

BERKELEY ELECTRIC COOPERATIVE)

INC., and ST. JOHN'S WATER)

COMPANY, INC.)

Defendants.)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2009-CP-10-1983

NOTICE AND MOTION

2010 NOV 10 PM 2:10
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

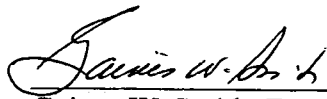
TO: EDWARD A. BERTELE, ESQ., ATTORNEY FOR PLAINTIFF

PLEASE TAKE NOTICE that St John's Water Company, by and through its undersigned attorney Gaines W. Smith, will on November 22, 2010 move before the honorable Mikell R. Scarborough for an Order dismissing the above entitled matter upon the grounds that the Plaintiff does not own the property upon which St. John's Water Company has installed a water line.

Said motion would be based on the records contained in the RMC Office for Charleston County, and upon the attached affidavit of Lydia Jean Pederson.

Respectfully submitted,

LEGARE HARE & SMITH


Gaines W. Smith, Esq.
720 St. Andrews Blvd.
Charleston SC 29407
843-722-7773 (Office)
843-722-3417 (Fax)

Dated: November 10, 2010
Charleston, SC

R 79

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ROOSEVELT SIMMONS)

Plaintiff,)

-versus-)

BERKELEY ELECTRIC COOPERATIVE)

INC., and ST. JOHN'S WATER)

COMPANY, INC.)

Defendants.)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2009-CP-10-1983

AFFIDAVIT OF

LYDIA JEAN PEDERSON

2010 NOV 10 PM 2:10
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

PERSONALLY APPEARED BEFORE ME, LYDIA JEAN PEDERSON, who first being duly sworn, deposes and says as follows:

1. That she is a citizen and resident of South Carolina.
2. That the undersigned has been a paralegal and title examiner for a period of 35 years.
3. That the plaintiff in this action claims ownership of the property known as 0 Kitford Road, Johns Island SC, said property having TMS# 283-00-00-498.
4. That your deponent has searched the records in the Charleston County RMC Office, and has found that the true owner of said property is Mase and Company, LLC, per the deed located in the RMC Office at Book 0109, page 498, the same being recorded March 1, 2010.
5. That your deponent has searched for any deeds to the said property out of Mase and Company LLC, and found there to be none.
6. That your deponent has made the conclusion that the subject property is not, in fact, owned by the plaintiff in this action, but is owned by Mase and Company, LLC.

By: 

LYDIA JEAN PEDERSON

SWORN to before me this

10 day of Nov, 2010



Notary Public for South Carolina

My Commission Expires: 6-25-2014

R80

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
))	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	CIVIL ACTION NUMBER: 08-CP-10-1983
ROOSEVELT SIMMONS,)	
))	
Plaintiff,)	
))	
Vs.)	AMENDED NOTICE OF MOTION AND
))	MOTION FOR SUMMARY JUDGMENT
BERKELEY ELECTRIC)	BY DEFENDANT BERKELEY ELECTRIC
COOPERATIVE, INC., and)	COOPERATIVE, INC.
ST. JOHN'S WATER)	
COMPANY, INC.,)	
))	
Defendants.)	
_____)	

TO: EDWARD A. BERTELE, ATTORNEY FOR PLAINTIFF

PLEASE TAKE NOTICE that Defendant Berkeley Electric Cooperative, Inc., by and though its undersigned attorneys, will and does move the Charleston County Master in Equity, at Charleston County Courthouse, Charleston, South Carolina, within ten (10) days form the date hereof, or as soon thereafter as the Court may appoint, for summary judgment on the claims and causes of action in Plaintiff's complaint alleging trespass, unjust enrichment and seeking declaratory relief and damages.

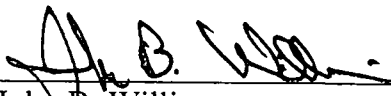
The grounds for this motion are that there are no genuine issues as to any material fact and that Defendant Berkeley Electric Cooperative, Inc., is entitled to judgment as a matter of law because the it has an easement by prescription to maintain its power lines on and over Plaintiff's property. Said prescriptive easement is based on the following undisputed facts: 1.) The power lines and supporting poles on Plaintiff's property constitute an open and obvious condition in existence prior to Plaintiff's acquisition of

the property; 2.) the power lines were established to transmit electrical power to the to surrounding properties and have been maintained under a claim of right by Defendant; and 3.) the power lines and support poles have been located on his property in excess of 20 years.

Also, a portion of the property which is subject to the motion TMS# 282-00-00-498 is no longer owned by the Plaintiff, therefore he lacks standing on this issue.

Said motion is based on this notice the accompanying affidavits in support, the pleadings and any exhibits in the Court's file, and any memorandum of law or further supporting documentation provided to this Court.

WILLIAMS & HULST, LLC



John B. Williams
Attorneys For Defendant
P.O. Box 1288
Moncks Corner, South Carolina 29461
(843) 761-8232
Facsimile: (843) 899-5834

Dated: November 9, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 08-CP-10-1983

ROOSEVELT SIMMONS,)
Plaintiff,)
vs.)
BERKELEY ELECTRIC)
COOPERATIVE, INC., and)
ST. JOHN'S WATER)
COMPANY, INC.,)
Defendants.)
DEFENDANT BERKELEY ELECTRIC
COOPERATIVE, INC.'S 2ND SUPPLEMENTAL
RESPONSES TO PLAINTIFF'S FIRST SET OF
INTERROGATORIES

Defendant, Berkeley Electric Cooperative, Inc., responding to the interrogatories of Plaintiff, states as follows:

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

1. Mr. Robert Bradley
Berkeley Electric Cooperative, Inc.
P.O. Box 1234
Moncks Corner, SC 29461

2. Mr. Thomas Seeney
Berkeley Electric Cooperative, Inc.
P.O. Box 1234
Moncks Corner, SC 29461

3. Mr. Richard Frank
Berkeley Electric Cooperative, Inc.
P.O. Box 1234
Moncks Corner, SC 29461

4. Ms. Lydia J. Pederson
2500 Maddis Rd.
Johns Island, SC 29455

The Deposition of Robert Bradley has been taken and all parties are in receipt of the transcript of said Deposition. Thomas Seeney and Richard Frank have submitted Affidavits in this matter. Those Affidavits were filed with the Court on May 7, 2009 and copies have been provided to the parties.

Ms. Lydia J. Pederson is a title abstractor who is knowledgeable of the Charleston County Records Office and property matters.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in the case.

ANSWER: Easement from the Estate of Edward Heyward.

3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER: None

4. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.

ANSWER: Not applicable

5. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case.

ANSWER: Ms. Lydia J. Pederson, Title Abstractor.

6. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

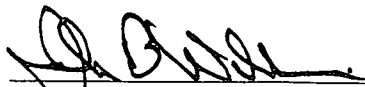
ANSWER: Mr. Robert Bradley is an employee of Berkeley Electric Cooperative, Inc. and he will testify regarding his knowledge of Berkeley Electric Cooperatives' records as well as his knowledge of the existence of the line in question.

Mr. Thomas Seeney is an employee of Berkeley Electric Cooperative, Inc. and he will testify regarding his knowledge of the existence of the line in question. A filed copy of the Affidavit of Thomas Seeney has previously been provided to Plaintiff's counsel.

Mr. Richard Frank is an employee of Berkeley Electric Cooperative, Inc. and he will testify regarding his knowledge of the existence of the line in question. A filed copy of the Affidavit of Richard Frank has previously been provided to Plaintiff's counsel.

Ms. Lydia J. Pederson is a title abstractor who is knowledgeable of the Charleston County Records Office and property matters.

WILLIAMS AND HULST, LLC



John B. Williams, Esquire
209 East Main Street
Moncks Corner, SC 29461
(843) 761-8232/Fax (843) 899-5834
Attorneys for Defendant Berkeley
Electric Cooperative, Inc.

November 9, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 08-CP-10-1983

ROOSEVELT SIMMONS,)
Plaintiff,)
Vs.)
BERKELEY ELECTRIC)
COOPERATIVE, INC., and)
ST. JOHN'S WATER)
COMPANY, INC.,)
Defendants.)

Defendant, Berkeley Electric Cooperative, Inc., responding to the Requests for
Production of Plaintiff, states as follows:

1. Any and all writings, photographs, moving pictures, maps, plats, drawings, diagrams, measurements, surveys or other documentary materials or tangible objects related to the case and/or of the areas and persons involved made either before, after or at the time of the incident in question.

ANSWER: Attached is a copy of an easement dated July 10, 1956 from Mrs. Mary Green Anderson and all documents attached as Exhibits to deposition of Roosevelt Simmons, Robert Bradley and Affidavits of Thomas Seeney and Richard Frank.

2. Any and all written or recorded statements made by any witness or persons, including the parties to this action, pertaining to the incident which is the subject matter of this action.

ANSWER: The Deposition of Robert Bradley has been taken and all parties are in receipt of the transcript of said Deposition. Thomas Seeney and Richard Frank have

submitted Affidavits in this matter. Those Affidavits were filed with the Court on May 7, 2009 and copies have been provided to the parties.

3. Copies of any and all other statements given by any other witness(es) to the incidents described in the Complaint which are in the possession of, or can reasonably be obtained by, the Defendants or counsel, whether written, or recorded, or on a tape recorder, or otherwise.

ANSWER: Affidavits of Thomas Seeney and Richard Frank which were previously provided to the Plaintiff.

4. Copies of any and all other statements, memoranda, reports, records, photographs, moving pictures, audiotapes, videotapes, drawings, charts, maps, diagrams or other documentary and/or tangible materials which in any other way might relate to the Defendant's defense(s) herein which are within the possession of, or can reasonably be obtained by, the Defendants or counsel.

ANSWER: See response to Number 1 & 3

5. Any and all photographs, slides, moving pictures, or videotape depicting the property giving rise to the subject matter of this lawsuit, which are within the possession of, or can reasonably be obtained by, the Defendant or counsel.

ANSWER: See response to Number 1 & 3

6. To permit the Plaintiff to otherwise inspect, photograph and copy any and all photographs, plats, diagrams or other documents which are the possession of, or may reasonably be obtained by, the Defendant or counsel, which reasonably relate to the

matters alleged in the Complaint herein, or to the Defendant's defenses, to include negatives of such photographs.

ANSWER: Requires no response.

7. Copies of every document or record received in response to any Subpoena sent out by Defendant.

ANSWER: None

8. Copies of all insurance policies, declaration pages and related documents setting forth any insurance coverage that may apply to the claims in this matter, including any documents that question coverage, such as a reservation of rights letter.

ANSWER: None

9. Copies of any and all written reports by expert witnesses retained for use at trial or identified as witnesses at trial in response to the Plaintiff's Interrogatories, including but not limited to the following:

(a) All documents, including draft notes, preliminary reports, and/or final reports, prepared in whole or in part by the expert on the subject matter and in connection with those matters about which the expert is expected to testify at trial;

(b) All documents sent to the expert by the Defendants or its counsel in reference to this litigation;

(c) All documents upon which the expert will rely for the opinion or opinions that the expert will express at trial;

(d) All documents utilizes, relied upon, consulted and/or reviewed by the expert in connection with this litigation to the best of the expert's recollection;

(e) All documents setting forth any compensation agreement between Defendants or its counsel and the expert;

(f) Identification by Court, term, number and date, any and all litigation wherein the expert was either a party or testified as a witness;

(g) All documents used or relied upon by the expert in preparing answers to expert Interrogatories;

(h) All documents that have been or will be shown to the expert during or in preparation of the expert's testimony at deposition or trial; and

(i) All documents, including a curriculum vitae that the Defendant contends will establish the expert's qualifications for trial purposes.

ANSWER: None

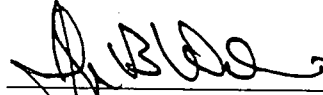
12. Copies (transcribed or recorded) of any recorded statement taken of any party or witness or anyone else relating to this incident.

ANSWER: None

13. To the extent not otherwise covered by one of the foregoing Request for Production, provide copies of all documents referred to by the Defendant or counsel in your responses to the Plaintiff's Interrogatories.

ANSWER: See response to Number 1 & 3.

WILLIAMS AND HULST, LLC



John B. Williams, Esquire
P.O. Box 1288
209 East Main Street
Moncks Corner, SC 29461
(843) 761-8232
Facsimile (843) 899-5834

November 9, 2010

Attorneys for Berkeley Electric Cooperative, Inc.

THE STATE OF SOUTH CAROLINA

County of New York

Personally appeared before me

and made oath that he saw the within named

Mrs. Mary Ellen Anderson

James H. Anderson

James H. Anderson

sign, seal and as

instrument of writing, and that he with

witnessed the execution thereof

Sworn to before me this

day of July

A.D. 1956

Notary Public for South Carolina

THE STATE OF

County of

Personally appeared before me

and made oath that he saw the within named

sign, seal and as

instrument of writing; and that he with

witnessed the execution thereof

Sworn to before me this

day

A.D. 19

Notary Public for

THE STATE OF SOUTH CAROLINA
County of Charleston

Heirs-at-law of Estate of
Edward Heyward

To
BERKELEY ELECTRIC COOPERATIVE
Incorporated

RIGHT-OF-WAY CONVEYANCE

No. 31

Filed day of A.D.

at O'clock M. and

Recorded in Book Page

Fee \$

Ratio of Clerk of Court District

County, S.C.

THE STATE OF SOUTH CAROLINA

County of New York

Personally appeared before me

and made oath that he saw the within named

Mrs. Mary Ellen Anderson

James H. Anderson

James H. Anderson

sign, seal and as

instrument of writing, and that he with

witnessed the execution thereof

Sworn to before me this

day of July

A.D. 1956

Notary Public for South Carolina

RENUNCIATION OF DOWER

do hereby certify unto all whom it may concern that Mrs.

did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread or fear of any person or persons whomsoever, renounce, release and forever relinquish right and claim of dower, of, in or to all and singular, the premises within mentioned and released.

Given under my hand and seal, this

day of July

A.D. 1956

Notary Public for South Carolina

Anno Domini 1956

THE STATE OF SOUTH CAROLINA

County of New York

Personally appeared before me

and made oath that he saw the within named

Mrs. Mary Ellen Anderson

James H. Anderson

James H. Anderson

sign, seal and as

instrument of writing, and that he with

witnessed the execution thereof

Sworn to before me this

day of July

A.D. 1956

Notary Public for South Carolina

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did this day appear before me, and upon being privately and separately examined by me, did declare that she does freely, voluntarily, and without any compulsion, dread or fear of any person or persons whomsoever, renounce, release and forever relinquish right and claim of dower, of, in or to all and singular, the premises within mentioned and released.

Given under my hand and seal, this

day of July

A.D. 1956

Notary Public for South Carolina

Anno Domini 1956

THE STATE OF

County of

Personally appeared before me

and made oath that he saw the within named

Mrs. Mary Ellen Anderson

James H. Anderson

James H. Anderson

sign, seal and as

instrument of writing, and that he with

witnessed the execution thereof

Sworn to before me this

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A.D. 1956

Notary Public for

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Given under my hand and seal, this

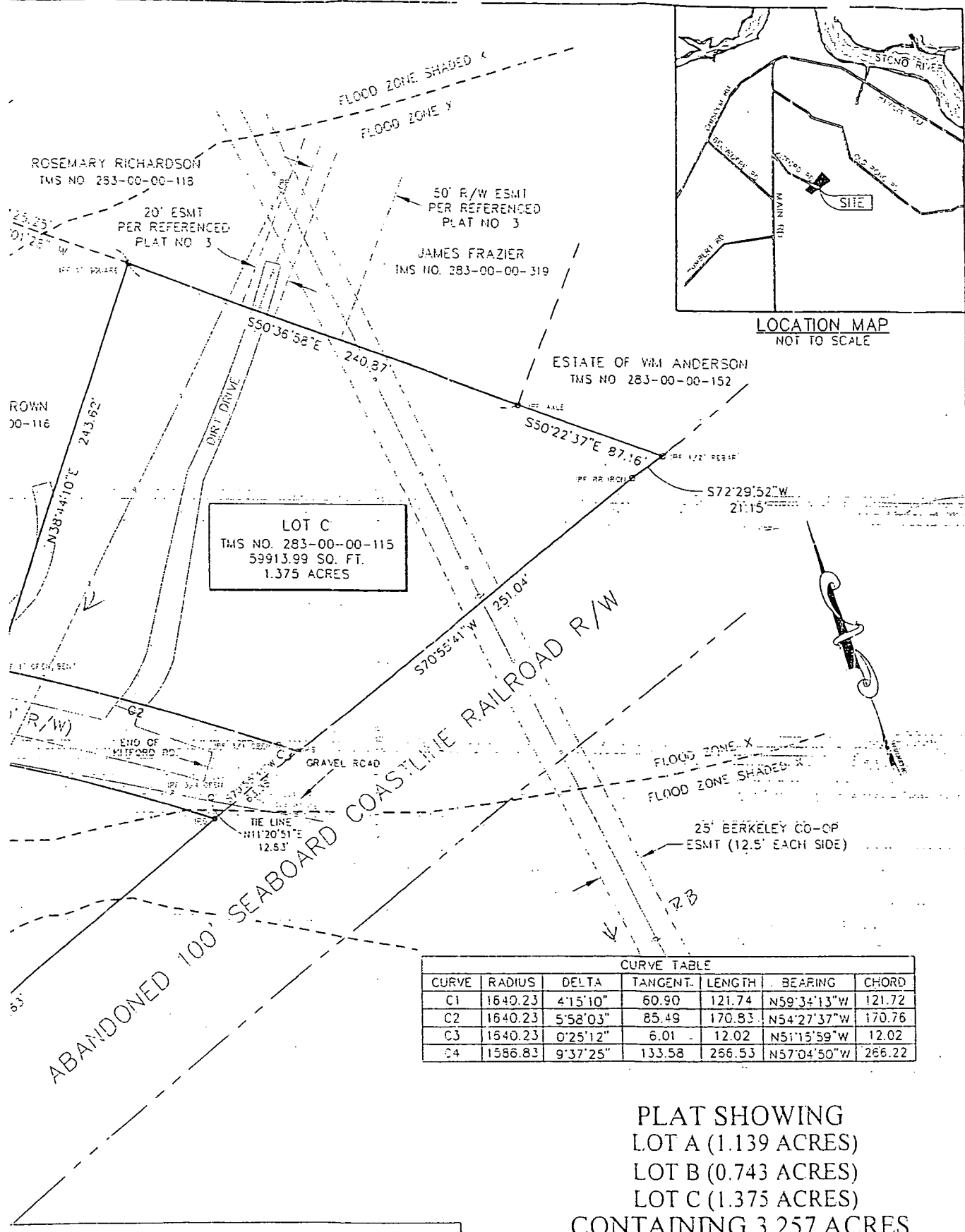
day of July

A.D. 1956

Notary Public for

Anno Domini 1956

293



CURVE TABLE						
CURVE	RADIUS	DELTA	TANGENT	LENGTH	BEARING	CHORD
C1	1640.23	4°15'10"	60.90	121.74	N59°34'13"W	121.72
C2	1640.23	5°58'03"	85.49	170.83	N54°27'37"W	170.76
C3	1640.23	0°25'12"	6.01	12.02	N51°15'59"W	12.02
C4	1586.83	9°37'25"	133.58	266.53	N57°04'50"W	266.22

PLAT SHOWING
 LOT A (1.139 ACRES)
 LOT B (0.743 ACRES)
 LOT C (1.375 ACRES)
 CONTAINING 3.257 ACRES
 PROPERTY OF
ROOSEVELT SIMMONS
 LOCATED ON
 JOHNS ISLAND CHARLESTON COUNTY
 SOUTH CAROLINA

DEPOSITION
 EXHIBIT #1
 SIMMONS
 8/12/04

R94

REFERENCES

- 1 CHARLESTON COUNTY TMS # 283-CO-00-115
2. PLAT BY W.L. STEPHENS JR., DATED APRIL 26, 1972.
RECORDED IN PLAT BOOK C, PAGE 047. CHARLESTON
COUNTY RMC.
3. PLAT BY W.L. GAILLARD, DATED OCTOBER 7, 1981.
RECORDED IN PLAT BOOK AZ, PAGE 623. CHARLESTON
COUNTY RMC.
- 4 PLAT BY W.L. GAILLARD, DATED OCTOBER 24, 1994.
NOT RECORDED.
- 5 PLAT BY CHARLIE AYCOCK III, DATED JULY 8, 2002.
RECORDED IN PLAT BOOK OD, PAGE 333. CHARLESTON
COUNTY RMC.

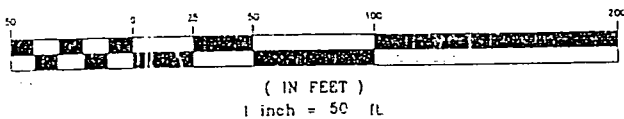
NOTES

1. AREA DETERMINED BY COORDINATE METHOD.
2. PORTIONS OF PROPERTY ARE LOCATED IN FLOOD ZONE X, ZONE SHADED X, AND FLOOD ZONE AE (EL. 11) AS PER FEMA MAP NUMBER 45019CO488J, COMMUNITY PANEL 455413 0488 J. EFFECTIVE NOVEMBER 17, 2004.
3. TOTAL NUMBER OF LOTS: 3.
SMALLEST LOT - B (.743 ACRES)
LARGEST LOT - C (1.350 ACRES)

LEGEND

-
- PP
 BOUNDARY LINE & CORNER FOUND (AS DESCRIBED)
 RES
 BOUNDARY LINE & CORNER SET (5/8" REBAR)
 CHS
 BOUNDARY LINE & 4" x 4" CONC. MONUMENT FOUND
 ADJACENT BOUNDARY LINE
 RIGHT OF WAY LINE
 EASEMENT LINE (AS DESCRIBED)
 CENTERLINE
 OVERHEAD POWER LINE
 POWER POLE
 UTILITY POLE

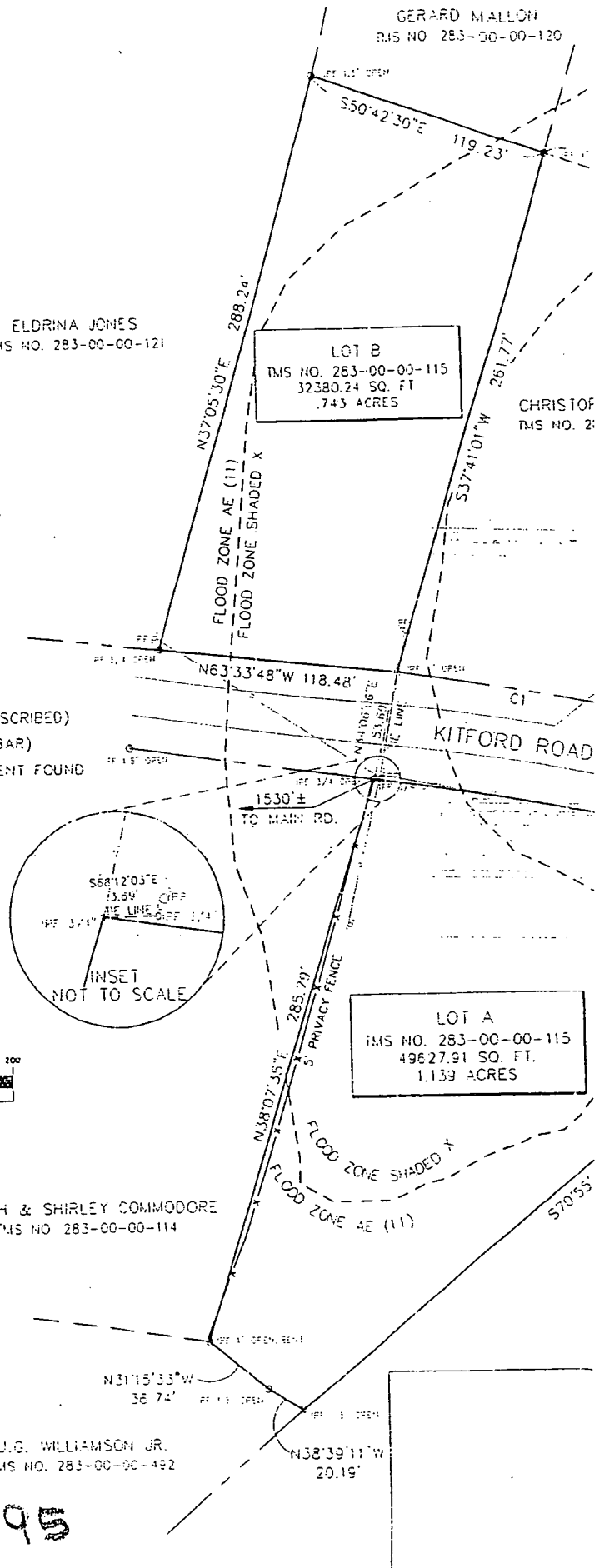
GRAPHIC SCALE

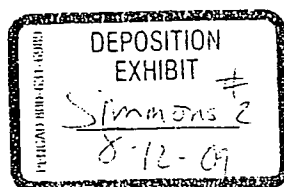
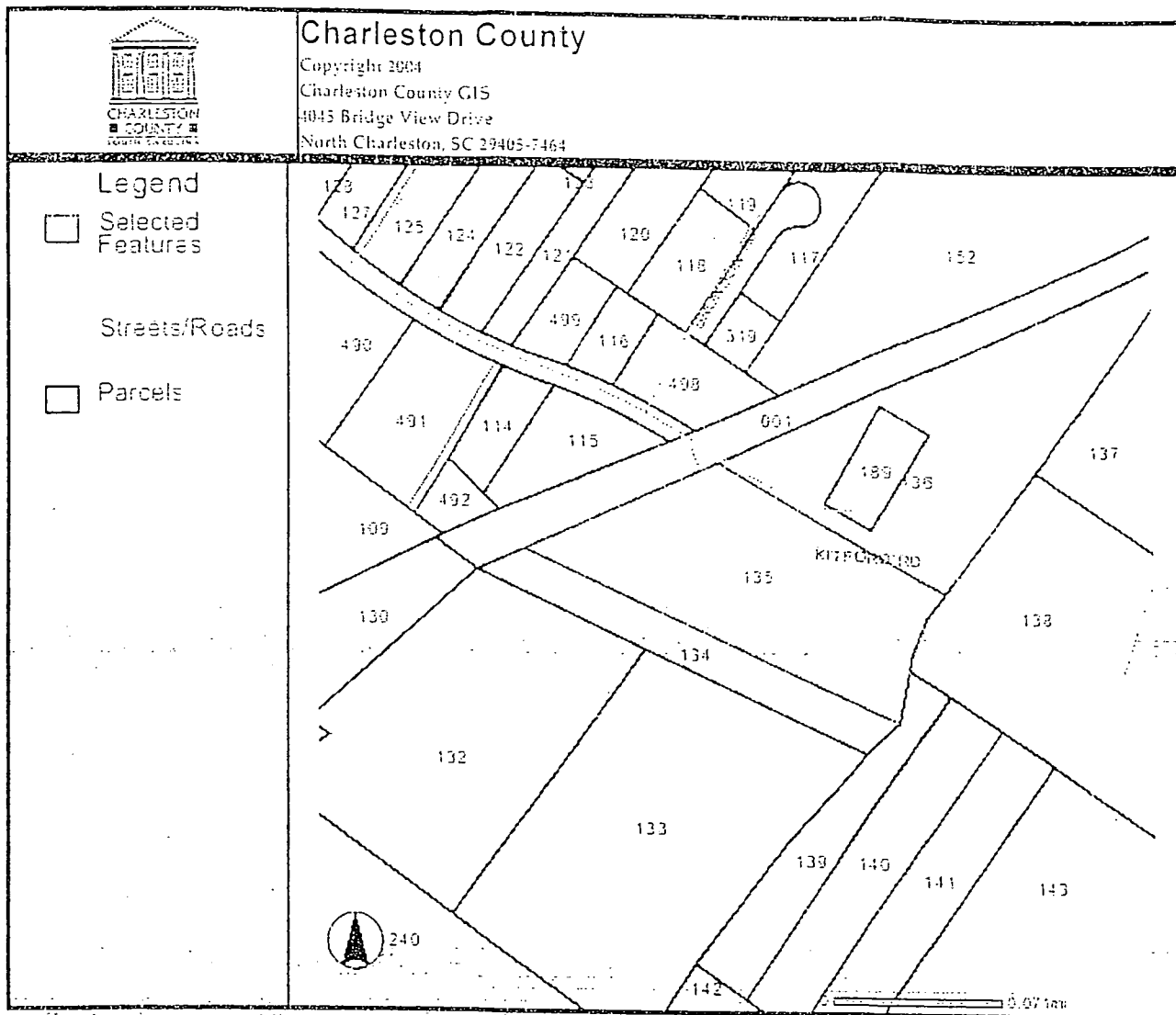


I HEREBY STATE THAT TO THE BEST OF MY KNOWLEDGE
INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON
WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF
THE MINIMUM STANDARDS FOR THE PRACTICE OF LAND
SURVEYING IN THE STATE OF SOUTH CAROLINA, AND
MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS "A"
SURVEY AS SPECIFIED THEREIN; ALSO THERE ARE NO
VISIBLE ENDOACHMENTS OR PROJECTIONS OTHER THAN

ELIJAH & SHIRLEY COMMODORE
TMS NO 283-GO-GO-114

U.G. WILLIAMSON JR.
RMS NO. 283-00-00-492





296



Charleston County, South Carolina

Copyright 2001
Charleston County GIS
4041 Bridge View Drive
North Charleston, SC 29405-7464

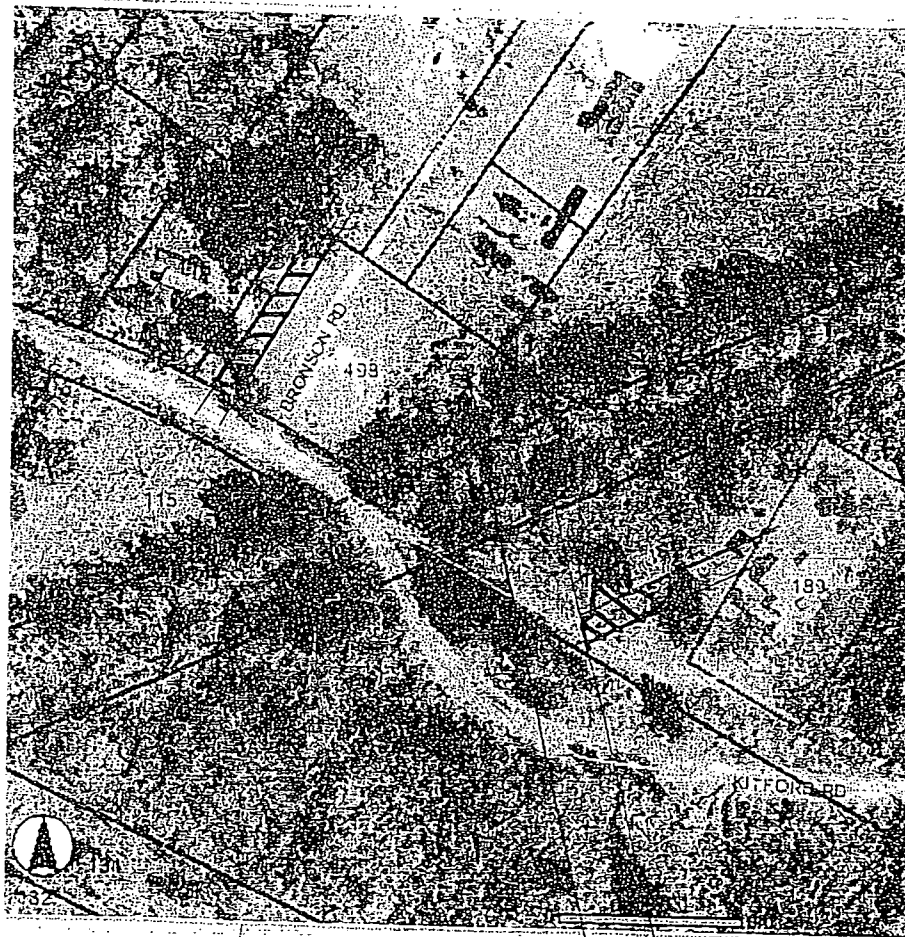
Legend

Selected
Features

Streets/Roads

 Parcels

Mar 2001
Color Photos



PARCEL NUMBER : 2320000189

PARCEL ID: 2320000189

STREET NUMBER: 3470

STREET NAME: KITFORD RD

PROP UNIT:

PROP CITY: JOHNS ISLAND

PROP ZIP: 29455

SITE NAME: S E SIDE

GENERAL USE: SFR

MOBILE HOMES: 0

SUBDIVISION: PART CALIFORNIA

LEGAL DESCRIPTION: LOT A

LGL HI ACRES: 0.53

LGL MAR ACRES: 0

LGL WATER ACRES:

LGL SWAMP ACRES: 0

LGL TOTAL ACRES: 0.53

TAX DISTRICT: 51

JURISDICTION: CTA

PLAT BOOK: AJ-51

OWNER ON 1ST: ANDERSON WM EST OF

OWNER2 ON 1ST:



AREA 1

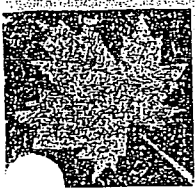


AREA 2

MAIN TRANSMISSION
LINE (B.E.C.)



297



ADKINS FORESTRY SERVICES, LLC

205 Grouse Rd., Summerville, South Carolina 29485
Voice/Fax (843) 821-8154, Mobile (843) 870-1655

January 8, 2007

Mr. Roosevelt Simmons

Johns Island, SC 29455

Dear Mr. Simmons,

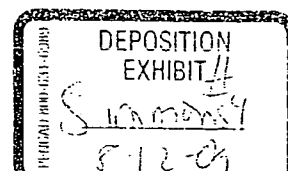
Pursuant to your request, I have examined trees in the vicinity of two Berkeley Electric Co-Op. residential service lines in an attempt to quantify the value of trees which have been killed or severely damaged. My efforts in this regard are based on the following parameters:

1. Locate the two service right-of-ways within the confines of your property, designated as Area 1 and Area 2 on the enclosed photo.
2. Exclude from consideration the area of the main transmission line, as shown on the enclosed photo.
3. Include for consideration areas directly under the service lines, since these right-of-ways are presumed to be trespassing on your property (lot legally conveyed).
4. Identify dead and dying pines and hardwoods, in this vicinity, which are presumed to have been treated with herbicides.
5. Produce a tally of affected trees.
6. Estimate the value of the affected trees.

On December 27, 2006, I conducted my field study, during which time I located the study areas and tallied the affected trees. In both areas I tallied a total of 102 affected loblolly pine saplings and 171 hardwood saplings. The dominant species of the tallied hardwoods is water oak, however, I tallied several sweet gums and chinaberrys as well. Area 1 contains 3 affected pines and 9 affected hardwoods. Area 2 contains 99 affected pines and 162 affected hardwoods. Inspection of annual rings indicates the pine's age to be 6 years old. The hardwoods can reasonably be assumed to be mostly 6 years old as well.

Mr. Simmons, you have told me you are managing this property as a tree farm and that, in addition to many others, you have planted the pines which have been damaged. Although these pines and hardwoods have not yet grown to a size which is merchantable, they have a value which can be estimated by several methods. Since this is a tree farm, I believe the most appropriate means of valuation is to discount the tree's future merchantable value to present day dollars. To accomplish this I have estimated the affected pine and hardwood's total growth to their first

R98



expected uniform point of merchantability, at which time they would be used for pulpwood. I have also estimated each product's "stumpage" value at this future date. Using a discount rate of 6%, I then estimated the present value of this future "stand" of trees. The results are tabulated below.

Product	Trees Tallied	Years to Maturity	Est. Tons @ Maturity	Est. Stumpage Value @ Maturity (b)	Est. Total Value @ Maturity	Estimated Present Product Value (a)
Pine Saplings	102	9	19.9 tons	\$8.37	\$166.56	\$98.59
Hardwood Saplings	171	19	15.4 tons	\$13.00	\$200.20	\$66.17

(a) Discount Rate @ 6% per annum

Total Present Sapling Value \$164.76

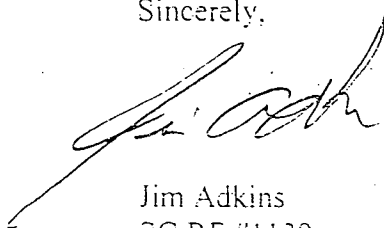
(b) Stumpage Inflation Rate @ 2% per annum

The estimated total present value of the affected trees is \$164.76. While I believe this estimate is reasonably accurate and reflective of a timber valuation for the purpose of tree farming, it is not guaranteed to reflect what you might actually have received for the present or future sale of these trees. Factors which may greatly impact the actual value include, but are not limited to: the growth rates of the trees in question, management and utilization practices, actual present and future stumpage values, and the discount rate. This estimate also does not include a damage multiple applied for an involuntary loss, or consideration of any alternate uses, and their impact on the valuations for these trees.

Per your request, I have sent this final report to your attorney, Mrs. Ayesha Washington, at Pierce, Hems, Sloan & McLeod, LLC, along with a copy of my invoice for this valuation, indicating receipt of your check for payment. Please contact me if you have any further questions or need for additional analysis.

Thank you for allowing me to assist you with this matter.

Sincerely,



Jim Adkins
SC RF #1139

CC: Mrs. Ayesha Washington

R 99



Charleston County, South Carolina

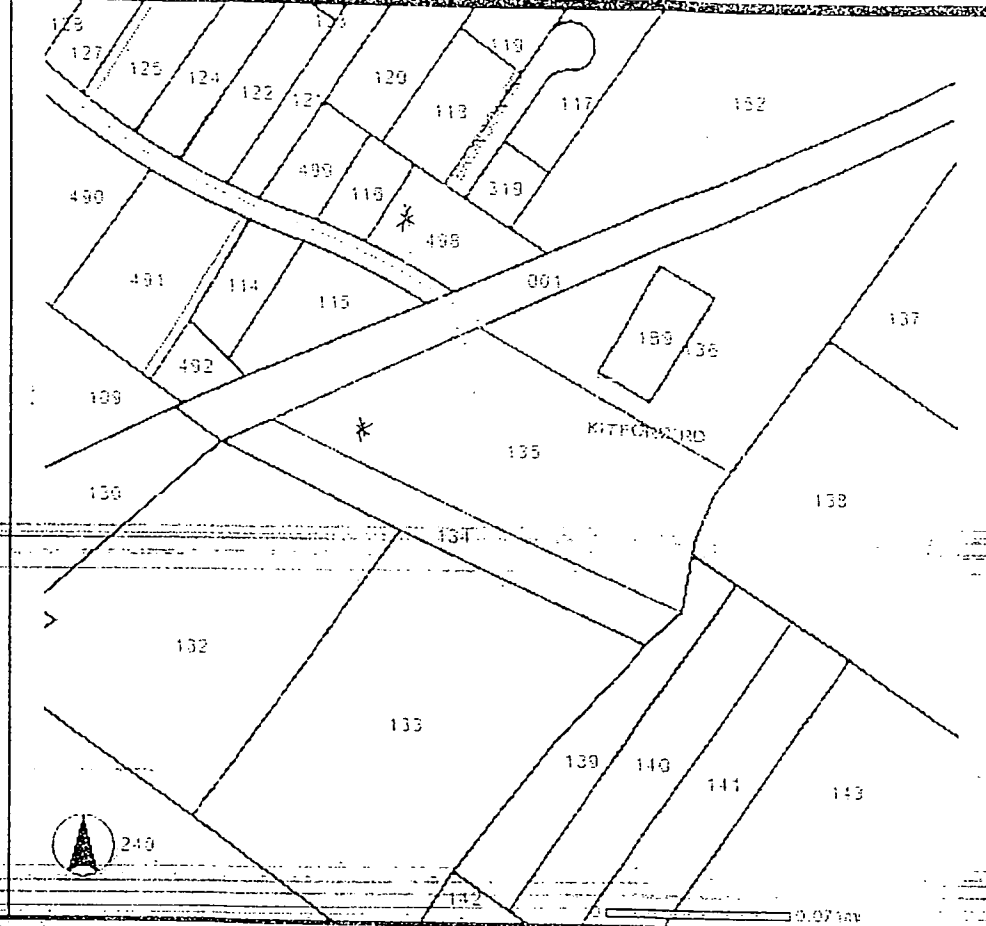
Copyright 2004
Charleston County GIS
4045 Bridge View Drive
North Charleston, SC 29405-7461

Legend

☐ Selected Features

Streets/Roads

☐ Parcels



PARCEL NUMBER: 2320000135

PARCEL ID: 2320000135

STREET NUMBER:

STREET NAME: KITFORD RD

PROP UNIT:

PROP CITY:

PROP ZIP: 29455

SITE NAME: END SW SIDE SOLRR RIGHT WAY

GENERAL USE: AGR

MOBILE HOMES:

SUBDIVISION: CALIF

LEGAL DESCRIPTION:

LGL HI ACRES: 7.87

LGL MAR ACRES: 0

LGL WATER ACRES:

LGL SWAMP ACRES: 0

LGL TOTAL ACRES: 7.87

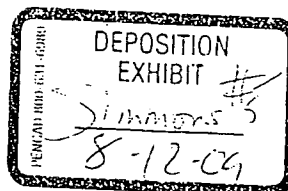
TAX DISTRICT: 51

JURISDICTION: CTA

PLAT BOOK: MC 3-15

OWNER ON 1ST: SIMMONS ROOSEVELT

OWNER2 ON 1ST:



R100

#493 - shown as lot C
on big plot - Ex. 1

Tax Map = Ex 2

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
1983

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 08-CP-10-

ROOSEVELT SIMMONS,)
Plaintiff,)

Vs.)

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

Defendants.)

AFFIDAVIT OF RICHARD C. FRANK

2009 MAY -7 PM 4:25
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

1. I am employed by Berkeley Electric Cooperative, Inc. (BEC) and have been since 1979.

2. I was the District Superintendent for the Johns Island District of BEC. Among my responsibilities were the construction and maintenance of the electrical distribution lines in the Johns Island area.

3. I am familiar with the age, configuration, features and characteristics of the utility line located at 3507 Kitford Road. The line is clearly visible from Kitford Road and is obvious to anyone inspecting the property.

4. To the best of my recollection this line has never been moved and has always been used to provide power to the residents in the area as long as I have worked for the Company. The poles on the property show birthmarks of 1984 and 1986 (Exhibit A). Based on the birthmarks and my own personal

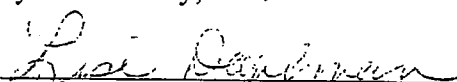
R101

recollection, I am reasonably certain that the pole was installed when the line was rebuilt. I believe that the line has been located on and across the subject property since at least 1980. However, I am certain that this utility line has been continuously operated on or above subject property in essentially the same configuration without interruption since I began working the area in 1979, well in excess of 20 years.

5. I always believed that BEC has an easement providing a right-of-way for this utility line because I am informed that is the company's normal practice. I entered the property to maintain the lines under the belief that BEC had a legitimate right to do so. Previous owners never objected to the operations or use of the property by BEC.


Richard C. Frank

Sworn to before me this 2nd
day of ~~February~~ ^{March}, 2009


Notary Public for the State of South Carolina
My Commission Expires: 5/23/2013

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
1983

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 08-CP-10-

ROOSEVELT SIMMONS,)
Plaintiff,)
Vs.)

AFFIDAVIT OF THOMAS SEENEY

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

2009 MAY -7 PM 2:25
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

1. I am employed by Berkeley Electric Cooperative, Inc. (BEC) and have been since 1978.

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recollection, I am reasonably certain that the pole was installed when the line was rebuilt. I believe that the line has been located on and across the subject property since at least 1980. However, I am certain that this utility line has been continuously operated on or above subject property in essentially the same configuration without interruption since I began working the area in 1978, well in excess of 20 years.

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Thomas Seeney
Thomas Seeney

Sworn to before me this 6th
day of ~~February~~, 2009
March

Martha B. Harris
Notary Public for the State of South Carolina
My Commission Expires: 3/15/09

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 08-CP-10-1983

ROOSEVELT SIMMONS)

Plaintiff)

Vs.)

BERKELEY ELECTRIC)

COOPERATIVE INC. and)

ST. JOHNS WATER)

COMPANY, INC.)

Defendants)

2010 NOV 22 AM 9:47
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS
AND SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

Plaintiff filed this action in April 2008 for trespass, unjust enrichment and declaratory relief against defendants Berkeley Electric Cooperative, Inc. (Berkeley Electric) and St. Johns Water Company, Inc. (St. Johns) relating to the location of their utility lines across property designated as TMS 283-00-498 and 283-00-00-136 adjacent to Kitford Road, Johns Island. The complaint demanded a jury trial. An Amended Complaint in substantially the same form was filed shortly thereafter. In September 2008, a Second Amended Complaint was filed in order to correct a misidentification of one of the properties; all references to TMS 283-00-00-136 were replaced by reference to TMS 282-00-00-135.

In May 2009, Berkeley Electric filed a motion for summary judgment on the basis that their utility lines had been existence for at least 20 years and therefore it was entitled to a prescriptive easement across part of the Simmons property. Simmons filed an affidavit in opposition denying that the line was present for the statutory period. While this motion was pending, and based upon the production of an additional easement by Berkeley Electric, the

parties agreed that the matter would be referred to the Master in Equity for a determination of the easements affecting the property including whether Berkeley Electric exceeded the scope of the easements it was granted by locating two utility lines across TMS 283-00-00-498. A Consent Order of Reference was entered on October 13, 2009, in which plaintiff reserved the right to return to the jury trial roster to pursue his damages claims.

In June 2010, defendant St. Johns filed a motion for summary judgment on its claim to a prescriptive easement for its water lines. Plaintiff filed an Opposition and an Affidavit of Roosevelt Simmons in support of the opposition. Pursuant to the Scheduling Order of August 9, 2010, defendant Berkeley Electric filed an Amended Motion for Summary Judgment alleging that in addition to its claim of a prescriptive easement, it was entitled to judgment because plaintiff did not own TMS 283-00-00-498, according to the records of the Charleston County RMC. St. Johns filed its own motion to dismiss on the basis of a transfer of ownership.

Plaintiff now submits this Memorandum and Affidavits of Edward A. Bertele and Roosevelt Simmons in opposition to defendants' motion to dismiss and summary judgment.

SUMMARY OF ARGUMENT

Plaintiff opposes the defendants' motion to dismiss based upon a transfer of title for two reasons: (1) plaintiff had legal title and possession of TMS 283-00-00- 498 when the cause of action occurred. Plaintiff has suffered damages arising from defendants' trespass on TMS 283-00-00-498 which survives the transfer of title; (2) plaintiff still has title to TMS 282-00-00-135 on which both defendants have located their utility lines so that his trespass claims as to that property are not affected by any title issue as to TMS 283-00-00-498.

Plaintiff opposes the defendants' motion for summary judgment for several reasons. In the case of St. Johns, plaintiff asserts that its lines are underground and not visible and that there

was no way for him to know they were there; and that he objected before the twenty years had run. Consequently, neither the requirement of an “open and apparent use” or the twenty years of use necessary for creation of a prescriptive easement was established by St. Johns.

In the case of Berkeley Electric, it has not met its burden of proof to establish by clear and convincing evidence that its lines were in place for the requisite 20 years. The documentary evidence provided by Berkeley Electric in discovery contradicts the sworn testimony of its employees that the line was in existence in 1980. Simmons contends and documents from Comcast suggest that that Berkeley Electric has used an alternate route to provide electricity and pole sharing in the past. In addition, the Court should not act summarily but is required to hold a hearing to balance the equities in accordance with the Order of Reference. These arguments are more fully described below.

LEGAL ARGUMENT

I. PLAINTIFF HAS A SUFFICIENT INTEREST IN THE PROPERTY TO RECOVER DAMAGES

Defendants’ motion to dismiss has no legal basis and should be summarily denied.

Defendants allege that a third party, Mase and Company, LLC has title to TMS 283-00-00-498 as of March 1, 2010. See Affidavit of Lydia Jean Pedersen. However, legal title at the time of judgment is not necessary for a plaintiff to proceed on a trespass claim in South Carolina. South Carolina Statutes Title 15-67-10 provides that “any person in possession of real property . . . may **bring** an action against any person who claims . . . any interest therein” Plaintiff alleges in the Second Amended Complaint, paragraph 6 and elsewhere that he is in title and possession of TMS 283-00-00-498 at the time of the filing of the Complaint. It is not subject to dispute that plaintiff acquired title by deed dated September 16, 2003. See Bertele Affidavit, Exhibit C. (At the time of the conveyance, TMS 283-00-00-498 was a part of TMS 283-00-00-115.) Simmons

has had exclusive possession since then. He planted trees and had the property assessed as a tree farm. He commenced this action against Berkeley Electric and St. Johns for damages caused by their utility lines during his ownership. Berkeley Electric destroyed trees he was harvesting. See Report dated January 8, 2007 from Adkins Forestry Services, attached to Berkeley Electric's Amended Motion for Summary Judgment.

Defendants have not cited any South Carolina case which holds that a trespass claim should be dismissed because of such transfer and plaintiff has not found any such case either. Defendants' argument that a transfer voids a damages claim due to a trespass is illogical. If plaintiff had sold the land during the pendency of the litigation, he would, according to defendants' logic not be entitled to proceed with a hearing as to any damages, even if he could show that the fair market value of the property was adversely affected at the time of sale.

Simmons has retained counsel to challenge this transfer which was involuntary and resulted from a sale conducted by the Charleston County Sheriff to enforce a judgment against Simmons for failure to pay a user fee of \$144. See Exhibits A and B, Bertele Affidavit.

The existence of the Sheriff's deed to Mase and Company, LLC does not prevent this court from carrying out the Order of Reference to determine the easements affecting the subject property including whether Berkeley Electric exceeded the scope of written easements granted to it or whether St. Johns is entitled to a prescriptive easement preventing Simmons from recovering damages from it. Therefore, this court should not adopt the defendants' position because it is contrary to Title 15-67-10 and does not enable plaintiff to recover damages that have arisen as a result of the trespass.

II. SUMMARY JUDGMENT MAY NOT BE GRANTED WHERE THERE ARE DISPUTED ISSUES OF MATERIAL FACT

The relevant legal standard for the court to decide a summary judgment is applicable to both defendants. Under SC Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman v. A.T. & T., 306 S.C. 101, 115(1991). In order to establish a prescriptive easement, a party must show (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years ; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right.” Horry County v. Laychur, 315 SC 364, 367 (1993). The claimant must show by “clear and convincing” evidence he has met the requirements for adverse possession. Davis v. Monteith, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986). Plaintiff contends that neither defendant has met its burden of proof on the issue of a prescriptive easement.

A. The material facts in dispute as to St. Johns Water Company

All of the material facts necessary for St. Johns to establish a prescriptive easement are disputed. St. Johns must show “a distinct and positive assertion of a right hostile to the owner, and brought home to him for the statutory twenty year period”. Williamson v. Abbott, 107 SC 397 (1917). St. Johns cannot definitively establish that its water lines were installed across plaintiff’s property, either TMS 283-00-00-498 or 282-00-00-135, for the full 20 years. According to St. John’s business records, water service was connected to the Andersen property (across TMS 282-00-00-135) in August 1987. According to these same business records, St. Johns connected water service to Frazier and Gordon, property owners to the rear of TMS 283-00-00-498 in July 1986 and August 1987 respectively. St. Johns has not provided any document in discovery to prove that its water lines servicing these properties were installed before those

dates. St. Johns submitted the affidavit of Hugh Miley, an engineer who was in charge of bringing water service from Main Road down Kitford Road, but his affidavit does not state when the individual lines across TMS 283-00-00-498 and TMS 282-00-00-135 were installed only that the water line from Main Road down Kitford Road was installed in 1978. St. Johns records of service to its customers are the more objective basis for this court to determine the date of installation of the water lines rather than the memory (unsupported by construction records) of the project manager. Simmons objected to St. Johns manager, Ava Robichaux in April 2005 when he found its meter on TMS 282-00-00-135 so that the twenty year statutory period was tolled. Simmons then learned about the line under TMS 283-00-00-498 and commenced this action.

Furthermore, it is not disputed that the water lines are underground beneath both properties. Simmons asserts that since the lines were hidden, St. Johns cannot show that their existence was open and notorious under the circumstances. He did not receive any notice and had no reason to know that water service was being provided to owners in the rear of his property since well water was available in the area. This Court should not grant summary judgment where as here the claimant has failed to establish by clear and convincing evidence that its use was open and notorious for twenty years.

B. The material facts in dispute as to Berkeley Electric

Plaintiff asserts that there are also material facts in dispute as to Berkeley Electric's claims of a prescriptive easement. First, Berkeley Electric has failed to establish it is entitled to a prescriptive easement across TMS 282-00-00-135 because the evidence it has provided in its Amended Motion for Summary Judgment relates only to the installation of its utility poles for a line across TMS 283-00-00-498. The Second Amended Complaint alleges that Berkeley

Electric's power lines servicing the Andersen property encroach on Simmons' property, TMS 282-00-00-135. Berkeley Electric has not submitted any evidence to establish its rights to a prescriptive easement, i.e. an adverse use for 20 years and its motion as to that property fails for a lack of any proof.

Certain material facts regarding TMS 283-00-00-498 are uncontested. It is not subject to dispute that two Berkeley Electric power lines cross TMS 283-00-00-498 as shown on a Plat dated May 12, 2005 and supplemented September 22, 2010 by Richard Lacey, P.E. Exhibit D, Bertele Affidavit. It is uncontested that the power line to the east is a high voltage power distribution line for which an easement was granted by a predecessor in title, Estate of Edward Heyward in 1956. Exhibit E, Bertele Affidavit. Simmons commenced this action under the belief that the second line to the west was unauthorized and constituted a continuing trespass. In its Answer to the Complaint, Berkeley Electric asserted as a defense that the second power line was entitled to a prescriptive easement. However, in discovery, it produced another written easement granted by a more recent predecessor in title, Edward Brown, in 1972 of which plaintiff was unaware. Exhibit F, Bertele Affidavit. Neither written easement contains any reference to the location of the easement on the subject property. Simmons contends that Berkeley Electric has abused the written easements by exceeding the reasonable scope, which is the reason for the Order of Reference. However, by renewing its motion for summary judgment, Berkeley Electric is trying to avoid having this Court make a decision as to the scope of its easements. Accordingly, plaintiff contends that any decision as to the existence of a prescriptive easement would violate the spirit and terms of the Order of Reference.

Notwithstanding this objection, plaintiff asserts that based upon various documents obtained from Berkeley Electric and third party discovery; there are disputed issues of fact which

preclude the granting of summary judgment as to any prescriptive easement on TMS 283-00-00-498. The following documents were produced by Berkeley Electric but are not mentioned by it in its motion. First, there is a survey dated November 8, 1983 prepared for Berkeley Electric which shows the location of the high voltage power distribution line (easement granted in 1956) crossing TMS 283-00-00-115 (k/n/a 498) on the east side but does not show the existence of the second line crossing TMS 283-00-00-498 which Berkeley Electric alleges was there in 1980 . See Exhibit G, Affidavit of Edward A. Bertele. Next, Berkeley Electric produced conflicting system maps. The System Map prepared by Southern Engineering dated 4/12/95 shows a power line across Kitford Road but does not indicate whether it encroaches on TMS 283-00-00-498. See Exhibit H, Bertele Affidavit. The current Berkeley Electric System Map shows the same power line in a substantially different location. See Exhibit I, Bertele Affidavit. Berkeley Electric did not produce any system map showing the location of its power line across TMS 283-00-00-498 prior to 1995 and before 1980 although plaintiff requested it to produce this in discovery.

It is reasonable to conclude from the inconsistent system maps that the power line was moved between 1995 and the present; otherwise the two system maps would be identical. Therefore, the documentary evidence supports the conclusion that there was no power line crossing TMS 283-00-00-488 at the end of 1983; and that the location of the power line changed from 1995 to the present based upon system maps prepared at different times.

Since Berkeley Electric could not produce a single document establishing that the power line crossing TMS 283-00-00-498 was installed in 1980, its summary judgment motion relies solely upon the statements of two employees. Thomas Feeney, current District Superintendent of Berkeley Electric states: "I believe that the line has been located on and across the subject

property since at least 1980.” Affidavit of Thomas Feeney, Paragraph 4. Mr. Feeney also avers that the line has never been moved. Id. Paragraph 4. Richard Frank, former District Superintendent, makes the identical allegations in the identical words. Affidavit of Richard Frank. In view of the inconsistency between their words and the company’s own records, the Court cannot accept one version of the facts and ignore another version when both versions come from the same source, Berkeley Electric. In addition, Simmons has denied that the line has been located there for twenty years. See Supplemental Affidavit of Roosevelt Simmons.

Further, plaintiff contends that the age of the “birthmarks” on the poles to which the power lines are attached (1984 & 1986) does not confirm when the power line was installed. Simmons contends that power to customers along Kitford Road was provided in the past by a line from the main distribution line crossing TMS 282-00-00-135 over his driveway down to Kitford Road. See Simmons Supplemental Affidavit. The pole on the south side of Kitford Road birthmarked “1986” could have been placed in its location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. Similarly, the pole on TMS 283-00-00-118 to the north of TMS 283-00-00-498 and birthmarked “1984” could have been placed in its location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. The date of the birthmarks on the poles may signify when the pole was installed but without other corroborating evidence, they are not conclusive as when the power line across TMS 283-00-00-498 was installed between those poles.

Simmons contends that Berkeley Electric has used a different route down his driveway for its power lines and cable lines in the past to service customers on Kitford Road and not the

line across TMS 283-00-00-498. See Simmons Supplemental Affidavit. Discovery obtained via subpoena from Comcast supports this contention. See Exhibit J, Bertele Affidavit. Berkeley Electric receives royalties from this use and has a monetary reason to create multiple pole locations. Id. Comcast's counsel advised that its cable lines were previously owned by US Cable and that a pole sharing agreement had been in existence between US Cable and Berkeley Electric prior to 2002 but that Comcast did not have a copy of it. Exhibit K, Bertele Affidavit. The Comcast system map indicates that Comcast (and its predecessor US Cable) used the Berkeley Electric poles on the south side of Kitford Road to carry its cable over Simmons driveway on TMS 282-00-00-135 as Simmons alleges. Exhibit L, Bertele Affidavit. Berkeley Electric never produced any pole sharing agreement in discovery; consequently it is unknown how long the cable lines have been running down Simmons driveway on Berkeley Electric poles.

In summary, Berkeley Electric's motion for summary judgment is not based on undisputed facts. The existence of a power line in the area has not been verified by any document prior to the Berkeley Electric 1995 System Map which does not even establish that it crosses TMS 283-00-00-498. A recent system map indicates a different location, which may or may not be across TMS 283-00-00-498. The facts and inferences which are drawn from the documents provided by Berkeley electric do not provide "clear and convincing" evidence of Berkeley Electric's claims for a prescriptive easement. Third party evidence supports Simmons contentions of an earlier different route.

C. The Court must view the inconsistencies in favor of plaintiff

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518

S.E.2d 301 (Ct. App. 1999). If triable issues exist, those issues must be submitted to the jury. Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999) Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

This Court must view the evidence and inferences most favorably toward the plaintiff. The documentary evidence is arguably inconsistent with testimony of Berkeley Electric's witnesses. Simmons has denied that this line has existed in its present location since 1980. Therefore, there is a dispute of material fact upon which to deny Berkeley Electric's motion for summary judgment.

D. The Court must balance the equities

The court should deny summary judgment for another reason. The matter was referred to this Court for a determination of the scope of the easements and the rights of the parties, i.e. to balance the equities. The question of the extent of an easement is an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997); Plott v. Justin Enters., 374 S.C. 504, 510, 649 S.E.2d 92, 95 (Ct. App. 2007); Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. South Island Pub. Serv. Dist., 355 S.C. 529, 532, 586 S.E.2d 146, 147 (Ct. App. 2003); Eldridge v. City of Greenwood, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998); Smith v. Commissioners of Pub. Works, 312 S.C. 460, 465, 441 S.E.2d 331, 334 (Ct. App. 1994).

This court should consider all of the circumstances present here including: the language of the written easements to Berkeley Electric and the circumstances under which they were granted and the reasonable expectations of the grantors. "Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention." Smith v. Comm.'s of Pub. Works of City of Charleston, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct.App.1994); Ten Woodruff Oaks, LLC v. Point Development, LLC, 385 S.C. 174, 181 (S.C. App. 2009):" If the language is uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect." 25 Am.Jur.2d Easements § 18, at 516 (2004)."

Neither of the easements contains a definite location where the power line is to be located. Although Berkeley Electric obtained two separate easements to install power lines across the Simmons property, it used these easements to justify crossing the Simmons property in four separate locations.

Simmons contends that Berkeley Electric unreasonably implemented these easements and granted pole sharing rights over multiple locations across Simmons land for a fee to serve its purposes without regard to Simmons property rights or the effect of its actions upon them. Simmons contends that there is an alternative to crossing TMS 283-00-00-498, i.e. the route which Berkeley Electric has used in the past which would less severely impact his property, i.e. over his driveway along the south side of Kitford Road. Simmons' surveyor will testify consistent with his supplemented plat that the total area of TMS 283-00-00-498 (1.375 acres) is

effectively reduced to .342 acres due to the existence of Berkeley electric's two overhead power lines and St. Johns underground water line.

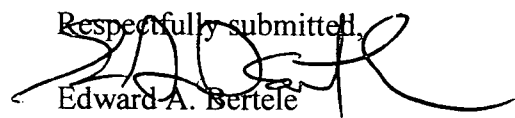
The Court must also consider the totality of the circumstances surrounding St. Johns Water Company's claim for a prescriptive easement. It is undisputed that St. Johns provided water service to third parties without obtaining any written easement from Simmons or his predecessor in title, installed underground water lines under Simmons property to remote locations without any prior or subsequent notice, while at the same time claiming it had an easement.

Only after considering the totality of these circumstances can the court fairly determine whether Berkeley Electric and St. Johns Water Company are entitled to prescriptive rights over TMS 283-00-00-498 and TMS 282-00-00-135.

CONCLUSION

For the reasons expressed, plaintiff respectfully requests that the Court deny this motion for summary judgment.

Respectfully submitted,


Edward A. Bertele
Attorney for Plaintiff

November 19, 2010
Charleston, SC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 08-CP-10-1983

ROOSEVELT SIMMONS)

Plaintiff)

Vs.)

BERKELEY ELECTRIC)
COOPERATIVE INC. and)
ST. JOHNS WATER)
COMPANY, INC.)
Defendants)

SUPPLEMENTAL AFFIDAVIT
ROOSEVELT SIMMONS

BY

JULE J. ARMSTRONG
CLERK OF COURT

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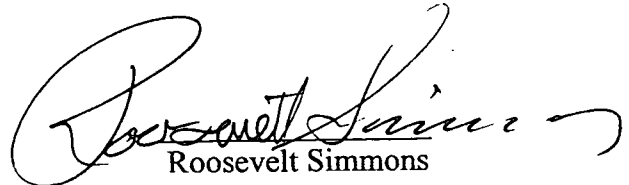
Roosevelt Simmons, of full age being duly sworn according to law upon his oath deposes and says:

1. I am the plaintiff and submit this affidavit in further opposition to Berkeley Electric's motion for summary judgment. I have personal knowledge of the facts set forth herein.
2. The power line owned by Berkeley Electric Company which I objected to has not been located across TMS 283-00-00-498 since 1980 as their witnesses claim. In my previous Affidavit, I referred to a plat dated October 7, 1981 prepared by W.L. Gaillard which shows the location of the Berkeley Electric power distribution line easement crossing the property but does not show the other power line which Berkeley Electric claims was there then.
3. After I acquired TMS 283-00-00-115 (later divided into three lots including TMS 283-00-00-498 and 499) and TMS 282-00-00-135 in 2003, I hired Richard Lacey, P.E. of HLA, to prepare a plat of all my property. The plat which he prepared dated May 12, 2005 showed only TMS 283-00-00-115, namely the property to the west of the Seaboard Coastline Railroad right of way, now abandoned. That plat shows the location of both the Berkeley Electric power distribution line which crosses the easterly side of TMS 283-00-00-498 and the power line about

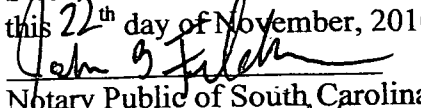
which I filed this suit which crosses on the westerly side. Because this plat did not indicate all of the power lines which were affecting my property, Mr. Lacey was asked to return to the site to determine the location of any other power lines.

4. The revised plat which he prepared dated September 22, 2010 shows another line running from the power distribution line where it crosses TMS 282-00-00-135 over my driveway out to Kitford Road and ending at the pole in front of the Turner residence on the south side of Kitford Road. The line running over my driveway has been used by Berkeley Electric to my knowledge for many years to service its customers on the south side of Kitford Road. There have even been cable TV lines running along this same route. I question why Berkeley Electric had to add another power line across TMS 283-00-00-498 which is connected to this same pole on the south side of Kitford Road when it had already had a route to service the same customers.

5. I am advised that Berkeley Electric was given two easements, one by the Estate of Edward Heyward in 1956, the other by Edward Brown in 1972. However, Berkeley Electric is using these two to justify crossing my property four times, twice across TMS 283-00-00-498 on the east and on the west and twice across TMS 282-00-00-135, on the north and on the south. I object to this as an unreasonable use of these easements because Berkeley Electric has used them to justify criss-crossing my property whenever and wherever they want and without regard to the effects this had on my ability to use or sell this property. Trees I have planned to harvest and other vegetation has been destroyed and my property values adversely affected without any permission or compensation.


Roosevelt Simmons

Sworn and subscribed before me
this 22th day of November, 2010


Notary Public of South Carolina

Joshua B. Feldman

My Commission Expires

October 17, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

ROOSEVELT SIMMONS)

Plaintiff)

Vs.)

BERKELEY ELECTRIC)

COOPERATIVE INC. and)

ST. JOHNS WATER)

COMPANY, INC.)

Defendants)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 08-CP-10-1983

2010 NOV 22 AM 9:47
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

AFFIDAVIT OF EDWARD A. BERTELE

Edward A. Bertele, of full age being duly sworn according to law upon his oath deposes and says:

1. I am an attorney at law of South Carolina and I submit this affidavit in opposition to defendants' motions to dismiss and for summary judgment. I have personal knowledge of the facts set forth herein.

2. Regarding the deed to Mase and Company, LLC, I have been retained by Mr. Simmons to challenge this transfer which was involuntary and resulted from a sale conducted by the Charleston County Sheriff to enforce a judgment against Mr. Simmons for failure to pay a user fee of \$144. Attached as Exhibit A is a true copy of the Sheriff's Deed to Mase and Company, LLC; attached as Exhibit B is a true copy of the judgment for which the sale occurred.

3. Attached as Exhibit C is a true copy of a deed dated September 16, 2003 from Charlene Simmons, Carol Simmons and Latosha Simmons to Roosevelt Simmons conveying their interest in TMS 283-00-00-115, and TMS 282-00-00-135 and 145.

4. Attached as Exhibit D is a true copy of a Plat dated May 12, 2005 and supplemented September 22, 2010 prepared by Richard Lacey, P.E.

5. Attached as Exhibit E is a true copy of an easement granted by Estate of Edward Heyward in 1956.

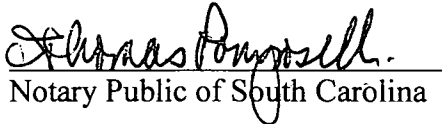
6. Attached as Exhibit F is a true copy of an easement granted by Edward Brown in 1972.

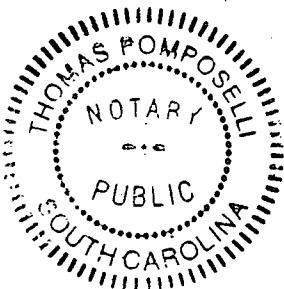
R120

7. Attached as Exhibit G is a true copy of a survey dated November 8, 1983.
8. Attached as Exhibit H is a true copy of a System Map prepared by Southern Engineering dated 4/12/95.
9. Attached as Exhibit I is a true copy of the current Berkeley Electric System Map.
10. Attached as Exhibit J is a true copy of a License Agreement between Berkeley Electric and Comcast.
11. Attached as Exhibit K is a true copy of a letter dated November 5, 2009 from Rosemary Pierce, Comcast Senior Litigation Counsel.
12. Attached as Exhibit L is a true copy of a portion of the Comcast map of cable service along Kitford Road.


Edward A. Bertele

Sworn and subscriber before me
This 19 day of November 2010.


Notary Public of South Carolina





BP0109498

**THE STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON**

SHERIFF'S DEED - NO WARRANTY
SUBJECT TO ALL LIENS,
MORTGAGES AND ENCUMBRANCES

RMC BK 9109
498 : pg 1 *

To All Whom These Presents May Come:

WHEREAS: I, J. Al Cannon, Jr., Sheriff of Charleston County

SEND GREETING:

WHEREAS, Charleston County Business License/User Fee Department did obtain a judgment on July 18, 2000 , against Roosevelt Simmons, and the same was docketed in the Court of Common Pleas of the Ninth Judicial Circuit on September 19, 2000, as evidenced by the records of the Clerk of Court of Charleston County in Case No. 2000-JG-10-1817; and

Whereas, on September 19, 2000 an execution was issued by the Court of Common Pleas to satisfy the said judgment; and

WHEREAS, following a levy by the Sheriff of Charleston County against the interests and only the interests of Roosevelt Simmons of John's Island, South Carolina, in the below described property, a public auction was held on August 1, 2009, and property was purchased by the Grantee herein on November 4, 2009, as prescribed by Section 15-39-710 of the Code of Laws of South Carolina, 1976, as amended.

NOW, KNOW ALL MEN BY THESE PRESENTS, That I, the said J. Al Cannon, Jr., Sheriff of Charleston County for and/in consideration of the sum of Six Hundred and 00/100 Dollars (\$600.00) to me in hand paid at and before the sealing and delivery of these presents by Mase and Company, LLC, (the receipt whereof is hereby acknowledged) have remised, released and forever quit-claimed, and by these presents do remise, release and forever quit-claim unto the said:

Mase and Company, LLC, his heirs and assigns, forever, the interests and only the interests of Roosevelt Simmons of John's Island, South Carolina, in the following described real property, to wit:

ALL that lot, piece, or parcel of land situate, lying, and being on Johns Island, County of Charleston, State of South Carolina, known and designated as Lot C, as shown on a plat made by HLA, Inc., entitled "PLAT SHOWING LOT A (1.139 ACRES), LOT B (0.743 ACRES) LOT C (1.375 ACRES), CONTAINING 3.257 ACRES, PROPERTY OF ROOSEVELT SIMMONS LOCATED ON JOHNS ISLAND, CHARLESTON, COUNTY SOUTH CAROLINA", dated May 12, 2005, and recorded in the RMC Office for Charleston County, South Carolina in Plat Book DE at Page

" A " R122

692. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Roosevelt Simmons by quitclaim deed of Cheryl Simmons, dated August 29, 2003 and recorded in the RMC Office for Charleston County, South Carolina in Book Z468 at Page 508.

TMS # 283-00-00-498

PROPERTY ADDRESS : 0 KITFORD RD
JOHNS ISLAND, SC 29455

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said Mase and Company, LLC, his heirs and assigns, forever so that neither I the said J. Al Cannon, Jr., Sheriff of Charleston County nor my heirs, nor any other person or persons, claiming under me or them, shall at any time hereafter, by any way or means, have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part or parcel thereof, forever.

WITNESS my hand and seal this 9th day of Feb., in the year of our Lord Two Thousand Ten and in the Two Hundred Thirty Third year of the Sovereignty and Independence of the United States of America.

J. Al Cannon, Jr. (L.S.)
J. Al Cannon, Jr., Sheriff of Charleston County

Signed, Sealed and Delivered
in the presence of:

Debra A. Lister
[Signature]

2123

THE STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me the undersigned witness Brenda A. Foster and made oath that he/she saw the within named J. Al Cannon, Jr., Sheriff of Charleston County, sign, seal, and as his act and deed, deliver the within written Deed; and that he/she with [Signature] the other witness subscribed, witnessed the execution thereof.

Brenda A. Foster
Witness

SWORN to before me this 9th

day of Feb, A.D. 2010

[Signature]
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 8/2/2017

R12A

CASE NO. 00-SC-86-2578
STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

00-JG-10-1817
MAGISTRATES COURT

TRANSCRIPT OF JUDGMENT

JUDGMENT AGAINST	ATTORNEY
NAME: ROOSEVELT L. SIMMONS GARY H. SIMMONS	FILED 2008 SEP 19 PM 2:08 CLERK OF COURT
ADDRESS: JOHNS ISLAND, SC 29455	
JUDGMENT IN FAVOR OF	
NAME: CHARLESTON COUNTY BUSINESS LICENSE USER FEE DEPT. 2 COURTHOUSE SQUARE, ROOM 105	
ADDRESS: CHARLESTON, SC 29401	
DAMAGES AND COST	

AMOUNT OF JUDGMENT.....	\$ 89.00
INTEREST.....	\$
ATTORNEY FEES.....	\$
COST.....	\$ 55.00
TOTAL.....	\$ 144.00

SAME

JUDGMENT RENDERED JULY 18 2000
Henry W. Dineen
MAGISTRATE

EXECUTION AGAINST PROPERTY

TO THE SHERIFF OF CHARLESTON COUNTY:

The above judgment was docketed in the office of the Clerk of the Court of Common Pleas, County of Charleston, the ____ day of _____, 20____.

THEREFORE, WE REQUEST YOU, that you satisfy the said judgment out of the personal property of the said judgment debtor within your county, or if sufficient personal property cannot be found, that out of the real property in your County belonging to such judgment debtor on the day when the said judgment was so docketed in your County, or at any time thereafter, in whose hands soever the same may be, and duly return this execution, according to law, to the Clerk of the Court of Common Pleas for the County of Charleston.

WITNESS, _____ Clerk of the Court of Common Pleas
of Charleston County, this _____ day of _____, 20____.

Plaintiff or Plaintiff's Attorney

" B " 125

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) QUIT-CLAIM DEED
(Title Not Examined by Davis Law Firm)

NOW, KNOW ALL MEN BY THESE PRESENTS that Charlene Simmons, Carol Simmons and Latosha Simmons, in consideration of the premises and also in consideration of the sum of Five (\$5.00) Dollars Love and Affection to grantor in hand paid at and before the sealing and delivery of these presents by grantee (the receipt whereof is hereby acknowledged) have remised, released and forever quit-claimed, and by these presents do remise, release and forever quit-claim there interest unto the said , Roosevelt Simmons his heirs and assigns, forever:

ALL that lot, piece or parcel of land, situate, lying and being on Johns Island, in the County of Charleston, State of South Carolina, known and designated as No. 27 1/2 on a plat made by Simmons which is recorded in the RMC Office for Charleston County in Plat Book B, Page 117, said land measuring and containing twelve (12) acres more or less.

BUTTING AND BOUNDING North on Lot No. 7 on said plat and on a public road separating it from Lot No. 8 1/2 conveyed to Anderson, East on Lot. 33 1/2 on said plat, and west on Lots Nos. 35 and 24.

TMS# 283-00-00-115

ALSO

ALL that lot, piece or parcel of land, situate, lying and being on Johns Island, in the County of Charleston, State of South Carolina, known as Lot No. 27, which is triangular in shape, as shown on said plat, measuring and containing 2 1/2 acres, more or less.

BUTTING AND BOUNDING North on Lot No. 27 1/2 on said plat; South on Lot No. 24 1/2; and West on Lot No. 24.

TMS#282-00-00-135

ALSO

ALL that lot, piece or parcel of land, situate, lying and being on Johns Island in the County of Charleston, State of South Carolina, known as Lot No. 27 1/4 on said plat, and measuring and containing two (2) acres, more or less.

" C "

R126

BUTTING AND BOUNDING North on Lot No. 8 on said plat; East on lands of Roberson; South on Lot No. 53 on said plat; and West on Lot No. 26.

TMS# 282-00-00-145

Grantee's(s') Address: 3416 Kitford Road
Johns Island, SC 29455

TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the said premises before mentioned unto the said grantee, his heirs and assigns, forever--so that neither the grantor, , nor grantor's heirs, nor any other person or persons, claiming under grantor or them, shall at any time hereafter, by any way or means, have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part or parcel thereof, forever.

WITNESS hand and seal this 16 Day of September, in the year of our Lord Two Thousand and Three.

Signed, Sealed and Delivered
in the presence of:

Blanca Brubaker
Wanda L. Smith

Charlene Simmons (L.S.)
Charlene Simmons

Carol Simmons (L.S.)
Carol Simmons

Latosha Simmons (L.S.)
Latosha Simmons

My Comm. Exp. 10/1/2008 WWS

My Comm. Exp. 10/1/2008 WWS

STATE OF MARYLAND

COUNTY OF PRINCE GEORGES

The foregoing instrument was acknowledged before me this 16th day of September, 2003, by Charlene Simmons, Carol Simmons, and Latosha Simmons.

Wade L. Smith (L.S.)
Notary Public for South Carolina Maryland (WLS) Wade L. Smith
My Commission expires: 10/1/05

My Comm. Exp. 10/1/05

Wade L. Smith 10/1/05



RECORDER'S PAGE

This page Must remain with
the original document.

Davis Law Firm



BK Z468PG507

Recording

Fee 10.00

State

Fee

County

Fee

Postage

TOTAL 10.00/B

FILED

Z468-503

2003 SEP 26 PM 3: 08

CHARLES LYBRAND
REGISTER
CHARLESTON COUNTY SC

RECEIVED FROM RMC

OCT 17 2003

PEGGY A. MOSELEY
CHARLESTON COUNTY AUDITOR

**PID VERIFIED
BY ASSESSOR**

REP LMG

DATE 10/17/03

(843) 958-4800 2 Courthouse Square Charleston, SC 29401

2129

REFERENCES

1. CHARLESTON COUNTY TMS # 283-00-00-118.
2. PLAT BY W.L. STEPHENS JR., DATED APRIL 26, 1972. RECORDED IN PLAT BOOK Q, PAGE 047. CHARLESTON COUNTY RMC.
3. PLAT BY W.L. GAILLARD, DATED OCTOBER 7, 1981. RECORDED IN PLAT BOOK AZ, PAGE 023. CHARLESTON COUNTY RMC.
4. PLAT BY W.L. GAILLARD, DATED OCTOBER 24, 1984. NOT RECORDED.
5. PLAT BY CHARLIE AYCOCK III, DATED JULY 8, 2002. RECORDED IN PLAT BOOK DD; PAGE 333. CHARLESTON COUNTY RMC.

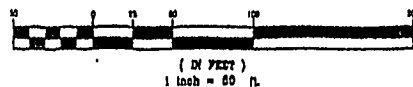
NOTES

1. AREA DETERMINED BY COORDINATE METHOD.
2. PORTIONS OF PROPERTY ARE LOCATED IN FLOOD ZONE X, ZONE SHADED X, AND FLOOD ZONE AE (EL. 11) AS PER FEMA MAP NUMBER 45018C048B, COMMUNITY PANEL 483413 048B J. EFFECTIVE NOVEMBER 17, 2004.
3. TOTAL NUMBER OF LOTS: 3.
SMALLEST LOT - B (.743 ACRES)
LARGEST LOT - C (1.375 ACRES)
4. WATERLINE SCALED FROM DRAWING WATER ASBUILT PREPARED BY TOLTEC SURVEYING, LLC DATED MAY 13, 2008

LEGEND

- BOUNDARY LINE & CORNER FOUND (AS DESCRIBED)
- BOUNDARY LINE & CORNER SET (6/8" REBAR)
- BOUNDARY LINE & 4" x 4" CONC. MONUMENT FOUND
- - - ADJACENT BOUNDARY LINE
- - - RIGHT OF WAY LINE
- - - EASEMENT LINE (AS DESCRIBED)
- - - CENTERLINE
- - - OVERHEAD POWER LINE
- - - OVERHEAD LINE
- PP — POWER POLE
- UP — UTILITY POLE

GRAPHIC SCALE



I HEREBY STATE THAT TO THE BEST OF MY KNOWLEDGE INFORMATION AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE MINIMUM STANDARDS FOR THE PRACTICE OF LAND SURVEYING IN THE STATE OF SOUTH CAROLINA, AND MEETS OR EXCEEDS THE REQUIREMENTS FOR A CLASS "A" SURVEY AS SPECIFIED THEREIN; ALSO THERE ARE NO VISIBLE ENCROACHMENTS OR PROJECTIONS OTHER THAN SHOWN.

RICHARD D. LACEY S.C.P.L.S. 18120

ELDRINA JONES
TMS NO. 283-00-00-121

ELIJAH & SHIRLEY COMMODORE
TMS NO. 283-00-00-114

U.O. WILLIAMSON JR.
TMS NO. 283-00-00-402

GERARD MALLON
TMS NO. 283-00-00-120

ROSEMARY RICHARDSON
TMS NO. 283-00-00-118

JAMES FRAZIER
TMS NO. 283-00-00-310

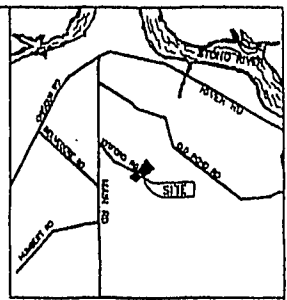
ESTATE OF WM ANDERSON
TMS NO. 283-00-00-182

CHRISTOPHER BROWN
TMS NO. 283-00-00-118
ZONED: I

LOT B
TMS NO. 283-00-00-115
32360.24 SQ. FT.
.743 ACRES
ZONED: RR-3

LOT C
TMS NO. 283-00-00-115
89913.89 SQ. FT.
1.375 ACRES
ZONED: RR-3

LOT A
TMS NO. 283-00-00-115
48927.91 SQ. FT.
1.139 ACRES
ZONED: RR-3



LOCATION MAP
NOT TO SCALE

CURVE TABLE					
CURVE	RADIUS	DELTA	TANGENT	LENGTH	BEARING
C1	1840.23	41°15'10"	60.80	121.74	N58°34'13"W
C2	1840.23	5°58'03"	85.40	170.83	N84°27'37"W
C3	1840.23	0°25'12"	6.01	12.02	N81°18'59"W
C4	1588.83	8°37'25"	133.88	280.83	N57°04'50"W

EXHIBIT SHOWING
LOT A (1.139 ACRES)
LOT B (0.743 ACRES)
LOT C (1.375 ACRES)
CONTAINING 3.257 ACRES
PROPERTY OF
ROOSEVELT SIMMONS
LOCATED ON
JOHNS ISLAND CHARLESTON COUNTY
SOUTH CAROLINA

DATE: May 12, 2005 SCALE: 1" = 50'
REVISED DATE: SEPTEMBER 21, 2010

HLA

LAND PLANNING LANDSCAPE ARCHITECTURE
CIVIL ENGINEERING SURVEYING

29 Leinbach Drive, A2, Charleston SC 29407-6788
tel 843.763.1166

RMC & PLANNING USE ONLY

Check No. 4193
R/W A/C No.

THE STATE OF SOUTH CAROLINA, EASEMENT

County of Charleston
The undersigned Grantors Heirs-at-Law of estate of Edward Heyward

of Charleston County, South Carolina, in consideration of the payment hereinafter agreed upon, hereby grants to the Berkeley Electric Cooperative, Inc. (hereinafter called the Cooperative), its successors and assigns, a perpetual easement for the construction and maintenance of an electric transmission line or lines, towers, poles, anchors and necessary fixtures and wires attached thereto, counterpoise underground wires, and all structures and appliances necessary or convenient in connection therewith, together with all rights and privileges incident to the use and enjoyment thereof, the right of ingress and egress to and along the said line and the right to clear and keep clear all brush, timber and tree tops along the right-of-way which might endanger any of the works thereon, over and upon that certain tract situated in Johns Island School District,

Charleston County, South Carolina, more fully described as follows:
Bounded on the North by Benj. Olisor et al
On the East by Wm. Anderson estate
On the South by Road - Coole estate
On the West by Cecelia Fraser
and containing approximately _____ acres, about 12 miles S.C. from the Town of Charleston, S.C.
(direction)

It is agreed that a lump sum consideration for said easement and right of construction with all rights incident thereto, the Cooperative will pay to the Grantor S the sum of Fifty dollars and 50/100 Dollars
(\$ 50.50).
Payments provided for by this instrument may be made by check mailed to the Grantor S, at 4457 W. 125th Street
New York 27, N. Y. Apt. #15, C/o Smith
(Post Office Address)

(City) (State)
The Cooperative shall have the right to clear and keep clear the timber, pulpwood, brush and tree tops on a strip 37 1/2 feet wide on the east side and 37 1/2 feet wide on the west side of the center line as well as all danger trees at a greater distance which would injure the transmission line in falling. All saw timber will be cut into commercial lengths and piled separately from the limbs, tops and brush. All timber shall remain the property of the Grantor.
The Grantor S expressly reserves the right to use the lands described hereon for agricultural and other purposes of such nature as will not interfere with the construction, operation, patrol and maintenance of the transmission line or lines, but the Grantor S agrees not to construct, in the future, any dwelling, barn or other building, or create any fire hazard within 37 1/2 feet on the east side and 37 1/2 feet on the west side of the center line of the above described right-of-way without first obtaining written consent of the Cooperative.

The undersigned agree that all poles, wires and other facilities, installed on the above described lands at the Cooperative's expense, shall remain the property of the Cooperative, removable at the option of the Cooperative.

Known as or land consist of lot 27 1/2 of California Tract

The Grantor S further represents and warrants that the property described in this easement is free from all liens and encumbrances including mortgages, timber deeds, mineral deeds, and tax liens except as shown above, and in the event any such liens and encumbrances do exist, the Grantor S hereby grants to the Cooperative, its successors and assigns, the right at its discretion to pay all or any portion of the consideration for this agreement to the owners and holders of any liens on the property, including tax liens, if any such liens be outstanding. Such payments to lien holders shall be part of the consideration for this agreement to the same effect as if made directly to the Grantor S.

This agreement shall extend to the parties, their heirs, executors, administrators, successors and assigns.

TO HAVE AND TO HOLD, all and singular the rights, privileges and easements aforesaid unto the said Berkeley Electric Cooperative, Inc., its successors and assigns, forever. And I (we) do hereby bind myself (ourselves) and my (our) heirs, executors, administrators, successors and assigns to warrant and forever defend all and singular the said rights, privileges and easements unto the said Berkeley Electric Cooperative, Inc., its successors and assigns against me, (us) and all other persons whomsoever lawfully claiming or to claim the same or any part thereof.

IN WITNESS WHEREOF, we have hereunto set our hand and Seal this 10 day of July

56
WITNESS: [Signature] [Signature]

X

D 9/27/72
R 9/28/72

Handwritten signature

BOOK E100 PAGE 238

Citrus Electric
Johns Island, S.C.
W.D. 0672-1-36-6-462-5-51
Location Number 335-A-85W

RIGHT - OF - WAY EASEMENT

KNOW ALL MEN BY THESE PRESENTS, that the undersigned for a good and valuable consideration, the receipt whereof is hereby acknowledged, does hereby grant unto BERKELEY ELECTRIC COOPERATIVE, INC., a corporation, whose Post Office address is Moncks Corner, S. C. and to its successors or assigns, the right to enter upon the land of the undersigned, situated, in Johns Island Township of Charleston County, the State of South Carolina, and more particularly described as follows:

A tract of land approximately 4.7 acres in area located 1/2 miles S.W. from the town of CITRALESTON, S.C. and bounded:
North by LANDS OF TOWN
East by SEASIDE COAST LINE RAILROAD
South by LANDS OF ALBY DUNN
West by DANLEY CONSIDING

and to place, construct, operate, repair, maintain, relocate and replace thereon in or upon all streets, roads or highways abutting said lands an electric transmission or distribution line or system, and to cut and trim trees and shrubbery to the extent necessary to keep them clear of said electric line or system and to cut down from time to time all dead, weak, leaning or dangerous trees that are tall enough to strike the wires in falling.

The undersigned agree that all poles, wires and other facilities, including any main service entrance equipment, installed on the above described lands at the Cooperative's expense shall remain the property of the Cooperative, removable at the option of the Cooperative upon termination of service to or on said lands.

In granting this easement it is understood that at pole locations only a single pole and appurtenances will be used, and that the location of the poles will be such as to form the least possible interference to farm operations, so long as it does not materially increase the cost of construction.

The undersigned covenants that he is the owner of the above described lands and that said lands are free and clear of encumbrances and liens of whatsoever character except those held by the following persons:

It is further understood that, whenever necessary, words used in this instrument in the singular shall be construed to read in the plural and that words used in the masculine gender shall be construed to read in the feminine.

IN WITNESS WHEREOF, the undersigned has set his hand and seal this 25TH day of SEPTEMBER, 1972

E. C. BROWN (L.S.)
____ (L.S.)

Signed, Sealed and delivered in the presence of:
E. Smith
Arthur Carter

(Acknowledgments)

" F "
R132

Sumner

THE STATE OF SOUTH CAROLINA
County of CHARLESTON

SS

BOOK E100 PAGE 238

Personally appeared before me E. SMITH and made oath that
he saw the within named F. C. BROWN sign, seal and as his act and
deed deliver the within Right-of-Way for the uses and purposes therein mentioned, and that he with
ALBERTA COWEN in the presence of each other,
witnessed the due execution thereof.

Notary Seal
Notary Public for S. C.
My Commission Expires SEPTEMBER 15, 1978
THE STATE OF SOUTH CAROLINA,
County of CHARLESTON

SS

I, _____, do hereby certify unto all whom it may concern that
_____, the wife of the within named _____
_____ did this day appear before me, and, upon being privately and
separately examined by me, did declare that she does freely, voluntarily and without any compulsion, dread
or fear of any person or persons whomsoever, renounce, release and forever relinquish unto the within named
BERKELEY ELECTRIC COOPERATIVE, INC., its successors and assigns, all her interests and estate, and all
her right and claim of dower of, in, or to, all and singular the premises within mentioned and released.

Given under my hand and seal this _____ day of _____, 1978

Notary Public for S. C.
Berkeley Electric Co-op
P.O. Box 1234
Moncks Corner, S.C.

150
110

THE STATE OF SOUTH CAROLINA
County of _____

✓
p

TO

BERKELEY ELECTRIC
COOPERATIVE, INC.

RIGHT-OF-WAY

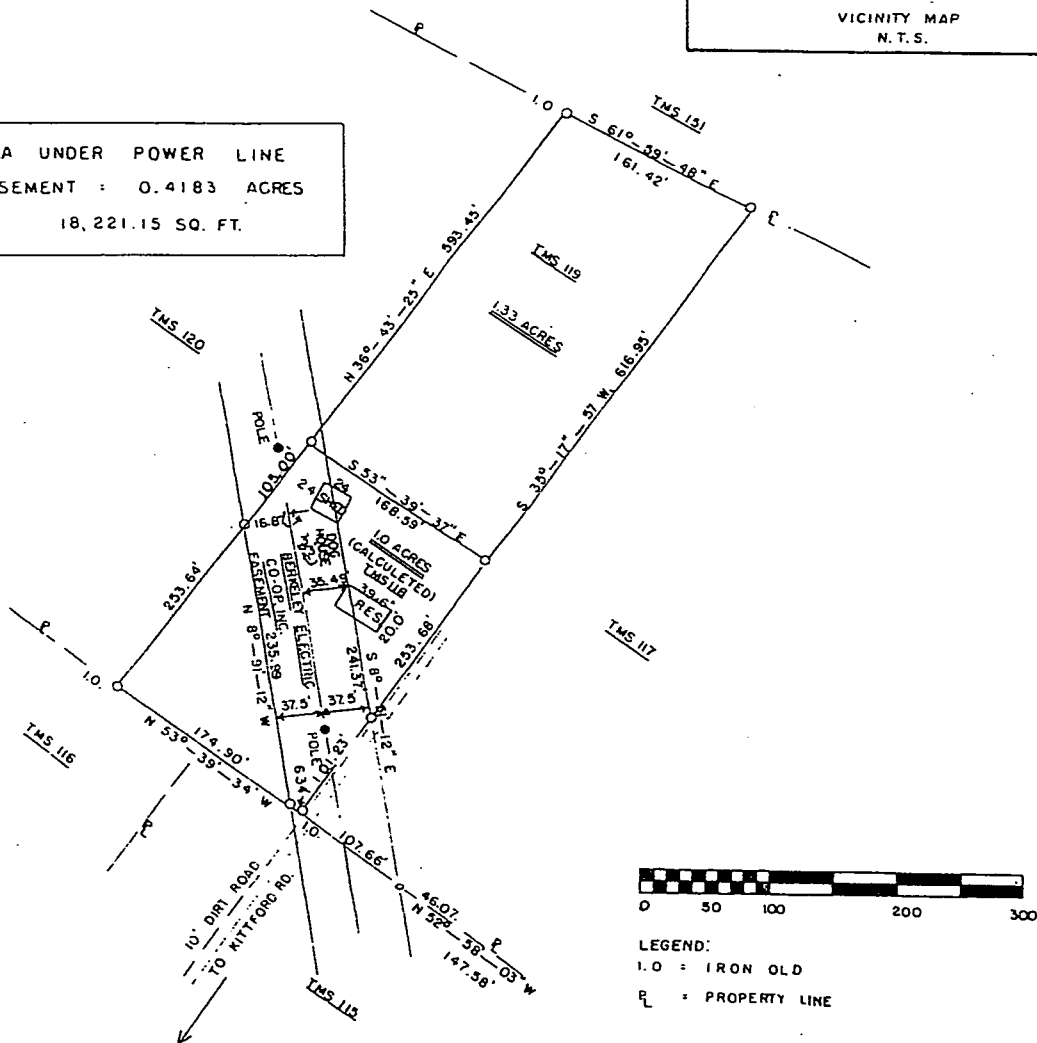
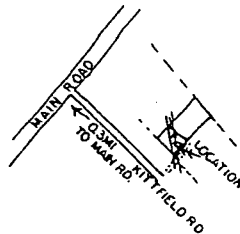
Recorded this _____ day of _____, 1978
Book E100 Page 238
Filed At Page _____
INDEXED and RECORDED
DATE 12-29-78 TIME 1:22
By [Signature]
Register of Deeds
Charleston County, S. C.

R133

MAGNETIC

NORTH

AREA UNDER POWER LINE
EASEMENT : 0.4183 ACRES
18,221.15 SQ. FT.



PLAT OF TMS 118
SURVEYED AT THE REQUEST OF
BERKELEY ELECTRIC CO-OP, INC.

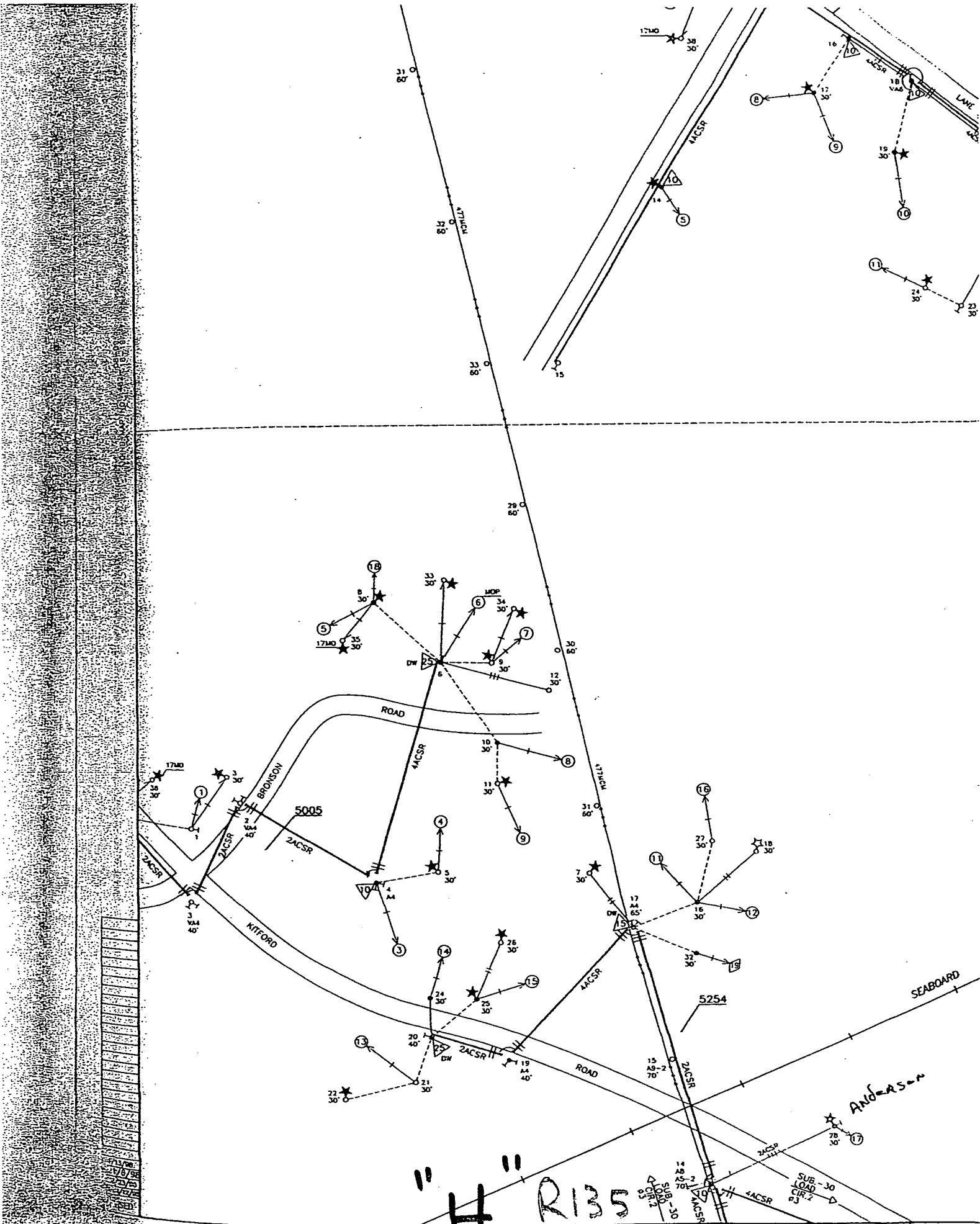
JOHNS ISLAND AREA
CHARLESTON COUNTY, SOUTH CAROLINA
NOVEMBER 8, 1993 SCALE: 1"=100'

I, HEREBY CERTIFY THAT THE RATIO OF PRECISION OF THE
FIELD SURVEY IS 1/5000 AS SHOWN HEREON, AND THE
AREA WAS DETERMINED BY D.M.D. METHOD OF AREA
CALCULATION.

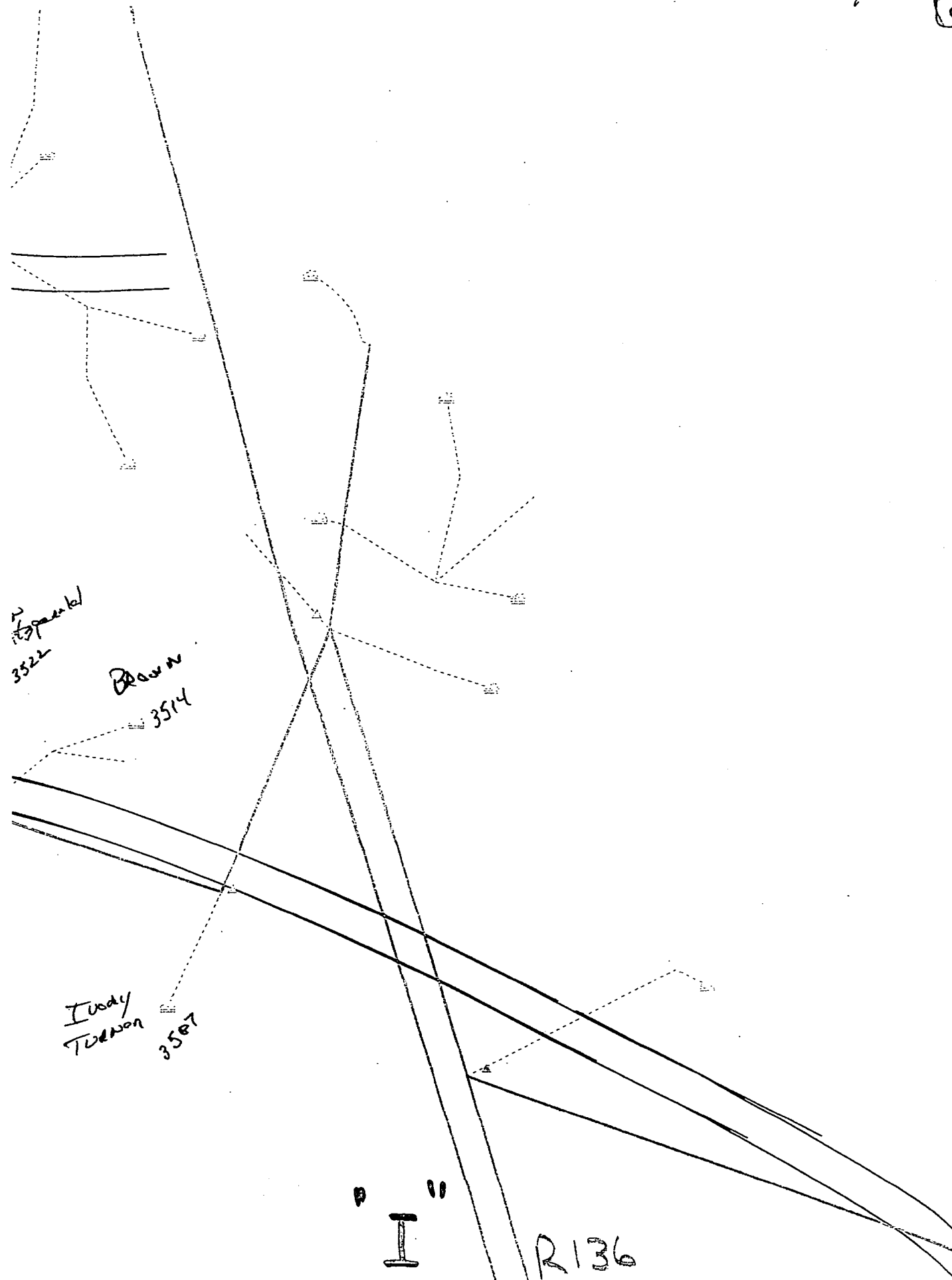
James E. Shuler R.L.S.
REG. NO. 3614
JAMES E. SHULER
CAROLINA SURVEYING & MAPPING
MONCK'S CORNER, S.C.

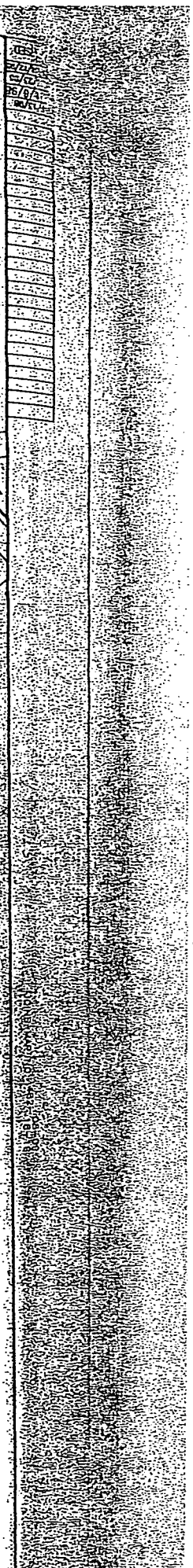


2134 5



System Map
(Current)





R137

LICENSE AGREEMENT

THIS AGREEMENT made and entered into the 14th day of October, 2002 by and between Berkeley Electric Cooperative, Inc., a South Carolina corporation, with its principal place of business in Moncks Corner, South Carolina, (hereinafter called "Licensor"), and Comcast Cablevision of Carolina, Inc. with its principal place of business in Charleston, SC (hereinafter called "Licensee").

WITNESSETH:

WHEREAS, Licensor owns, operates and maintains lines of poles extending in Berkeley, Charleston, and Dorchester Counties, South Carolina; and

WHEREAS, Licensee desires to place certain lines, attachments and apparatus on certain poles of Licensor, for the limited purpose of the transmission of signals in compliance with any and all local, state or federal regulations; provided, that such transmission of signals does not interfere or compete with the corporate purposes of Licensor or interfere with the furnishing of electrical service to consumers of Licensor, and where in its judgement, safety will not be adversely affected.

WHEREAS, Licensor is willing to permit Licensee, to the extent it may lawfully do so, to place said lines, attachments, and apparatus on said poles in the area shown on Exhibit "A" set forth below:

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, the parties hereto, for themselves, their successors and assigns, do hereby covenant and agree as follows:

1. DEFINITIONS

(a) For the purpose of this agreement, the phrase "joint use pole" shall mean a pole conforming to the latest specifications of the American Standards Association and containing at least one contact.

(b) A "pole contact" is defined as any single attachment by Licensee, to the poles of Licensor.

(c) For the purpose of this contract, the words Telephone and/or CATV company shall be used interchangeably with the word Licensee.

1
" *[Signature]* 10-11-02 "
JR138

2. SPECIFICATIONS

(a) The joint use poles covered by this agreement shall be placed and maintained in accordance with the most stringent requirements, specifications, rules, and regulation of the latest edition of the National Electrical Safety Code (NESC), the occupational Safety and Health Act (OSHA), the Rural Utilities Service (RUS), any governing authority having jurisdiction, and the rules and practices of Licensor as set forth in Exhibit "B".

(b) It is understood and agreed between the parties that the rules and practices set out in Exhibit "B" may be changed by Licensor, or new rules and practices may be adopted by Licensor, without resort to the provisions of Section 15, relating to supplementing or amending this agreement, and Licensee agrees to be bound by any such change or adoption.

(c) In the event that Licensor should change or adopt a rule or practice, or rules and practices, for the joint use of poles by Licensee, Licensor shall give Licensee written notice of such change or adoption in the manner contemplated by Section 18 and Licensee agrees to make such changes or alterations in its installations or maintenance of its facilities as may be required in order to fully comply with the provisions of such notice. In the absence of a contrary provision in said notice, Licensee agrees to make all required changes or alterations within thirty (30) days after receipt.

(d) No tag, brand, or other device showing Licensee's name or insignia should be placed on, or attached to, any pole of Licensor, except such tag or insignia which shows Licensee to be the Licensee or lessee of such pole and not the owner thereof, and then only after obtaining the written consent of Licensor.

(e) The strength of poles covered by this Agreement shall be sufficient to withstand the transverse and vertical loads imposed upon them under the storm loadings of the National Electrical Safety Code assumed for the area in which they are located.

(f) Any unbalanced loading of Licensor's poles caused by the placement of Licensee's circuits shall be properly guyed and anchored by Licensee, at no expense to Licensor.

3. ESTABLISHING JOINT USE OF POLES

(a) Before the Licensee shall make use of any of the Licensor's poles under this Agreement, it shall request permission in writing on the application form attached and identified as Exhibit C, and shall comply with the procedures set forth in this section.

(b) If, in the judgement of the Licensor, joint use under the circumstances is undesirable, the Licensor shall have the right to reject the application. In any event, within thirty (30) days after the receipt of such application the Licensor shall notify the Licensee in writing whether the application is approved or rejected. If the Licensor does not respond within 30 days, the failure to respond within 30 days does not constitute an approval of the application.

2

10-11-02
R139

(c) After receipt of notice from the Licensor regarding the approved application, the Licensee shall furnish the Licensor detailed construction plans and drawings for each pole line, together with necessary maps, indicating specifically the poles of the Licensor to be used jointly, the number and character of the attachments to be placed on such poles, any rearrangement of the Licensor's fixtures and equipment necessary for joint use, any relocations or replacements of existing poles, and any additional poles which may be required. The Licensor shall, on the basis of such detailed construction plans and drawings, submit to the Licensee within thirty days a cost estimate (based on Licensor's method of computing costs) for all changes which may be required in each such pole line, including an estimated completion date for such changes. Upon written notice by the Licensee to the Licensor of the cost estimate being approved, the Licensor shall proceed with the necessary changes in the pole line covered by the referenced cost estimate. The Licensor shall make every effort to complete this work at a mutually agreed upon completion date. Nothing shall preclude the parties from making any mutually agreeable arrangement for contracting for or otherwise accomplishing the necessary changes. Upon completion of all changes, the Licensee shall have the right to use the poles jointly and to make attachments in accordance with the terms of the application and of this Agreement. The Licensee shall, at its own expense, make attachments in such manner as not to interfere with the service of the Licensor, and shall place guys and anchors to sustain any unbalanced loads caused by its attachments.

(d) Upon completion of all changes in each pole line to be used jointly, the Licensee shall pay to the Licensor the cost of making such changes. The obligations of the Licensee shall not be limited to amounts shown on estimates made by the Licensor. Costs include materials, less salvage, labor, engineering, supervision, overheads, and tree trimming, (Engineering includes design, proper conductor spacing and bonding, and calculations to determine proper ground clearances and pole and down guy strength requirements for horizontal and transverse loading.) An itemized statement of the actual costs of all such changes shall be submitted by the Licensor to the Licensee, in a form mutually agreed upon.

(e) Any reclearing of existing right-of-way, and any tree trimming necessary for the establishment of joint use, shall be performed by the parties as may be mutually agreed. The Licensor shall pay 50% of the cost of any reclearing that Licensor finds to be good utility practice and mutually consents to; Licensee shall pay all other reclearing costs.

(f) All poles jointly used under this Agreement shall remain the property of the Licensor, and any payments made by the Licensee for changes in pole lines under this Agreement shall not entitle the Licensee to ownership of any of said poles.

(g) The Licensor reserves the right to exclude any of its facilities from Joint use.

3
flw
10-11-02

R140

4. EASEMENTS AND RIGHT-OF-WAY FOR LICENSEE'S ATTACHMENTS

The Licensor does not warrant or assure to the Licensee any right-of-way privilege or easements, and if the Licensee shall at any time be prevented from placing or maintaining its attachments on the Licensor's poles, no liability shall attach to the Licensor. Each party shall be responsible for obtaining its own easements and right-of-way.

5. MAINTENANCE OF POLES, ATTACHMENTS AND RIGHT-OF-WAY

(a) The Licensor shall, at its own expense, maintain the jointly used poles in a safe and serviceable condition and in accordance with the specifications mentioned in Section 2, and shall replace, reinforce or repair such poles as become defective.

(b) Whenever right-of-way considerations or public regulations make relocation of a pole necessary, such relocation shall be made by the Licensor at its own expense, except each party shall bear the cost of transferring its own attachments.

(c) Whenever it is necessary to replace or relocate a jointly used pole, the Licensor shall, before making such replacement or relocation, give twenty (20) days notice in writing (except in case of emergency, when verbal notice will be given and subsequently confirmed in writing) to the Licensee, specifying in such notice the time of such proposed replacement or relocation. Licensee shall, at the time so specified, transfer its attachments to the new or relocated joint pole or Licensee shall place its facilities underground if the pole line is to be abandoned and removed by Licensor. Licensor shall be the sole judge in determining whether to abandon and remove the existing line. Should the Licensee fail to transfer its attachments to the new or relocated joint pole at the time specified for such transfer of attachments, the Licensor may elect to do such work, and the Licensee shall pay the Licensor the cost. In the event the Licensee fails to transfer its attachments and the Licensor does such work, the Licensor shall not be liable for any loss or damage to the Licensee's facilities which may result.

(d) Except as otherwise provided in (c) of this Section, each party shall at all times maintain all of its attachments in accordance with the specifications mentioned in Section 2 and shall keep them in safe condition and thorough repair. All necessary right-of-way maintenance, including tree trimming or cutting, shall be performed by the parties as may be mutually agreed upon, and the cost shall be borne by the parties as provided in Section 3(e).

(e) Any existing Joint use construction of the parties which does not conform to the specifications mentioned in Section 2 shall be brought into conformity as soon as practicable. When such existing construction shall have been brought into conformity with said specifications, it shall at all times thereafter be maintained as provided in (a) and (d) of this Section. Should the Licensee fail to comply, the Licensor may elect to do such work and the Licensee shall pay the Licensor the cost.

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[Signature]
10-11-02

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(f) Licensee expressly assumes responsibility for determining the condition of all poles to be climbed by its employees, contractors, or employees of contractors. Licensor disclaims any warranty or representation regarding the condition and safety of the poles of the Licensor. Licensor agrees that, upon written notification, it will replace any pole that has become unserviceable at Licensor's cost when Licensor has determined that the pole in question is unserviceable for its intended original purpose. All other costs of replacement shall be borne by Licensee.

6. RECOVERY, REARRANGING OR RELOCATION OF FACILITIES

(a) In the event it is necessary for Licensor, or for another regulated utility with whom Licensor has an agreement for the joint use of wood poles, or for another Licensee with whom Licensor has a prior agreement for the joint use of wood poles, to use the space on poles occupied, or contracted for, by the Licensee, the Licensee shall, upon receipt of a thirty (30) day written notice, either vacate the space by the removal of its attachments or shall instruct Licensor to replace the poles at the expense of Licensee and Licensee shall pay for said replacements as provided for in 6(b), provided however that Licensee has not paid for the replacement of such poles.

(b) In any case where facilities of Licensor are required to be rearranged on the poles of the Licensor or of others to accommodate the attachments of Licensee, Licensee shall pay to Licensor the total costs incurred by Licensor in rearranging such facilities. The Licensee shall also reimburse other users of the poles of Licensor for their costs of rearrangement to provide space or clearance for the facilities of Licensee.

(c) Whenever it is necessary to replace or change the location of a joint use pole, for reasons other than those set out in 6(a) and (b), and over which Licensee has no control, Licensor shall, before making such change, give due notice to the Licensee, specifying in such notice the time of such proposed change, and the Licensee shall promptly begin to transfer or remove its attachments. In case of any such pole replacement or relocation where Licensor has transferred or removed its attachments and Licensee has not transferred or removed its attachments within sixty (60) days after receipt of such written notice, Licensee shall become liable for such old pole, if it still exists, as provided in Section 8 (a).

(d) In the event of any changes contemplated under 6 (a), (b) or (c), Licensee shall pay the entire cost of any removal, transfer or installation of its own attachments.

7. INDEMNIFICATION

Licensee shall indemnify, protect, save harmless and insure Licensor from and against any and all claims and demands for damages to property, and for injury or death to persons, including payments made under any Workmen's Compensation Law or under any plan for employees disability and death benefits, and including all expenses incurred in defending against any such claims or demands, which may arise out of or be caused by the erection, maintenance, presence,

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use, rearrangement or removal of the attachments of Licensee's equipment to Licensor's poles or by the proximity of the Licensee's cables, wires, apparatus and appliances to those of Licensor or by any act of Licensee, its agents and employees on or in the vicinity of Licensor's poles. Licensee shall carry insurance in such form and in such companies as are satisfactory to Licensor to protect the parties from and against any and all claims, demands, actions, judgements, costs, expenses and liabilities of every name and nature which may arise or result directly or indirectly from or by reason of such loss, injury or damage.

The Licensee shall take out and maintain throughout the period during which this Agreement shall remain in effect insurance conforming with the RUS requirements of 7 CFR §1788.28 as follows:

RUS requires that public liability insurance be maintained covering the ownership liability and all operations of the borrower with limits for bodily injury or death of not less than \$1 million each occurrence--\$1 million aggregate per policy period and with limits for property damage of not less than \$1 million per occurrence and \$1 million aggregate for the policy period. Borrowers have the option to purchase a \$1 million single limit coverage for bodily injury and property damage. This required insurance may be in a policy or policies of insurance, primary and excess including the umbrella or catastrophe form.

The Licensee shall furnish to the Licensor a certificate evidencing compliance with the above requirements. This certificate will list Licensor as additional insured and will note specific cancellation language, as follows: "In the event of cancellation of any of the said policies, the insuring company shall give the party to whom this certificate is issued fifteen (15) days' prior notice of such cancellation." If Licensee fails to renew adequate insurance, Licensor may terminate this agreement pursuant to Section 10. Defaults.

8. ABANDONMENT OR REMOVAL OF JOINT USE POLES

(a) If Licensor desires at any time to abandon or remove any joint use pole, it shall give Licensee notice in writing to that effect at least sixty (60) days prior to the date on which it intends to abandon or remove such pole or poles. If, at the expiration of said period Licensor shall have no attachments on such pole but Licensee shall not have removed all of its attachments, such pole may become the property of Licensee at the sole option of Licensor, and Licensee shall hold harmless the Licensor from every obligation, liability, or cost, and from all damages, expenses or charges incurred thereafter, arising out of, or because of, the presence of or the condition of such pole or any attachments; and shall pay to Licensor a sum equal to the present value in place of such abandoned pole or poles, or such other equitable sum as may then be agreed upon between the parties, and Licensor shall provide Licensee with a properly authorized bill of sale for such pole. Licensor has the sole authority to remove a pole or poles and not replace them by giving Licensee sixty (60) days written prior notice. Within this sixty (60) days Licensee has the option of placing its facilities underground or transferring its facilities to the nearest facilities owned by the Licensor in accordance with the work rules contained in Exhibit "B".

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(b) Licensee may at any time abandon the use of a joint use pole by giving Licensor due notice in writing of such abandonment, as provided in Section 18, and removing from such pole all attachments that Licensee may have, and in case of such abandonment of the use of any such pole, Licensee shall pay to Licensor the full rental for the current year for the space on said pole set aside for the use of Licensee.

9. RENTALS, CHARGES and RATES

(a) On or about December 31 of each year, the parties, acting in cooperation, shall tabulate the total number of joint poles in use as of the preceding day. This tabulation shall indicate the number of poles on which rentals are to be paid. The rentals shall be computed on the basis of \$11.25 dollars per annum for each jointly used pole attachment.

(b) The yearly rental period covered by this agreement shall be the twelve month period between January 1 and December 31. Rental payable for each such rental period during the continuance of this agreement shall be due and payable on February 1 following the end of the rental period. The annual rental per pole shall apply to any attachments made or removed during the year and rents shall not be prorated; provided, however, that if this agreement is executed between June 30 and December 31, Licensee shall pay to Licensor only one-half (1/2) of the annual rental due for attachments made during that period.

(c) In the event that Licensee requires a source of electrical energy for power supply to a cable system which constitutes a part of the licensed attachments and apparatus, such energy will be supplied by Licensor in accordance with the provisions of its standard service extension policies and approved rates and tariffs.

(d) All other amounts payable under this agreement, such as for erection, rearrangement, relocation or abandonment, shall be due and payable within thirty (30) days of billing by Licensor.

10. DEFAULTS

(a) If Licensee shall fail to comply with any of the provisions of this agreement or should default in any of its obligations under this agreement, and shall fail within thirty (30) days after written notice from Licensor to correct such noncompliance or default, Licensor may, at its option, and without further notice, declare this Agreement to be terminated in its entirety, or may terminate the permit covering the pole or poles in respect to which such default or noncompliance shall have occurred. In case of such termination, no refund of accrued rental shall be made and the Licensee's facilities may be physically removed by the Licensor at Licensor's sole option and the cost shall be borne by Licensee.

(b) If Licensee shall make default in the performance of any work which it is obligated to do under this agreement, the Licensor may elect to do such work, and the Licensee shall reimburse the Licensor for the cost.

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(c) If the Licensee shall make default in any of its obligations under this Agreement and it becomes necessary for the Licensor to obtain the services of an attorney, who is not a salaried employee of the Licensor, to enforce such obligations, the Licensee agrees to pay any and all attorney fees, court costs and other costs of litigation associated with the enforcement of such obligations.

11. UNAUTHORIZED ATTACHMENT

(a) If any of Licensee's facilities for which no permit has been issued shall be found attached to Licensor's poles, Licensor may, without prejudice to its other rights or remedies under this Agreement, including termination, require Licensee to submit, within fifteen (15) days after the date of written or oral notification from Licensor of the unauthorized attachment, a pole attachment license application. If such application is not received by Licensor within the specified time period, Licensee shall immediately remove its unauthorized attachment, or Licensor may remove such Licensee facilities without liability, and the expense of such removal shall be borne by Licensee.

(b) No act or failure to act by Licensor with regard to said unauthorized attachment shall be deemed as a ratification or the licensing of the unauthorized attachment. If any license should be subsequently issued, said license shall not operate retroactively or constitute a waiver by Licensor of any of its rights or privileges under this Agreement; provided, however, that Licensee shall be subject to all liabilities, obligations and, responsibilities of this Agreement from its inception in regard to said unauthorized attachment.

12. RIGHTS OF OTHER PARTIES

Nothing herein shall be construed to limit the right of Licensor, by contract or otherwise, to confer upon others, not parties to this agreement, rights or privileges to use the joint use poles covered by this agreement.

13. TERM OF AGREEMENT

This agreement shall continue in force and effect for a period of one (1) year from and after the date of this Agreement, and thereafter from year to year unless terminated by either party by giving written notice of its intention so to do not less than thirty (30) days prior to the end of any period, provided, however, if the Licensee shall fail to commence construction on the poles of Licensor within the period of one hundred eighty (180) days after the date of execution of this License Agreement, then this License Agreement shall be null and void, and of no further force and effect. Upon termination of this agreement, Licensee shall remove its attachments from the poles of Licensor within one hundred eighty (180) days after the effective date of such termination. Should the Licensee fail to comply, the Licensor may elect to do such work and the Licensee shall pay the Licensor the cost.

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14. WAIVER OF TERMS OR CONDITIONS

The failure of either party to enforce or insist upon compliance with any of the terms or conditions of this agreement shall not constitute a general waiver or relinquishment of any such terms or conditions, but such conditions and terms shall be and remain at all times in full force and effect.

15. SUPPLEMENTAL AGREEMENTS

(a) This agreement may be amended or supplemented at any time upon written agreement by the parties hereto. Should either an amendment or supplement become necessary, the party desiring such amendment or supplement shall give thirty (30) days written notice to the other party setting out in detail the changes or additions desired.

(b) In the event that Licensee desires to add or reduce the number of pole contacts, Section 15 (a) shall not apply, but in each case a sketch, map, or other mutually acceptable notice shall be submitted to Licensor, setting out in detail the pole numbers and exact locations of the poles, and the quantity of poles involved in the addition or subtraction in accordance with the work rules contained in Exhibit "B".

16. PAYMENT OF TAXES

Each party shall pay all taxes and assessments lawfully levied on its own property upon said jointly used poles, and the taxes and the assessments which are levied on said joint use poles shall be paid by the Licensor thereof, but any tax, fee or charge levied on Licensor's poles solely because of their use by the Licensee shall be paid by Licensee.

17. INTEREST AND PAYMENTS

All amounts to be paid by Licensee to Licensor under this Agreement shall be due and payable within thirty (30) days after an itemized statement is presented to the Licensee. Any payment not made within thirty (30) days from the due date shall bear interest at the rate of 1.5 Percent per month (18% per annum) until paid.

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JLW
10-11-02
R146

18. NOTICES

Any notice, request, consent, demand or statement which is contemplated to be made upon either party by the other party under any of the provisions of this agreement, shall be in writing and shall be treated as duly delivered when it is either (a) personally delivered to the office of Licensor in the case of a notice to be given to Licensor, or personally delivered to the office of Licensee in the case of a notice to be given to Licensee, or (b) sent certified United States mail return receipt requested and properly addressed to the party to be served as follows:

- (i) If notice is to Licensor,

Berkeley Electric Cooperative, Inc.
Attn: James K. Withington, Jr., Superintendent of Special Contracts
114 Highway 52 North, Post Office Box 1234
Moncks Corner, SC 29461

- (ii) If notice is to Licensee,

Comcast Cablevision
Attn: Gary E. Waterfield
4400 Belle Oaks Drive
N. Charleston, SC 29405

19. SUPPLYING INFORMATION

(a) It is understood and agreed to between the parties that Licensee shall furnish to Licensor within sixty (60) days after the execution of this agreement a detailed sketch or map upon which will be shown the precise locations by streets or roads of the joint use poles covered by this agreement, showing the facilities installed or to be installed upon the joint use poles and the pole numbers upon which these facilities are to be attached. Such sketch or map shall be reviewed by, and approved, commented upon, or rejected by the engineers of Licensor, and Licensee agrees to make any and all such changes in said sketch or map as are suggested by said engineers. Licensee shall not begin the installation of any facilities covered by this agreement until engineering approval by Licensor is granted and all other requirements of the work rules as shown in Exhibit "B" have been met.

(b) Within thirty (30) days after the completion of the initial installation of the facilities, as set forth on the above mentioned sketch or map, Licensee shall furnish to Licensor a revised copy of said sketch or map showing the precise location of each power supply, pole contact, and other attachment of Licensee which is actually installed on poles of the Licensor. Such revised sketch or map shall be verified by the Licensor and shall be the basis for determining the number of pole contacts made initially.

(c) Licensee shall promptly report to Licensor any changes made in the number of poles of the Licensor contacted by Licensee.

(d) Upon request of Licensor or Licensee, but not sooner than four (4) years after the execution of this agreement, and every four (4) years thereafter, or as may be mutually agreed upon, the parties shall make a joint field check to verify the accuracy of contact records. If, as a result of any such joint field check, it is found that the Licensee is occupying any poles of the Licensor without having advised the Licensor as provided in Section 16, the Licensee shall pay to the Licensor the rental for such poles from the date that Licensee's attachments were installed on such poles, or if dates of installation cannot be determined to the satisfaction of both parties, the installations shall be presumed to have occurred at the same rate as those reported throughout the entire period since the last field check was made.

20. CONSTRUCTION OF AGREEMENT

This agreement is deemed executed in the State of South Carolina and shall be construed under the laws of the State of South Carolina.

21. PRIOR AGREEMENTS SUPERSEDED

This agreement supersedes and replaces any and all previous agreements entered into by and between Licensor and Licensee with respect to the subject matter of this agreement.

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16-11-02
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22. ASSIGNMENT OF AGREEMENT

Neither party shall assign or otherwise transfer this Agreement or any of its rights and interests to any firm, corporation or individual, without the prior written consent of the other party.

In witness whereof, the parties have caused this Agreement to be duly executed.

ATTEST:

Martha B. Harris

Oct. 11, 2002
(Date)

Berkeley Electric Cooperative, Inc.

(Licensor)

By: James K. Withington, Jr.
James K. Withington, Jr.

Title: Superintendent of Special Contracts

ATTEST:

John P. Pringle

10/24/02
(Date)

Comcast Cablevision

(Licensee)

By: Lien Rodzek
Lien Rodzek

Regional
Title: Vice President

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10-11-02
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AMENDMENT OF LICENSE AGREEMENT

BERKELEY ELECTRIC COOPERATIVE, INC., a corporation organized under the laws of the State of South Carolina, (hereinafter called the "Cooperative"), and Comcast Cablevision of Carolina, Inc., (hereinafter called the "Cable TV company"), desiring to continue to cooperate in the joint use of their respective poles, do hereby agree for themselves and their respective successors and assigns to amend the License Agreement, dated and signed by both parties on October 14, 2002, as follows:

Berkeley Electric Cooperative, Inc. desires to amend a portion of Section 9(a) to read:

9. RENTALS, CHARGES and RATES

- (a) On or about December 31 of each year, the parties, acting in cooperation, shall tabulate the total number of joint poles in use as of the preceding day. This tabulation shall indicate the number of poles on which rentals are to be paid. The rentals shall be computed on the basis of \$12.94 dollars per annum for each jointly used pole attachment.

IN WITNESS WHEREOF, the parties hereto, have caused these presents to be executed in duplicate, and their corporate seals to be affixed thereto by their respective officers thereunto duly authorized on this 31st day of May, 2002.

Berkeley Electric Cooperative, Inc.

(Licensor)

ATTEST:

Megan Wright
9/12/05
(Date)

By:

James K. Withington, Jr.
James K. Withington, Jr.

Title: Superintendent of Special Contracts/Work Orders

Comcast Cablevision of Carolina, Inc.

(Licensee)

ATTEST:

Glenn Smith
9-12-05
(Date)

By:

Trinity J. M.

Title:

VP/Am



Comcast Corporation
One Comcast Center
Philadelphia, PA 19103-2838

Direct Dial: 215.286.7016

Fax Number: 215.286.3572

November 5, 2009
Via UPS 2nd Day Air

Edward A. Bertele, Esq.
1812 Pierce Street
Charleston, SC 29492

Re: *Roosevelt Simmons v. Berkeley Electric Coop, Inc., et al.*
Case No. 2008-CP-1983

Dear Mr. Bertele:

This letter is in response to your letter dated October 14, 2009, containing additional questions regarding the subpoena served on Comcast Corporation in this case and our response.

- License Agreement Exhibit A (map). Enclosed is a DVD containing the original map from US Cable at the time of our acquisition. The DVD also contains the latest version of the map last updated May 1, 2007, illustrating a line extension built that year.
- License Agreement Exhibit C (Berkeley poles; poles Comcast is attached to). Berkeley Electric owns all of the poles identified on the maps. Both maps have red lines that show where our cable is attached to each pole marked with an "x". One section on Kitford Road is underground for 520 feet, as indicated with a broken red line. All other Comcast facilities are aerial.
- License Agreement Exhibit D (poles Comcast detached from during term of agreement). Comcast has not detached from any poles on Kitford Road.
- Map Legend. A complete map furnished with our production of October 12, 2009, is found on the DVD with the Legend. Comcast uses the US Cable map created by Mason Brothers, Inc. on December 15, 2001, and Comcast's internal map vendor, Telex, last updated it on May 1, 2007.
- Status of Contract. The contract is active.

Please feel free to contact me with any questions at the above number.

Sincerely,

Rosemarie Pierce
Senior Litigation Paralegal

Enclosures

"K"
R152

C6	
ADC 1174-1	
RR 1 18.7	
EO 0 EP 0	
RE 3 12.105	
AL 1 12.105	
C2 1 IN	
72.5V 12.112	

C6R	
ADC 1174-1	
RR 1 18.0	
EO 2 EP 4.5	
RE 1 12.45	
AL 1 12.45	
C2 1 IN	
72.5V 12.45	

C5A2	
ADC 1174-1	
RR 2 123.0	
EO 2 EP 0	
RE 1 12.105	
AL 1 12.105	
C2 1 IN	
72.5V 12.105	

C5A1	
ADC 1174-1	
RR 7 22.2	
EO 7 EP 1	
RE 9 12.8	
AL 1 12.8	
C2 1 IN	
72.5V 12.8	

C5A2	
ADC 1174-1	
RR 2 123.0	
EO 2 EP 0	
RE 1 12.105	
AL 1 12.105	
C2 1 IN	
72.5V 12.105	

C5A1	
ADC 1174-1	
RR 2 123.0	
EO 2 EP 0	
RE 1 12.105	
AL 1 12.105	
C2 1 IN	
72.5V 12.105	

Bus
=

North Road

Kitford Rd.

Brunson Rd.

Kitford Rd.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CA NUMBER: 08-CP-10-1983

ROOSEVELT SIMMONS,)
Plaintiff,)

Vs.)

AFFIDAVIT OF ROBERT BRADLEY

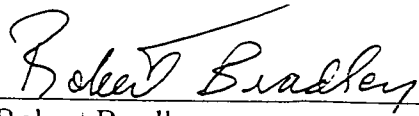
BERKELEY ELECTRIC)
COOPERATIVE, INC., and)
ST. JOHN'S WATER)
COMPANY, INC.,)
Defendants.)

1. I am employed by Berkeley Electric Cooperative, Inc. (BEC) and have been since 1978.

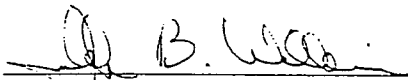
2. I am a right-of-Way agent for BEC and have reviewed drawings and plats regarding our lines and service along Kitford Road on Johns Island.

3. I have reviewed our 75' wide easement granted by the Heirs at Law of Edward Heyward dated July 10, 1956, and the survey showing the said easement. Our easement encroaches on property owned by the Andersons, shown as TMS# 282-00-00-136. In reviewing the drawings, plats and tax maps it is my opinion that our service to their property does not encroach on the property of Roosevelt Simmons outside of the 75' wide easement. See Exhibit A and Exhibit B.

4. Our line extends from a pole located within the 75' wide easement directly onto the property of Estate of W.M. Anderson.


Robert Bradley

Sworn to before me this 22nd
day of November, 2010


Notary Public for the State of South Carolina
My Commission Expires: 01/03/2013

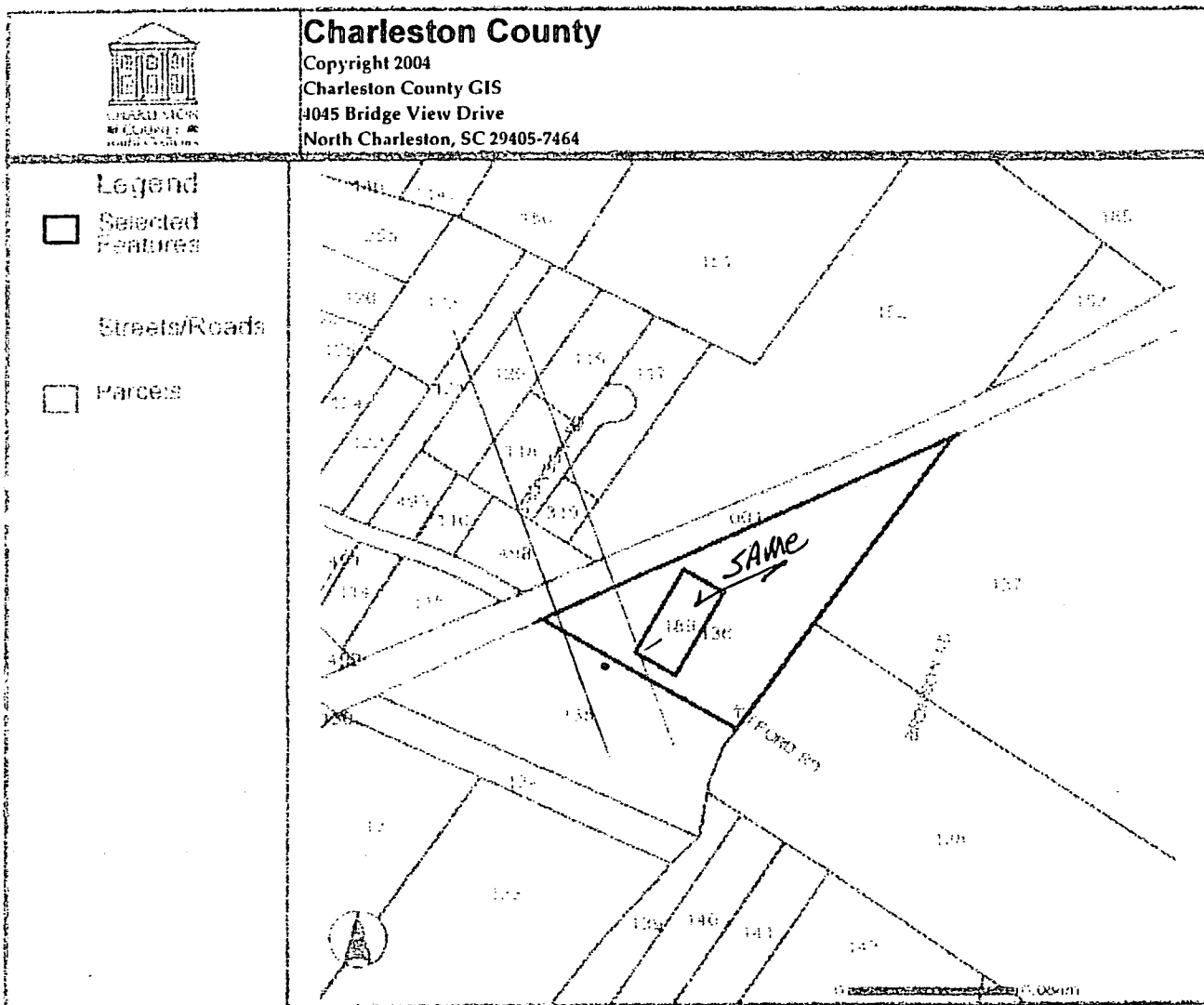


Exhibit A

282 00 00 135
R156

S.C. 25 BERKELEY
TRANSMISSION SECTION — ST. NO. TO JOHNS ISLAND

T.M.S. 282-00-00 - 136

S.C. L. RR. R/W

135

136

R/W AREA

7,875 SQ. FT. = .181 ACRES

LOSS AREA

2,020.5 SQ. FT. = .046 ACRES

Exhibit B

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
BERKELEY ELECTRIC)
COOPERATIVE INC. and)
ST. JOHNS WATER)
COMPANY, INC.)
Defendants)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 08-CP-10-1983

FILED
DEC 20 PM 3:39
CLERK OF COURT

**PLAINTIFF'S MOTION TO
ALTER OR AMEND FINAL JUDGMENT**

PLEASE TAKE NOTICE that on the tenth day following service of the within NOTICE of MOTION or as soon thereafter as counsel may be heard, plaintiff Roosevelt Simmons, by his attorney, Edward A. Bertele, Esq. shall move before the Master in Equity for the Ninth Judicial Circuit at the Charleston County Courthouse, 100 Broad Street, Charleston, SC 29401 for an Order pursuant to South Carolina Rules of Civil Procedure 59(e) which alters and amends the Final Judgment.

BASIS FOR THIS MOTION

Plaintiff respectfully asks the Court to alter and amend its decision of November 22, 2010 granting the motions of defendants Berkeley Electric Cooperative, Inc (Berkeley Electric) and St. Johns Water Company, Inc. (St. Johns) for summary judgment in order to address issues previously raised but not decided which are set forth below. The Court's decision was stated on the record of the motion hearing on November 22, 2010. A copy of the Transcript is attached to this Motion. The Court found that there were express easements allowing both Berkeley Electric and St. Johns to install utility lines across plaintiff's property and that plaintiff has sustained no damages and lacked standing to assert the claims set forth in the complaint. Transcript at pages

35-36. The Final Judgment was filed on November 24, 2010 without any findings and conclusions of law.

A. St. Johns failed to establish an express easement by clear and convincing evidence.

It is not disputed that St. Johns obtained an encroachment permit in 1977 from Charleston County to extend its water line from Main Road down Kitford Road. During oral argument, counsel for St. Johns claimed that a dirt road crossing TMS 498 (shown on the 2005 plat prepared by HLA, Exhibit D, Bertele Affidavit) was part of Kitford Road and thus included in the encroachment easement granted by Charleston County in 1977.

MR. SMITH: In 1977 our engineers for the Water Company obtained from the County of Charleston an easement for the construction of a water line along Kitford Road on Johns Island. That was a dirt road maintained by the county and it traversed a long distance from Kitford Road and then going north into the residences along the still established dirt road. That water line was layed in 1978. It has not been disturbed since that time.

...

THE COURT: No express easement for that but that water line's been there --

MR. SMITH: Only express easement was -- that was considered a part of Kitford Road. At the time the County included a part of Kitford Road.

THE COURT: That was constructed at the same time?

MR. SMITH: Yes, sir. Absolutely. It took two years to come through there with that line and it was completed.

Transcript at page 28, line 21 - 29, line 3; page 31, lines 13-21. The County had no authority to grant any easement across property of third parties such as TMS 498, whether or not it

maintained the dirt road, so its encroachment permit does not extend any rights of permissive use to St. Johns. Furthermore, there is no evidence that the dirt road was maintained by the county. There is no evidence that the dirt road was part of the county road system. There is no evidence that St Johns asked the record owner in 1978, Edward Brown, for an easement across TMS 498. St. Johns could not have reasonably relied upon the County to provide it with the right to encroach on TMS 498. Therefore, the facts do not allow the conclusion that St. Johns had an express easement to cross TMS 498 since it clearly did not.

In addition, St. Johns has not produced any evidence regarding an express easement to encroach upon TMS 135 which is to the east of TMS 498 and the Seaboard Coastline Railroad right of way. As shown on the HLA plat, the public portion of Kitford Road ends at the Seaboard Coastline Railroad right of way and thereafter becomes a private road. Thus TMS 135 could not be included in any encroachment easement granted by the county. St. Johns could not have reasonably relied upon the encroachment permit to cross TMS 135. Therefore, there is no clear and convincing evidence of an express easement as to TMS 135.

B. St. Johns failed to establish the date of first use by clear and convincing evidence.

Notwithstanding the lack of legal authority to do so, St. Johns alleges that it did construct a water line in 1978 under the dirt road across TMS 498. However, the evidence submitted by St. Johns of a "first use" in 1978 is not clear or convincing. The sole evidence of the construction of the water line in 1978 is the affidavit of Hugh Miley, the project engineer. He states only that "the first construction project began in 1977 and included the installation of a water line in and along Kitford Road." Hugh Miley affidavit at para. 3. Mr. Miley does not identify the location of the water line as crossing TMS 498 or TMS 135 or refer to any maps or drawings which indicate its exact location. Plaintiff contends that Hugh Miley's affidavit is

insufficient as the basis for granting a prescriptive easement across two parcels of private property because it is vague and inconclusive.

St. Johns did not submit any surveys or plats which indicate the exact location of its water lines as encroaching on TMS 498 or 135 in 1978 in support of summary judgment. Where are the maps or surveys which it used in 1978 to carry out this project? This Court should not have accepted St Johns allegation as to the location of its water line without some corroboration which unequivocally indicates where the water lines were located. The standard of proof, "clear and convincing" requires more than what the defendant has provided.

Similarly, St Johns did not produce any evidence that the work done in 1978 extended the water line east over the Seaboard Coastline Railroad right of way, across TMS 135 and then onto the Andersen property. Therefore St. Johns cannot establish any first use as to TMS 135 and its summary judgment motion should have been denied.

C. St. Johns did not provide clear and convincing evidence of twenty years of adverse use

Notice of adverse use is the second element which the adverse user must prove in order to establish a prescriptive right. St. Johns contends that "a minimum amount of diligence would have revealed the fact that plaintiff's neighbors received their water from St. Johns Water Company." St Johns Brief in Support of Motion for Summary judgment at page 3. The Court apparently agreed that the existence of homes in the area should have put plaintiff on notice that public water service was available. Transcript at page 35, line 19-22. Plaintiff respectfully disagrees that the existence of homes must signify that water service has arrived since his and other homes in the area use well water. In opposing St. Johns motion, Mr. Simmons stated: "I have well water and so do many other homes in this area. I had no reason to know that St Johns was providing water service to property owners using my land for access. The water company

never marked the location of their lines or asked my permission or told me about the location of their lines until I told them about the water meter on TMS 282-00-00-135 in 2005.” Simmons Affidavit at page 6. Therefore, in light of the availability of well water in the area, the Court should not have concluded that Simmons had constructive notice that public water service had crossed his property.

Further, the record shows that water service was connected to the Andersen property (across TMS 282-00-00-135) in August 1987 and to Frazier and Gordon, property owners to the rear of TMS 283-00-00-498 in July 1986 and August 1987 respectively. St. Johns did not produce evidence of water service to any property owner to the north of TMS 498 earlier than July 1986. Therefore, the earliest that Simmons had constructive notice of the existence of water service would be July 1986. This date, not 1978, is the earliest date from which the statutory 20 years could have commenced. Plaintiff discovered a St. Johns meter in April 2005 and immediately complained to the company. He therefore tolled the statute before the twenty years had run.

Plaintiff respectfully urges the Court to alter and amend its order by denying St. Johns motion for summary judgment because it did not meet its burden of proof to show by clear and convincing evidence that the legal owner by ordinary diligence should have known of its adverse use. Graniteville Co. v. Williams, 209 S.C. 112, 120-21 (1946); Williamson v. Abbott, 107 SC 397 (1917).

D. Berkeley Electric failed to produce evidence of an easement across TMS 135

The Complaint alleges a trespass across two different parcels, referred in the motion hearing as TMS 498 and TMS 135. In its summary judgment motion, Berkeley Electric did not assert any express or prescriptive easement across TMS 135. The evidence it provided related

only to the installation of its utility poles for a line across TMS 498. Plaintiff raised this fact in its Memorandum in Opposition to the motion, see page 6. Counsel for Berkeley Electric tried to cure this deficiency by submitting an Affidavit of Robert Bradley purporting to interpret the property boundaries, Transcript at page 9, to which plaintiff's counsel objected. Transcript at page 14. SC Rule 56 does not provide for any replies by the party seeking summary judgment. The Bradley Affidavit should have been part of the original motion since it relates to one of the Counts of the Complaint. Further, it was not filed by November 12 as required by the Scheduling Order. Although the Bradley Affidavit was not properly before the Court, Berkeley Electric's counsel relied on it to argue that there was no encroachment upon TMS 135. Transcript at page 11. The Court should not have relied upon it, should have expressly been rejected it and Simmons' trespass claims as to TMS 135 should not have been dismissed.

E. Berkeley Electric failed to produce clear and convincing evidence of continuous use

Plaintiff opposed Berkeley Electric's motion for summary judgment on the basis that it failed to establish by clear and convincing evidence that one of its power lines across TMS 498 has been continuously in the same place. In its Memorandum in Opposition, plaintiff directed the Court's attention to the survey dated November 8, 1983 prepared for Berkeley Electric. Exhibit G, Affidavit of Edward A. Bertele. The survey does not show the second power line crossing TMS 498 which Berkeley Electric alleges was there in 1980. Plaintiff previously submitted an Affidavit in July 2009 referring to a recorded plat dated October 7, 1981 prepared by W.L. Gaillard showing the Berkeley Electric high voltage line crossing TMS 498 but not the second line. Affidavit of Roosevelt Simmons, Exhibit B. In addition, Berkeley Electric produced conflicting system maps. The System Map prepared by Southern Engineering dated 4/12/95 shows a power line across Kitford Road but does not indicate whether it encroaches on TMS

283-00-00-498. See Exhibit H, Bertele Affidavit. The current Berkeley Electric System Map shows the same power line in a substantially different location. See Exhibit I, Bertele Affidavit. Berkeley Electric did not produce any system map showing the location of its power line across TMS 283-00-00-498 prior to 1995 and after 1980 although plaintiff requested it to produce this in discovery.

Further, plaintiff contends that the age of the "birthmarks" on the poles to which the power lines are attached (1984 & 1986) does not confirm when the power line was installed. Simmons contends that power to customers along Kitford Road was provided in the past by a line from the main distribution line crossing TMS 282-00-00-135 over his driveway down to Kitford Road. See Simmons Supplemental Affidavit. The pole on the south side of Kitford Road birthmarked "1986" could have been placed in its location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. Similarly, the pole on TMS 283-00-00-118 to the north of TMS 283-00-00-498 and birthmarked "1984" could have been placed in its location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. The date of the birthmarks on the poles may signify when the pole was installed but without other corroborating evidence, they are not conclusive as when the power line across TMS 283-00-00-498 was installed between those poles.

The Court must view the evidence and all inferences which can be reasonably drawn therefrom in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Surveys done in 1981 and 1983 do not show the existence of a power line across TMS 498 which Berkeley Electric

alleges was there in 1980. Two Berkeley Electric system power surveys show the power line in different locations. Birthmarks on power poles are not conclusive evidence that a power line ran between them. Berkeley Electric's own documents contradict the sworn testimony of its employees, Seeny and Frank upon which its allegation of continuous use rests. The Court should not have accepted the sworn testimony as conclusive proof of continuous use when it was contradicted by the documentary evidence. Berkeley Electric has not proven with "clear and convincing" evidence that its power line has been in the same location for twenty years.

F. The Court should consider all of the circumstances surrounding the easement grant

During the motion hearing, the Court expressed concern about the lack of any details concerning the location of the easements. Transcript at page 21, line 17-19. Berkeley Electric' counsel said it was because they were trying to save money. Id. Under the circumstances, the Court should have deferred any decision pending a hearing on the scope of the easement and Berkeley Electric's actions in furtherance of the grant. "If the language [of an easement] is uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect." 25 Am.Jur.2d Easements § 18, at 516 (2004). The extent of an easement is a question to be resolved by an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). The parties consented to an Order of Reference in order to determine whether Berkeley Electric had exceeded the scope of the written easements granted to it by plaintiff's predecessors in title in 1956 and 1972.

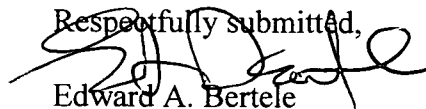
Plaintiff contends that the easement grants were vague and that Berkeley Electric violated the spirit of the grant by multiple power line and cable encroachments. Simmons

contends that Berkeley Electric unreasonably implemented these easements and granted pole sharing rights over multiple locations across Simmons land for a fee to serve its purposes without regard to Simmons property rights or the effect of its actions upon them. Simmons contends that there is an alternative to crossing TMS 283-00-00-498, i.e. the route which Berkeley Electric has used in the past which would less severely impact his property, i.e. over his driveway along the south side of Kitford Road. Simmons' surveyor will testify consistent with his supplemented plat that the total area of TMS 283-00-00-498 (1.375 acres) is effectively reduced to .342 acres due to the existence of Berkeley electric's two overhead power lines and St. Johns underground water line. The record before the Court established the need for hearing to consider all of the facts and circumstances rather than summary disposition.

CONCLUSION

For the reasons expressed, plaintiff respectfully requests that the Court grant his motion.

Respectfully submitted,



Edward A. Bertele
Attorney for Plaintiff

December 17, 2010
Charleston, SC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
BERKELEY ELECTRIC)
COOPERATIVE INC. and)
ST. JOHNS WATER)
COMPANY, INC.)
Defendants)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 08-CP-10-1983

FILED
2011 JAN 25 PM 3:54
JULIE J. ARMSTRONG
CLERK OF COURT

**PLAINTIFF'S MOTION FOR
RECONSIDERATION AND TO
ALTER OR AMEND THE
DECEMBER 22 ORDER GRANTING
SUMMARY JUDGMENT TO
ST. JOHNS WATER CO.**

PLEASE TAKE NOTICE that on the tenth day following service of the within NOTICE of MOTION or as soon thereafter as counsel may be heard, plaintiff Roosevelt Simmons, by his attorney, Edward A. Bertele, Esq. shall move before the Master in Equity for the Ninth Judicial Circuit at the Charleston County Courthouse, 100 Broad Street, Charleston, SC 29401 for reconsideration and to alter and amend the Order granting Summary Judgment to St. Johns Water Company filed December 22, 2010.

BASIS FOR THIS MOTION

Plaintiff respectfully asks the Court to reconsider the Order Granting Summary Judgment to St. Johns Water Company filed December 21, 2010 and to alter and amend the order in accordance therewith. The decision is not supported by the motion record and encompasses legal claims which were not asserted in St. John's summary judgment motion. Specifically, the Order contains the following Findings of Undisputed Facts: paragraph 2 states that St. John's Water Company obtained an express easement to install water lines along Kitford Road "which included a portion of the road extending north from the main portion of Kitford Road to residences along said roadway". Paragraph 4 states that its use has been open and notorious

under the encroachment permit and without the use of any wells; and to the extent that the express easement is silent as to the specific location, St. Johns holds a prescriptive easement. Paragraph 5 states that there are affidavits from customers to attest to twenty years of uninterrupted use in the motion record. The reasons for plaintiff's objections to the decision and Order are more fully set forth below.

A. St. John's Motion for summary judgment was limited to a prescriptive easement.

Plaintiff requests reconsideration of the Court's findings of Paragraph 2 recognizing an express easement being granted to St. Johns Water Company. St. John's motion for summary judgment was limited to the imposition of a prescriptive easement. See St. John's Brief at pages 2-3. SC Rule 56 and this Court's scheduling order preclude St. John's from asserting a new basis for summary judgment, i.e. an express easement or the granting of same.

St. John's based its motion for a prescriptive easement in part on an encroachment permit it received in 1977 from Charleston County to extend its water line from Main Road down Kitford Road. St. John's Brief at page 3. It asserted that the encroachment permit represented a "claim of right". Id. During oral argument, counsel for St. Johns claimed that a dirt drive over Simmons property was part of Kitford Road and thus included in the encroachment permit. Transcript of motion hearing at page 28, line 21 - 29, line 3; page 31, lines 13-21. However the encroachment permit (attached to St. John's motion as Exhibit B) states on its face that it applies only to construction on a "right of way of county road or street". There was no evidence in the motion record that this dirt drive across Simmons property was ever a county road or street or that it was ever maintained by Charleston County. If St. John's had made the assertion about country maintenance in the motion papers, plaintiff would have proffered an

affidavit that to his knowledge there never was any maintenance done by the county since the dirt drive was always in disrepair because of illegal use by adjoining property owners.

The encroachment permit refers to a drawing (designated as U-25) which was not part of the motion record. If St. John's had included this drawing into its motion, plaintiff would have proffered an affidavit that the drawing does not show any water line across Simmons property. Because St. John's motion for summary judgment did not assert a claim of express easement, plaintiff did not present evidence to rebut the unsubstantiated allegations of an express easement made at oral argument.

In summary, St. John's motion was limited to a prescriptive easement and the motion record does not support a finding of an express easement. Charleston County has no authority to grant any easement across Simmons property. There was no evidence that the County ever maintained the dirt drive across Simmons property. The county encroachment permit does not grant any express rights to St. Johns. Because St. Johns motion failed to request summary judgment on an express easement, plaintiff was denied the right to rebut the allegations and demonstrate the existence of disputed issues of fact. Therefore, the court should reconsider its finding of an express easement and based upon the motion record, deny the existence of an express easement.

B. St. Johns failed to establish a claim of right by clear and convincing evidence.

Plaintiff requests reconsideration of Paragraph 4 of the Findings which states that to the extent that the express easement is silent as to the specific location, St. Johns holds a prescriptive easement. The motion record does not contain any evidence to support the conclusion that the County's encroachment permit created a claim of the right to encroach on Simmons property. The county has no legal right to allow access to private property. St. Johns obtained an

encroachment permit for the purpose of installing water lines along Kitford Road. The dirt drive is not shown on any map as a county road or street. St. John's motion referred to the encroachment permit as its only justification to cross private property. The encroachment permit does not create a "claim of right" on its face and St. John's did not present evidence to establish that it could have relied on it for such a purpose.

In addition, St. John's motion did not contain any evidence that the encroachment permit allowed it either expressly or as a claim of right to encroach upon TMS 135 which is to the east of TMS 498 and the Seaboard Coastline Railroad right of way. In opposition to the summary judgment motions of the defendants, plaintiff submitted a plat showing that the public portion of Kitford Road ends at the Seaboard Coastline Railroad right of way and thereafter becomes a private road. Therefore TMS 135 was not included in any encroachment permit granted by the county and could not create any claim of right to encroach on TMS 135. Summary judgment should not have included TMS 135. In summary, the Court should reconsider St. John's claim of a claim of right and deny it because St. John did not submit any evidence that it had a claim of right to cross Simmons property, either across TMS 498 or TMS 135.

C. St. Johns did not provide clear and convincing evidence of its first use in 1978

The Order also contains a finding that St. John's use has been open and notorious under the encroachment permit and without the use of any wells. In its motion, St. John's alleges that it constructed a water line in 1978 under the dirt road across TMS 498 and was an adverse user for twenty years. However, the sole evidence of the construction of the water line is the affidavit of Hugh Miley, the project engineer. He states only that "the first construction project began in 1977 and included the installation of a water line in and along Kitford Road." Hugh Miley affidavit at para. 3. Mr. Miley does not identify the location of the water line as crossing TMS

498 or TMS 135 or refer to any maps or drawings which indicate its exact location. Hugh Miley does not state that the water line was constructed under the dirt drive on TMS 498 (then part of TMS 115). Plaintiff urges the Court to reconsider this finding of first use in 1978 because Hugh Miley's affidavit is vague and inconclusive. This Court should not have accepted St John's allegation as to the location of its water line without some corroboration which unequivocally indicates where the water lines were located. The standard of proof, "clear and convincing" requires more than what the defendant has provided in its motion.

St. John's did not produce any evidence that the work allegedly done in 1978 extended the water line east over the Seaboard Coastline Railroad right of way, across TMS 135 and then onto the Andersen property. Therefore the motion record is not sufficient to support a finding of first use as to TMS 135 and summary judgment should not have been entered as to this property.

D. Customers records do not establish the required twenty years of adverse use.

Plaintiff requests that the Court reconsider its findings of twenty years of uninterrupted and adverse use. The installation of a water line across Simmons property even if it did occur in 1978 would not give him notice of use at that time since it was underground and did not service any homes. St. John's relied upon a customer list (Exhibit A) for evidence of twenty years of open and notorious use. See St. John's Brief at page 3. There are only two customers on this list whose service predated 1985. There is no evidence that the two customers to whom service was extended pre 1985 live in the homes serviced by a water line across Simmons property- because they do not. In his response to the motion, Simmons rebutted St. John's assertion that reasonable diligence would have alerted him to the presence of water service in the area. He stated: "I have well water and so do many other homes in this area. I had no reason to know that St Johns was providing water service to property owners using my land for access." Simmons Affidavit at

page 6. The customer list showing that water service was provided to customers in the 1970's along Kitford Road does not support the finding that the service was open and notorious for twenty years given that there were only two homes in the vicinity on St. John's water (not served by the line across Simmons property), the water lines were concealed and the remainder of residences including Simmons were on well water.

There are many more customers on the list whose service began after 1985 which would not provide a basis for the twenty years of uninterrupted use. The customer list shows that water service was connected to the Andersen property (across TMS 282-00-00-135) in August 1987 and to Frazier and Gordon, property owners to the rear of TMS 283-00-00-498 in July 1986 and August 1987 respectively. St. Johns did not produce evidence of water service to any property owner to the north of TMS 498 earlier than July 1986. Therefore, the earliest that Simmons had constructive notice of the existence of water service across his property would be July 1986. This date, not 1978, is the earliest date from which the statutory 20 years could have commenced. Plaintiff discovered a St. Johns meter in April 2005 and immediately complained to the company. He therefore tolled the statute before the twenty years had run.

In Paragraph 5 of the Findings, the Order refers to affidavits of St. John's customers attesting to twenty years of uninterrupted use. There were no affidavits submitted with the motion and accordingly the motion record does not support this finding. Therefore plaintiff respectfully asks the Court to reconsider its finding as to open and notorious use because it is not supported in the motion record.

E. The motion record does not support a finding of prescriptive easement

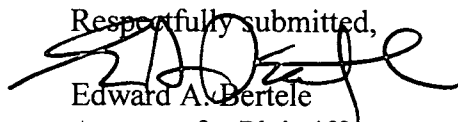
The Court must examine the evidence and all inferences which can be reasonably drawn therefrom in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v.

Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Plaintiff respectfully urges the Court to reconsider its decision and order and deny St. Johns motion for summary judgment because it did not meet its burden of proof to show the existence of a prescriptive easement by clear and convincing evidence. Graniteville Co. v. Williams, 209 S.C. 112, 120-21 (1946); Williamson v. Abbott, 107 SC 397 (1917). There was no evidence of an express easement. The existence of a prescriptive easement was not established by clear and convincing evidence. The claim of right could not be established on the face of the encroachment permit or by reference to any drawing in the record. The first use was not established by Hugh Miley's affidavit because it was not specific as to Simmons property. The customer list is not evidence of a first use pre 1985 since the two customers were not served by a water line on the property that Simmons or his predecessor in title owned. The post 1985 customers on the list do not establish twenty years of adverse use since Simmons complained about St. John's possible encroachment in 2005.

CONCLUSION

For the reasons expressed, plaintiff respectfully requests that the Court grant his motion.

Respectfully submitted,



Edward A. Bertele
Attorney for Plaintiff

January 25, 2011
Charleston, SC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
ROOSEVELT SIMMONS)
Plaintiff)
Vs.)
BERKELEY ELECTRIC)
COOPERATIVE INC. and)
ST. JOHNS WATER)
COMPANY, INC.)
Defendants)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CASE NO. 08-CP-10-1983

**PLAINTIFF'S MOTION FOR
RECONSIDERATION AND TO
ALTER OR AMEND THE
JANUARY 18 ORDER GRANTING
SUMMARY JUDGMENT TO
BERKELEY ELECTRIC COOP, INC.**

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT

PLEASE TAKE NOTICE that on the tenth day following service of the within NOTICE of MOTION or as soon thereafter as counsel may be heard, plaintiff Roosevelt Simmons, by his attorney, Edward A. Bertele, Esq. shall move before the Master in Equity for the Ninth Judicial Circuit at the Charleston County Courthouse, 100 Broad Street, Charleston, SC 29401 for reconsideration and to alter and amend the Order granting Summary Judgment to Berkeley Electric Cooperative, Inc. filed January 18, 2011.

BASIS FOR THIS MOTION

Plaintiff respectfully asks the Court to reconsider the Order Granting Summary Judgment to Berkeley Electric Cooperative, Inc. ("BEC") filed January 18, 2011 and to alter and amend the order in accordance therewith. Specifically, the Order contains the following factual findings. Paragraph 3 states that in 1956 BEC obtained an easement for maintenance of an electric transmission line across TMS 282-00-00-135 and that the same kind of easement was granted to BEC by the heirs of William Andersen adjacent to the northern boundary of TMS 135. Paragraph 4 of the Order states that in 1972 BEC obtained an easement to maintain an electric transmission or distribution line across the 4.7 acre parcel then owned by E.C. Brown of which

TMS 283-00-00-498 was a part. Paragraph 11 of the Order states that the power poles and lines presently on plaintiff's property were installed between 1984 and 1986 but had existed on plaintiff's property in that configuration for over 30 years. The Order contains the following Conclusions of Law: "The terms of the easements might be broad in scope, but that is because most of the area was undeveloped when the easements were granted and property owners were not interested in incurring the cost of a survey in order to specifically locate the right of way." Order at page 6. The Conclusions of Law contain the following statement: "Plaintiff has failed to establish that any of BEC power lines on his property exceed the authority granted under the written easements." Order at page 6. The Conclusions of Law at page 7 -8 found that two plats of adjacent property prepared in 1981 (Gaillard) and 1983 (Schuler) were not supportive of plaintiff's claims that BEC's power line did not cross the westerly portion of TMS 498 until after the date of these surveys. The Court found that these plats were not of plaintiff's property and did not contradict the testimony of BEC's supervisors Seeny and Frank. Order at page 7-8 . The Order at page 8 states that BEC's system maps do not conflict with its employees testimony concerning the location of its power lines because plaintiff did not provide any testimony as to how these maps should be interpreted; also that plaintiff failed to produce any sufficient evidence that BEC's use was not continuous for at least twenty years. The reasons for plaintiff's objections to the decision and Order are more fully set forth below.

A. Berkeley Electric failed to produce evidence of an express or prescriptive easement across TMS 135

The Complaint alleges a trespass across two different parcels, referred in the motion hearing as TMS 498 and TMS 135. In its summary judgment motion, Berkeley Electric did not assert any express or prescriptive easement across TMS 135. The evidence it provided related

only to the installation of its utility poles for a line across TMS 498. Plaintiff raised this issue in its Memorandum in Opposition to the motion, see page 6. Counsel for Berkeley Electric tried to cure this deficiency by submitting an Affidavit of Robert Bradley purporting to interpret the property boundaries, Transcript at page 9, to which plaintiff's counsel objected. Transcript at page 14. SC Rule 56 does not provide for any replies by the party seeking summary judgment. The Bradley Affidavit should have been part of the original motion since it relates to one of the Counts of the Complaint. Further, it was not filed by November 12 as required by the Scheduling Order. It was not properly part of the motion record because it violates both SC R 56 and this Court's Order.

Although the Bradley Affidavit was not properly before the Court, Berkeley Electric's counsel relied on it to argue that there was no encroachment upon TMS 135 and plaintiff objected. Transcript at page 11. Plaintiff had no opportunity to address the 1956 easement in its opposition papers and thus was denied the opportunity to respond.

Plaintiff further asserts that his objection is not only procedural but also based upon disputed facts relating to the 1956 easement. As stated in the Order, the 1956 easement granted BEC the right to maintain only a transmission line across the subject property. Simmons asserted in opposition to BEC's motion that BEC also abused this right by extending a power line from its transmission line across TMS 135 to the Andersen residence. Since the 1956 easement does not provide any right for any further distribution of power beyond the 75 feet encompassed in the transmission easement, BEC has trespassed upon his property. This power line was shown on Exhibit D, attached to the Bertele Affidavit submitted in opposition to BEC's motion. Plaintiff is providing the Court with another copy with the trespassing power line highlighted for convenience, attached to this motion.

BEC clearly understood the significance of its omission of any reference to the 1956 easement since it tried to remedy the fatal defect by submitting Bradley's affidavit in which he purports to interpret the boundary line between Simmons and Andersen property by saying that the offending power line is totally on Andersen's property. The Bradley Affidavit contains boundary line interpretations which the witness, not a licensed surveyor, is not competent to make. As such the affidavit contains hearsay and is not competent upon which to base a decision on summary judgment.

Because the Order contains facts which were not properly before the Court and on which the Court should not have relied in granting summary judgment and to which plaintiff never had the opportunity to respond, plaintiff respectfully requests that the Court reconsider its decision. Simmons contended that the power line is on TMS 135 based upon his historical usage of the area under that line containing a dirt road and other documents which support his claim. BEC bears the burden to establish by clear and convincing evidence that it is not his property. Assuming but not conceding that the Court were to consider the 1956 easement, Simmons is entitled to present evidence to rebut its significance.

Since BEC has not provided any evidence of an express easement to cross TMS 135, there is no evidence to support a prescriptive easement based upon some claim of right. As far as any outright adverse use for 20 years, BEC did not submit any evidence of when it first installed the power line to the Andersen property which crosses TMS 135 and has failed to meet its burden of proof of clear and convincing evidence. Since BEC's motion did not address either the express or prescriptive rights it claims across TMS 135, plaintiff never had the opportunity to respond.

Finally, the Order refers to another document, an easement granted by the heirs of William Andersen in 1956 which was not identified in BEC's motion for summary judgment. Furthermore, BEC never stated in discovery that it intended to rely upon any other easement including the 1956 easement given by the heirs of William Andersen. Standard Interrogatory No 4 specifically requests all documents on which defendants intend to rely for their defense and BEC never provided or referred to the Andersen easement in any answer or supplement. Thus, plaintiff never had the opportunity to provide a response to BEC's last minute attempt to cure the defects in its motion for summary judgment. The Order should not contain any reference to it since it was not properly before the court and Simmons was not afforded the opportunity to respond.

In summary, the Court should reconsider its decision granting an express easement as to TMS 135 because the record contains documents not properly before the Court which were made part of its decision. The Order fails to consider that there were disputed issues of fact concerning TMS 135 and the reasonable interpretation of 1956 easement supports Simmons contention as to a trespass.

Also the Court should reconsider its decision granting a prescriptive easement across TMS 135 because BEC did not establish when its power line was first installed to the Andersen property across TMS 135 and when the statutory 20 period began to run. This was a disputed issue of fact. Accordingly, the Court should not have granted summary judgment as to any prescriptive rights across TMS 135 because there are no facts in the record to support this claim.

It would be an abuse of discretion for this Court to grant BEC's motion for summary judgment based upon a lack of competent evidence and without allowing Simmons an

opportunity to respond to allegations which were made outside of the record. Therefore, the Court should not have dismissed Simmons' trespass claims as to TMS 135 for these reasons.

B. The Conclusion of Law interpreting the easements is without factual support

The Order at page 6 contains the following Conclusions of Law: "The terms of the easements might be broad in scope, but that is because most of the area was undeveloped when the easements were granted and property owners were not interested in incurring the cost of a survey in order to specifically locate the right of way." This conclusion is unsupported because there is no factual basis for it in the motion record. BEC did not offer any testimony from any property owners about this, therefore it is speculative and based upon hearsay and not appropriate evidence to be considered as part of a summary judgment motion. It is the opinion of BEC's counsel and not evidential.

It is an abuse of discretion for the Court for the Court to adopt a purely speculative statement as a basis for a legal conclusion. The Court must rely only upon competent evidence in the record. The Court may not make an interpretation of a legal document based upon its own understanding of the circumstances since this does not enable the plaintiff to offer any contrary interpretation or evidence.

C. The findings and conclusion of law disregarding the plats of adjacent property is not supported in the record

Paragraph 11 of the Factual Findings of the Order states that the power poles and lines presently on plaintiff's property were installed between 1984 and 1986 but had existed on plaintiff's property in that configuration for over 30 years. The Conclusions of Law at page 7 -8 found that two plats of adjacent property prepared in 1981 (Gaillard) and 1983 (Schuler) were

not supportive of plaintiff's claims that BEC's power line did not cross the westerly portion of TMS 498 until after the date of these surveys. The Court found that these plats were not of plaintiff's property and did not contradict the testimony of BEC's supervisors Seeney and Frank. Order at page 7-8 .

The Court should reconsider its decision because both plats raise a disputed issue of fact as to when BEC installed a power line across the westerly portion of TMS 498. The role of the Court is to determine whether a dispute of material fact exists, not whether one party's evidence is better than the others. Both plats are evidential of the condition and existence (or not) of a power line situated on a pole to the north of TMS 498 since both plats show that area. The 1983 plat is entitled " Area under Power line Easement" and was prepared for Berkeley Electric by James Schuler. This plat does not show any power line attached to the transmission line in 1983 . BEC claims that power line was there in 1980 and therefore it should be shown as attached to the transmission line as part of the area under easement but it is not. Since this document was prepared for BEC and it provided it in discovery, it is bound by it and it is an admission against BEC's interest. The document purports to establish the area under easement. There is no other reasonable explanation but that the power line which BEC alleges was part of its BEC's distribution system was not there in 1983. The explanation in the Order that the plat was not of Simmons property is an inadequate explanation for the discrepancy and should have been rejected. This plat alone raises a question of fact as to when the power line was installed because it contradicts BEC employees testimony.

Similarly, the Gaillard plat (1981) was done by adjacent property owners and does not show any power line from their property directed toward Simmons property to the south. This plat was submitted as part of Simmons' opposition to BEC's summary judgment motion filed in

June 2009. The motion was carried when the case was transferred to the Master of Equity. BEC had over one year to respond to this plat in its renewed motion but never addressed it. The same explanation, that the plat was not of Simmons property is inadequate and does not address an obvious inconsistency and does not support a findings that the Court can disregard this evidence.

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

Simmons contends that these plats and the reasonable inferences drawn from them raise a question of fact which precludes the granting of summary judgment. There is no evidence in the record to provide any explanation of these plats which would enable the Court to disregard them. The Order contains factual findings and a conclusion of law disregarding the evidential value of these plats. These findings and conclusion are not based upon the record, are not supported by any reasonable inferences drawn from the record and are not a proper basis for the granting of summary judgment. Therefore, these findings cannot support a conclusion of law rejecting evidence that contradicts BEC's supervisors testimony.

D. BEC's system maps contradicted its employees testimony

The Order at page 8 states that BEC's system maps do not conflict with its employees testimony concerning the location of its power lines because plaintiff did not provide any testimony as to how these maps should be interpreted; also that plaintiff failed to produce any sufficient evidence that BEC's use was not continuous for at least twenty years.

Plaintiff respectfully requests that the Court reconsider its decision regarding this evidence because its findings are not supported by the record. The record on its face is clear. Berkeley Electric produced conflicting system maps. The System Map prepared by Southern Engineering dated 4/12/95 shows a power line across Kitford Road but does not indicate whether it encroaches on TMS 283-00-00-498. See Exhibit H, Bertele Affidavit. The current Berkeley Electric System Map shows the same power line in a substantially different location. See Exhibit I, Bertele Affidavit. Berkeley Electric did not produce any system map showing the location of its power line across TMS 283-00-00-498 prior to 1995 and after 1980 although plaintiff requested it to produce this in discovery. The maps on their face are inconsistent.

Plaintiff was entitled to rely upon them as "maps" since he specifically requested that Berkeley Electric produce all "maps showing the location of the disputed power line from 1980 to the present" in discovery. These are "maps". By definition they are intended to be accurate. They are not designated as sketches or schematic drawings but maps, with a scale indicated thereon.

Similarly, the Court should have relied upon them as being maps. The Order states that there was no evidence that they were accurate, but to the contrary, there was no evidence to establish that they were inaccurate or not maps. They do not require interpretation. Anyone including the Court can examine the two system maps and see they are inconsistent. Either they

say what the plaintiff says or they it don't. The Court has only to refer to them to see that they cannot be consistent since they show different locations for the subject power line across TMS 498 in 1995 and the present. BEC offered no explanation of the inconsistency in its maps so the record cannot support any finding that this evidence does not create a dispute of material fact.

There was a dispute of fact as to the BEC supervisors claim that the power line was across TMS since the late 1970 because the system maps show the power line to be in different locations between 1995 and the present. Significantly BEC could not produce any system map prior to 1995 in support of its claim as to the location of that line. Simmons contends that the system maps demonstrate that there was a dispute of material fact regarding the existence of the power line between 1995 and the present which precluded the granting of summary judgment. Summary judgment is appropriate only if the moving party can establish that inquiry into the facts is not desirable to clarify the application of the law. Standard Fire v. Marine Contracting, 301 SC 418, 421 (1990). BEC failed to establish that there was no need for further inquiry into this issue and the Court should reconsider its rejection of evidence as the basis for granting summary judgment.

E. The Court improperly weighed the evidence and ignored the existence of numerous material disputed facts

Plaintiff contends that the Court did not properly apply the standard for summary judgment in deciding to grant summary judgment to BEC. The Court's role is to examine the record to determine whether there are material issues of disputed fact and if there are none, to decide whether the moving party is entitled to judgment as matter of law. The Court's role is not to balance and interpret the evidence to determine which side should prevail. Here the record contains numerous instances of facts in dispute which should have caused the Court to deny

BEC's motion . The Court's Order however, contains findings which weigh the evidence and which the Court should not perform at this stage of the proceedings. See above.

Plaintiff asks the Court to reconsider its findings that Simmons did not produce any evidence to rebut BEC's continuous use. In addition to the two plats which do not contain any BEC power lines at a time when BEC contends they were in place, plaintiff submitted other evidence to support his opposition to the imposition of a prescriptive easements across TMS 498. This included the system maps discussed above and other competent evidence below.

Simmons Affidavit asserted that BEC used a different route in the past along his driveway across TMS 135 for its power lines and cable lines to service customers on Kitford Road and not across TMS 283-00-00-498. See Simmons Supplemental Affidavit. Discovery obtained via subpoena from Comcast supports this contention. See Exhibit J, Bertele Affidavit. Berkeley Electric receives royalties from this use and has a monetary reason to create multiple pole locations. Id. Comcast's counsel advised that its cable lines were previously owned by US Cable and that a pole sharing agreement had been in existence between US Cable and Berkeley Electric prior to 2002 but that Comcast did not have a copy of it. Exhibit K, Bertele Affidavit. The Comcast system map indicates that Comcast (and its predecessor US Cable) used the Berkeley Electric poles on the south side of Kitford Road to carry its cable over Simmons driveway on TMS 282-00-00-135 as Simmons alleges. Exhibit L, Bertele Affidavit. Berkeley Electric never produced any pole sharing agreement in discovery; consequently it is unknown how long the cable lines have been running along Simmons driveway across TMS 135 on Berkeley Electric poles.

The record does not support the granting of summary judgment because Simmons assertions create a disputed issue of fact as to continuous use for twenty years Simmons assertion

that power to customers along Kitford Road was provided in the past by a line from the main distribution line crossing TMS 282-00-00-135 under the 1956 easement down to Kitford Road is consistent with other evidence. The power pole on the south side of Kitford Road birthmarked "1986" could have been placed in its location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. Similarly, the pole on TMS 283-00-00-118 to the north of TMS 283-00-00-498 and birthmarked "1984" could have been placed in its location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. The date of the birthmarks on the poles may signify when the pole was installed but without other corroborating evidence which BEC never provided, they are not conclusive as when the power line across TMS 283-00-00-498 was installed between those poles.

The Court must view the evidence and all inferences which can be reasonably drawn therefrom in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Surveys done in 1981 and 1983 do not show the existence of a power line across TMS 498 which Berkeley Electric alleges was there in 1980. Two Berkeley Electric system power surveys show the power line in different locations. Birthmarks on power poles are not conclusive evidence that a power line ran between them. Berkeley Electric's own documents contradict the sworn testimony of its employees, Seeny and Frank upon which its allegation of continuous use rests. The Court should not have accepted the sworn testimony as conclusive proof of continuous use when it was contradicted by the documentary evidence. Berkeley Electric has not proven with "clear and convincing" evidence that its power line has been in the same location for twenty years.

In summary, the record contains disputed issues of fact which preclude the granting of summary judgment. The Court attempted to weigh and interpret the evidence instead of simply deciding whether there was a dispute of fact. The Findings and Conclusions of Law are subjective evaluations of the evidence which the Court should not have undertaken at this stage of the proceedings. They are not supported by the motion record and exceed the scope of the Court's duty to determine this motion.

F. The Court should consider all of the circumstances surrounding the easement grant

During the motion hearing, the Court expressed concern about the lack of any details concerning the location of the easements. Transcript at page 21, line 17-19. Simmons previously urged the Court to defer any decision pending a hearing on the scope of the easement and Berkeley Electric's actions in furtherance of the grant. Simmons renews that request in this motion. "If the language [of an easement] is uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect." 25 Am.Jur.2d Easements § 18, at 516 (2004). The extent of an easement is a question to be resolved by an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). The parties consented to an Order of Reference in order to determine whether Berkeley Electric had exceeded the scope of the written easements granted to it by plaintiff's predecessors in title in 1956 and 1972.

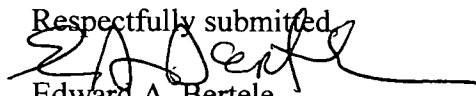
In addition to the vague language of the 1956 grant, Simmons asserts that the motion record contained evidence that BEC violated the spirit of the grant by multiple power line and cable encroachments. Simmons contends that Berkeley Electric unreasonably implemented these easements and granted pole sharing rights over multiple locations across Simmons land for

a fee to serve its purposes without regard to Simmons property rights or the effect of its actions upon them. Simmons contends that there is an alternative to crossing TMS 283-00-00-498, i.e. the route which Berkeley Electric has used in the past which would less severely impact his property, i.e. over his driveway along the south side of Kitford Road. Simmons has served an expert report and that his surveyor will testify that as shown on the supplemented plat, the total area of TMS 283-00-00-498 (1.375 acres) is effectively reduced to .342 acres due to the existence of Berkeley electric's two overhead power lines and St. Johns underground water line. The record before the Court established the need for hearing to consider all of the facts and circumstances rather than summary disposition.

CONCLUSION

In summary, the Order granting summary judgment to BEC should be reconsidered. The Court attempted to weigh and evaluate the facts and did not follow the appropriate standard in determining whether there was a disputed issue of material fact. The facts and inferences which are drawn from the documents provided by the parties evidence various disputed issues of fact relating to easement grants applicable to TMS 135 and BEC right to a prescriptive easement across same. Also, the record contains competent evidence that BEC did not maintain its power line for the applicable twenty year period in support of its claims for a prescriptive easement across TMS 498. For the reasons expressed, plaintiff respectfully requests that the Court grant his motion.

Respectfully submitted,


Edward A. Bertele
Attorney for Plaintiff

February 7, 2011
Charleston, SC

November 22, 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

FOR THE NINTH JUDICIAL CIRCUIT

ROOSEVELT SIMMONS,

Plaintiff,

VS.

BERKELEY ELECTRIC COOP, ST.
JOHNS WATER COMPANY

Defendants.

CASE NO.: 2008-CP-10-1983

 COPY

Motion before the
Honorable Mikell R. Scarborough, reported by Bernadette A.
Cali, CSR and Notary Public, at 10 a.m. on November 22,
2010 at 100 Broad Street, Charleston, South Carolina.

A P P E A R A N C E S --

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Bernadette A. Cali, CSR
Notary Public

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1 THE COURT: Mr. Smith, Mr. Bertele, Mr. Williams,
2 you-all come on up. This is Roosevelt Simmons versus
3 Berkeley Electric Coop, 2008-CP-10-1983. I have this
4 one down for pretrial and Defendants' summary judgment
5 motions. I assume those were timely filed in this
6 case.

7 MR. WILLIAMS: Yes, sir.

8 MR. BERTELE: Your Honor, might I hand you up
9 Plaintiff's response to the summary judgment motion
10 and --

11 THE COURT: All right. I see opposition to St.
12 Johns' summary judgment motion.

13 (Discussion off the record.)

14 (Hands up document.)

15 THE COURT: All right. Mr. Williams, I've got the
16 motion for summary judgment of St. John's Water filed
17 by Mr. Smith. That was filed back in June.

18 MR. WILLIAMS: Ours was -- the amended one was
19 filed November 12.

20 THE COURT: I may not have that one yet. Do you
21 have a copy of that?

22 MR. WILLIAMS: Yes, sir.

23 (Hands up document.)

24 THE COURT: All right. We've got Ed Bertele for
25 the Plaintiff, Roosevelt Simmons; John Williams for

1 Berkeley Electric Coop and Gaines Smith --

2 MR. SMITH: My grandson, Jeffrey Moore. He's
3 going to sit here and help us.

4 (Discussion off the record.)

5 THE COURT: Good to have you.

6 THE COURT: Mr. Williams?

7 MR. WILLIAMS: Your Honor, if it please the Court,
8 we have a motion for summary judgment that we have
9 filed here but we have had some intervening actions
10 that I think we need to clear up before we proceed.
11 Mr. Simmons' property -- he has two properties. One
12 piece he has lost in a judgment sale. He does not own
13 that property any more. So the question is whether he
14 has standing to proceed in this matter, since he's no
15 longer the owner.

16 THE COURT: That's as to which parcel?

17 MR. BERTELE: TMS 498, Judge. If we could refer
18 to the parcels as TMS 283-00-00-498; 282-00-00-135 so
19 if the Court is with that I'll refer to the first as
20 498 the second one as 135

21 THE COURT: Are they adjacent? I'm trying to
22 remember.

23 MR. BERTELE: No, Judge, they're not. Just brief
24 description. Kitford Road runs down between 498 and
25 some other property that Mr. Simmons owns and then

1 there is the Seaboard Coastline Railroad right-of-way
2 that separates 498 from 135. And Kitford Road, which
3 is a public road, up to the end of that section,
4 becomes a private road that Mr. Simmons uses, over 135
5 to get back to his home which is on another tract.
6 Thank you.

7 THE COURT: All right. Let me just ask --
8 Mr. Bertele, as to the 498, Lot 498, does Mr. Simmons
9 still own that today?

10 MR. BERTELE: No. Title is in Mason and Company,
11 LLC. As Mr. Williams indicated it was sold at a
12 Sheriff's auction for a judgment for a user fee of
13 \$144. I'm retained to proceed to pursue a claim to
14 have the property returned to Mr. Simmons, but as of
15 this time title is still in Mason and Company, LLC.

16 If I could address the issue.

17 THE COURT: Let me just stop you and make sure I'm
18 clear. At the time the action was instituted it was in
19 Mr. Simmons' name?

20 MR. BERTELE: Yes, sir.

21 THE COURT: It's been transferred by virtue of a
22 Sheriff's sale?

23 MR. BERTELE: Yes, in February of this year.

24 THE COURT: All right. Let me hear from you on
25 that, Mr. Williams.

1 MR. WILLIAMS: Well, Your Honor, several things.
2 First of all, if he does not own it he cannot pursue an
3 action for damages.

4 Taking the next step, if he could pursue an action
5 for damages his damages would be limited to the time
6 that he owned the property, which was from '03, where
7 he got title, to '09 where he lost title. So he would
8 be limited for that time period on that.

9 There is no indication -- he's alleging all of
10 these things without any proof whatsoever. We were
11 notified of five, six additional witnesses that relate
12 to matters before he acquired title.

13 One other issue, just to make it a little more
14 involved, and I don't exactly know where this leaves
15 us. Mr. Simmons actually acquired title in 1993 as
16 trustee for a minor child. Well, if he had title then,
17 then a six year Statute of Limitations on a tort claim
18 would have expired in '99, which was before this action
19 was filed. He held as the trustee. He did not hold
20 individually, but he stands in the name of that
21 individual. And those are the people who deeded the
22 property to him. So the person for whom he was trustee
23 when she reached majority, conveyed that property to
24 Mr. Simmons.

25 Now --

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1 THE COURT: When did that take place?

2 MR. WILLIAMS: That took place in 2003. He got a
3 deed -- and I have that if Your Honor needs it -- as
4 trustee in '92.

5 THE COURT: In 2003 he was conveyed individually?

6 MR. WILLIAMS: Correct.

7 THE COURT: And has owned it since then. In his
8 individual capacity?

9 MR. WILLIAMS: Correct.

10 THE COURT: Until sometime this year?

11 MR. BERTELE: 2010, yes.

12 THE COURT: From '03 to '10.

13 MR. BERTELE: Judge, respectfully I'm going to
14 object to Mr. Williams raising the statute of
15 limitations issue. That was not the subject of the
16 summary judgment motion, and we're not here to do that.

17 THE COURT: No, but you've got to have standing.
18 I'm going to take that issue under advisement. I'll
19 listen to you as to both lots at this point in time,
20 then I'll issue my ruling after. I'm not going to make
21 that threshold ruling right now. Let me find out
22 what's going on here.

23 MR. WILLIAMS: All right, sir.

24 THE COURT: It will flesh out as you talk. It
25 appears as we speak today that Mr. Simmons is not the

1 owner of the property, and I'll take that into
2 consideration as we go forward, but let me go ahead and
3 hear as if the case were as plead. Let's go from
4 there.

5 MR. WILLIAMS: Okay, sir.

6 In our motion I stated for -- the motion was based
7 on a prescriptive easement. It was also -- and the
8 documents were provided to Mr. Bertele and, in fact, he
9 has included those in his affidavit. There is an
10 actual written grant of easement beyond the
11 prescriptive easement. So one was done in 1972. One
12 was done in 1956, and Mr. Bertele includes those in his
13 presentation to the Court today. So we have the
14 express easement crossing the property.

15 Let me get -- there have been documents provided
16 to Mr. Bertele establishing that service was provided
17 in '72. Those should be with our affidavit.

18 Your Honor, the situation with the ownership of
19 the property and new owners, there is -- and I've got
20 it here. I would hand it up to Your Honor
21 (Hands up document.)

22 MR. WILLIAMS: It is the case of
23 Shonnerd(phonetic) versus South Carolina Public Service
24 Authority at 60 Southeastern 2cd 894 which addresses
25 issues like this, and it says ordinarily a grantee or

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1 purchaser cannot sue for a taking or injury occurring
2 prior to his aquisition of title. But he may sue for
3 any new taking or injury.

4 Well, our lines were there before '03 when he got
5 it. This case also goes on, I think, and Your Honor
6 can certainly determine that, that the new owners are
7 necessary parties to this action. Because we don't
8 want to have to defend against them, then defend
9 against the new owners. And so I guess, depending on
10 the status of ownership, we would submit that he would
11 be limited to his damages from '03 to '0-whenever,
12 February of '10. Plus the people who own it now are
13 necessary parties to this matter, so that would reopen
14 this can of worms. Then I have -- I think --

15 (Discussion off the record.)

16 THE COURT: At this point in time I'm interested
17 in the expressed grant of the easement. Tell me about
18 that. I don't know why we're even here.

19 MR. WILLIAMS: Attached to our motion for summary
20 judgment is the grant from E. C. Brown, Chris Brown,
21 granting the easement in 1972 across one of the pieces
22 of property. That would be the 498 -- 496 -- 498, I'm
23 sorry.

24 Now, also across 498, on one of the plats that
25 have been handed to you, the plat says 25 foot

1 easement, but it's actually a 75 foot easement that
2 goes to Berkeley Coop, not 25 feet; 75 feet.

3 In his deposition Mr. Simmons specifically stated
4 that he has no objection to the 75-foot easement across
5 his property. Your Honor, that same easement crosses
6 the Anderson property which is the subject of the 135
7 trespass action and since we're just exchanging
8 affidavits, we have one from Mr. Robert Bradley --
9 (Hands up document.)

10 MR. WILLIAMS: -- for the Coop that states that on
11 the 135 property our lines do not cross Mr. Simmons'
12 property outside of the 75-foot easement. So if we're
13 located -- if our line is within that 75 feet, which he
14 says he has no objection to, no contest to, then in
15 that case we would not be trespassing on Mr. Simmons'
16 property because it goes from that easement, which
17 crosses Anderson property and Simmons property to serve
18 Anderson's property. There is no -- the line does not
19 cross Mr. Simmons' property outside of the 75-foot
20 easement, if it crosses at all.

21 Now, Mr. Bertele has a survey of the 498 but not
22 the 135. So in the 498 we've got the questions of
23 ownership. You've got an express easement which has
24 been provided. You've got a limitation of when he can
25 claim damages, even if he could, which we state that he

1 could not because he acquired the property in '03. Our
2 easement was an easement of record. He takes with
3 notice of that. The line is above ground. It's in
4 plain view, and for him to come in now and allege
5 damages, Your Honor, we would say should be -- his
6 claim should be dismissed, and the same thing with the
7 property across road of the 136 -- I keep saying the
8 wrong number. 135; that he would take that property
9 subject to the easements and, Your Honor, in his
10 deposition he specifically states, after a question
11 from me, that he has no objection to that easement.
12 Let me see. I should have had it marked.

13 Bear with me one minute, Your Honor.

14 THE COURT: Okay.

15 MR. WILLIAMS: Any how -- okay, sir. I can hand
16 up the deposition, Mr. Simmons' deposition, Your Honor.
17 (Hands up document.)

18 MR. WILLIAMS: On page 13 at the bottom of the
19 page.

20 THE COURT: All right, sir.

21 MR. WILLIAMS: I'm asking the question, I say, but
22 let me back off and ask you another question. The big
23 transmission line that is coming through there, are you
24 objecting to that? His answer, no. So you have no
25 problem with the big transmission line coming through?

1 No, I don't.

2 That's the 75-foot easement that crosses the
3 Anderson property which is receiving service, crossing
4 Mr. Simmons' property which he has no objection to --

5 THE COURT: Okay.

6 MR. WILLIAMS: -- on that. And, again, Mr.
7 Bartel's own affidavit, he supplied the easement, the
8 75-foot easement that was granted to the Coop, which is
9 that big transmission line he's talking about. That
10 also crosses the Anderson property, crosses
11 Mr. Simmons' property twice, but there are two
12 different pieces. Crosses the 498 and the 135. That
13 line comes through there and that's what Anderson is
14 fed off of, and Anderson's property encroaches under
15 the easement on that. So we get to Anderson without
16 having to cross Mr. Simmons and so, therefore, there is
17 no dispute there. We aren't taking any of his
18 property. And that's under an express easement. And
19 on 498, again provided, our motion for summary judgment
20 and I think also in Mr. Bartel's affidavit, that
21 easement is there, is granted, so that's a specific
22 grant, so we have easements on both properties.

23 On the Anderson, it does not cross Mr. Simmons'
24 property so there is no cause for damages there, and on
25 the other piece of property, which is the one that he

1 lost in the tax sale, he's either going to have to
2 bring in the new owners as parties to that and, in
3 addition, even if he did have damages he's going to
4 have to tell what they are from 2003 until he lost the
5 property.

6 THE COURT: All right. I'm looking at what -- I
7 got into this deposition. I see a power line and the
8 width of it -- at least on here appears it to be
9 25-foot but you-all acknowledge it's 75-foot?

10 MR. BERTELE: Yes, Judge. It should be 75 feet.
11 That's what the express grant provided; 1956. Just to
12 save time, Judge, we don't have an issue with the
13 75-foot power transmission line. That brought power to
14 Johns Island from the mainland to everybody. That's
15 not what we're arguing about.

16 THE COURT: I'm assuming the one you have the
17 problem with is the one with the yellow line on it.
18 What appears to be Kitford Road back behind there?

19 MR. BERTELE: Yes. Also a line which goes west
20 from the 75-foot easement down Kitford Road, which does
21 cross 135. I'll get to that in a minute, though.

22 THE COURT: So you've got -- the Complaint is not
23 as to the granted easement of the 75-foot, which goes
24 across the property in a north-south direction.

25 MR. BERTELE: Yes.

1 THE COURT: Based on this plat. But you've got
2 one going more easterly, east-west. Then there is
3 another one, you're saying -- I don't see on this one
4 but this is showing lot -- said 115. I don't know if
5 that jibes with what we're talking about here.

6 MR. BERTELE: There are a lot of loose ends. I'll
7 be happy to try them up for you as best I can.

8 THE COURT: Go ahead.

9 MR. BERTELE: First, might I give the Court a full
10 size copy of a plat which Mr. Simmons had done?
11 Counsel had seen this, they have copies. It was
12 amended recently. The amendment is not shown on here
13 because I didn't get it from the surveyor yet.

14 THE COURT: Show that to Mr. Smith.

15 MR. BERTELE: It's been provided in discovery and
16 they have a copy of it.

17 (pause)

18 MR. SMITH: I have no objection to the court
19 having that.

20 (Hands up document.)

21 THE COURT: All right, sir.

22 THE COURT: It's easier to read. Flood zones
23 shown on there. Got it. Okay.

24 MR. BERTELE: Okay. Let me first note my
25 objection to a couple of things which Mr. Williams

1 said. He talked about Mr. Bradley's affidavit. This
2 is new matter. He talked about the statute of
3 limitations. Mr. Bradley's affidavit could have been
4 supplied initially with the motion for summary
5 judgment. I don't think it's appropriate for the Court
6 to consider it at this point.

7 But the circumstances that lead to this case being
8 filed are that Mr. Simmons did not know of the 1972
9 easement granded by Edward Brown to Berkeley Electric.
10 He wasn't aware of it. He filed this action for
11 trespass because of the existence of a power line, a
12 power line which extends over his property from poles
13 which are to the north and to the south of his
14 property. So, again, there is no power poles on his
15 property on 498 but there is a power line that extends
16 over it.

17 Now, in our opposition we explain the divergence
18 between TMS number 115. TMS number 115 was the
19 identification for the bigger tract which contained
20 four lots. Your Honor may recall from an earlier case
21 that Lot 499, which was the subject of a prescriptive
22 easement demand by another party, that was part of Lot
23 115, as was 498 and another lot to the south of Kitford
24 Road. They were all part of the original tract.

25 In any event, 498 is -- was acquired by

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1 Mr. Simmons in 2003.

2 THE COURT: 2003 individually; right?

3 MR. BERTELE: Yes, sir. In 2003.

4 He was given -- I say given because the deed
5 recites love and affection and a nominal consideration,
6 as was the deed to his children by the Brown estate.
7 They're relatives of Mr. Simmons. They gave him this
8 property so that his access to the rear, where his
9 house is, would be protected. So this was an
10 inter-family transaction. It wasn't an arms length
11 sale, which explains, to me at least, why Mr. Simmons
12 didn't know about the easement that was given by
13 Mr. Brown in 1972. They forgot to tell him. Mr. Brown
14 had died in the interim. His wife, who was the
15 executrix of the estate, deeded the property and that
16 easement was just not mentioned.

17 THE COURT: Is that the one that provides power
18 from Kitford Road to the lot behind?

19 MR. BERTELE: Let me try to answer your question
20 this way. If you look to the north of 498, that's Lot
21 118, I believe. There is a series of poles there. One
22 of which is used to bring, now, to bring power down
23 across Mr. Simmons' lot to the opposite side of Kitford
24 Road and to the residences of that side of Kitford
25 Road. We contend that there are issues of fact which

1 relate to the intent of Mr. Brown in 1972, as well as
2 to the fact that Berkeley Electric has made multiple
3 uses of the same easement.

4 Mr. Simmons has submitted an affidavit and the
5 current survey of the property indicates that there is
6 a power line from the 75-foot wide power distribution
7 easement that runs to the west. In fact, you can see
8 it partially on the survey that you have and connects
9 to the same pole that the wire from north of 498
10 connects to.

11 Have I lost you, judge?

12 THE COURT: Well, yes. Because the plat you
13 handed me has got no 498 on it. It's got two
14 283-00-00-115.

15 MR. BERTELE: It's Lot C.

16 THE COURT: Lot C has been subdivided into four
17 separate lots; has it not?

18 MR. BERTELE: No, 115 consisted of lots A, B, C
19 and the lot owned by Christopher Brown.

20 THE COURT: All right.

21 MR. BERTELE: By way of additional explanation --

22 THE COURT: We're talking about Lot C, are we not?

23 MR. BERTELE: Exactly.

24 THE COURT: I'm with you then.

25 MR. BERTELE: By way of additional explanation,

1 Judge, in 1972 -- and I think this is relevant, and
2 included in our exhibits is a copy of a subdivision
3 plat prepared for Edward Brown in which he does divide
4 that parcel into four lots and dedicates a portion of
5 the property as an extension of Kitford Road. In other
6 words, Kitford Road previously ended at what we now
7 know is Lot 499.

8 In 1972 Mr. Brown dedicated 50-foot wide right of
9 way to extend Kitford Road to the Seaboard Coastline
10 Railroad right-of-way which was the termination of his
11 property, at least on that side.

12 We contend that it was more reasonable for the
13 power company to bring its power along Kitford Road
14 than it was to cross Mr. Simmons' property the way they
15 did.

16 Now, you asked the question of why we are here.
17 The parties consented to an Order of Reference to allow
18 Your Honor to consider the existence of prescriptive
19 easements, or not, as well as the scope of the written
20 easement, the 1972 easement. That's why I wanted to
21 come here, and I think counsel understood that as well.
22 We reserved any damages issue to go back to Common
23 Pleas for a jury trial if we get -- if we succeed here.

24 THE COURT: Okay.

25 MR. BERTELE: And so, Your Honor is dealing with

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1 numerous factual issues in the context of the
2 determination of the equity of the parties. We think
3 this matter is inappropriate for summary judgment, at
4 least insofar as it relates to Berkeley Electric,
5 because the Court should look at the 1956 easement --
6 excuse me, the 1972 easement, and examine its terms.
7 The 1972 easement does not talk about Lot 135. It only
8 talks about the area which composes Lot 115. So
9 Berkeley Electric did not get any easement across 135
10 in the 1972 easement. They are running their lines
11 over 135 to the west.

12 In any event --

13 THE COURT: I'm looking at that right-of-way
14 easement dated September 25, '72, Book E-100, Page 238.
15 It doesn't give me any specifics. Only describes a
16 tract of land approximately 4.7 acres to me, 12 miles
17 southwest of Charleston.

18 MR. BERTELE: That's part of the problem, Your
19 Honor. We would, I don't want to say concede, but we
20 would consider that that description certainly is vague
21 and nonspecific. The property, if you look at the
22 adjacent owners, the property which is described in
23 that easement is more or less corresponding to 115,
24 more or less. But it does not correspond to 135 in any
25 way.

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1 THE COURT: It clearly comes as more than 115
2 because 115 -- total 3.257 acres and you've got a
3 description of 4.7, so there is another one and a half
4 acres somewhere.

5 MR. BERTELE: You're reading that correctly,
6 Judge, yes. But it -- it's limited to the lands to the
7 west of the Seaboard Coastline Railroad. 135 is to the
8 east so, therefore, 135 cannot be included in that.

9 THE COURT: Okay.

10 MR. BERTELE: Now, the fact of the matter is,
11 Judge, that there are numerous questions regarding what
12 this 1972 easement means, how it was implemented by
13 Berkeley Electric and whether, in fact, they
14 constructed and put up this line across Mr. Simmons'
15 property when they say they did.

16 The affidavits which counsel provided in his
17 summary judgment motion were from the district manager
18 or supervisor, Mr. Seney(phonetic) and his predecessor,
19 claiming that they know of their own knowledge that
20 this line has been there since 1980. Well, I don't
21 think that that's an appropriate basis to make a
22 determination when the company has documents and
23 information which has been provided in discovery that
24 contradicts that statement.

25 Specifically, Judge, there is a survey which

1 Berkeley Electric had done in 1983 of TMS number 118,
2 which does not show that line being there as of the end
3 of 1983. There are other documents which Berkeley
4 Electric provided, including maps of its system, which
5 are different over time. We believe that the
6 inconsistencies between the documents and the
7 affidavits is sufficient to raise an issue of material
8 fact upon which the Court should deny summary judgment.

9 It's -- to me, Judge, it doesn't enable the Court
10 to have a full understanding of the facts and balance
11 the equities and determine whether Berkeley Electric is
12 allowed to have two easements, the 1956 easement and
13 the 1972 easement, crossing a single piece of property
14 to the extent of reducing its useful area to
15 approximately one third of its actual physical size.
16 Our expert is the surveyor who performed the survey
17 that you have in front of you and which was updated.
18 His latest report will show that given the effect of
19 the power lines on both sides and the side yards and
20 setbacks that Mr. Simmons literally has a third of an
21 acre upon which to develop his property. That's really
22 the reason why we're here, for Your Honor to understand
23 all the circumstances, to weigh the equities and
24 determine facts as to what happened when and why and
25 reach a fair decision.

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1 Thank you, Judge.

2 THE COURT: All right. Mr. Williams?

3 MR. WILLIAMS: Thank you, Your Honor.

4 First of all, there is no question the easements
5 were granted. Second --

6 THE COURT: What do we have to define the second
7 easement, is my question.

8 MR. WILLIAMS: The '72 easement? The document
9 itself, Your Honor.

10 Now, if I may, beyond that, say that that line is
11 above ground, clearly visible in 2003 when Mr. Simmons
12 got title to this property. Now he's coming in and, of
13 course, they're saying he didn't know about the
14 easement. But that's a matter of public record. That
15 easement was recorded, as Your Honor pointed out, in
16 Book E-100 at Page 238 in 1972.

17 THE COURT: Nowhere on here do I see attempts to
18 define the easement. Just they got a flowing easement
19 over 4.7 acres of land?

20 MR. WILLIAMS: They were general easements back
21 then because the -- this easement was given to provide
22 service to Mr. Brown. The property owners did not want
23 to have to go in and do surveys to specifically locate
24 it, the expense and everything. The line has not been
25 moved. We have affidavits from the employees of the

1 Coop that worked there during that time.

2 THE COURT: This easement was granted in '72? Do
3 we know when power was provided there?

4 MR. WILLIAMS: '72. There are documents -- it was
5 provided to Mr. Chris Brown. There are lines
6 hooking -- work orders hooking up his service; work
7 order hooking up a security light. So --

8 THE COURT: Do I have those in my record now?

9 MR. WILLIAMS: I think so. Let me get my head on
10 straight here, Your Honor.

11 THE COURT: There are some diagrams with a letter
12 H on the back of them in the Plaintiff's Memorandum,
13 which is what I've been referring to mainly in these
14 documents, but that's dated 1995. So --

15 MR. WILLIAMS: No, sir. There is a -- let me see
16 if I can find it -- it was -- I apologize. I'm usually
17 a little better organized. Let me see. That's
18 Anderson.

19 Your Honor, these are called service orders. I've
20 highlighted the name Christopher Brown 1972 on that.
21 He subdivided the property later. That's not -- but
22 that's not in -- I don't think that's contested.

23 But, Your Honor, the bottom line is Mr. Simmons
24 takes the property as he finds it. And what he found
25 was an easement. If he had some question about exactly

1 where the easement was after it had been there for 31
2 years, the written easement filed in '72, he got it in
3 '03; 31 years later. Then he has a duty to inquire,
4 Your Honor, on exactly -- hey, Berkeley, tell me about
5 this line right here, how wide is the easement?
6 Whatever. It's not like they sneaked in there and hid
7 it from him.

8 THE COURT: Seems like it would be notable if it's
9 been there since '72.

10 MR. WILLIAMS: That's our position, Your Honor.

11 THE COURT: Mr. Bertele, your position is there is
12 a question as to where it's supposed to be?

13 MR. BERTELE: No, Judge. Our position -- well,
14 excuse me, Judge. Not exactly. The -- let me address
15 Mr. Williams' statement that the '72 easement is a
16 general easement. The '56 easement is a general
17 easement but, nonetheless, it says how wide it's
18 supposed to be and where it's going to occur.

19 It's absurd for counsel to take the '56 easement
20 and say that, well, we can put it anywhere we want, or
21 to suggest -- and I think that's what they're doing
22 here, is that and if we want to move it we can because
23 that's what they've done. Judge, let me just point you
24 to one thing.

25 THE COURT: Let me stop you right there. It's a

1 little far a field of our case but if Mr. Simmons wants
2 it moved I assume they would move it for him, would
3 they not? There may be a price to pay to do that
4 but --

5 MR. BERTELE: We've talked about that, yes. We've
6 talked about that. But we're here because this
7 activity has been going on for a long period of time,
8 and it's unfair to Mr. Simmons to have to fight with
9 power companies and utility companies over something as
10 simple as having an easement which is clear and doesn't
11 present problems to the land owner. Again, we're here
12 because you are able to look at this circumstance and
13 see whether this easement is an undue burden on the
14 land owner.

15 Getting back to my point earlier, Judge, attached
16 as Exhibit G to my affidavit -- and I'll be happy to
17 hand up to the Court the full size of this plat -- is a
18 survey done in November of 1983 by Mr. Shuler for
19 Berkeley Electric calculating the area of the main
20 power transmission line on Lot 118. Now, that's where
21 the pole is from which the wire over 498 runs and
22 that's where they claim they had an easement to run
23 this line. But there is no wire shown on there as of
24 1983.

25 Now, where is there, in the records of Berkeley

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1 Electric, a survey, a plat, a document which locates
2 that line? The earliest they have is one in 1995. I
3 submit that if the power company doesn't have a record
4 to show exactly where that line is, that how can they
5 claim they're entitled to a prescriptive easement?

6 THE COURT: Have you seen these work orders?

7 MR. BERTELE: Yes.

8 MR. WILLIAMS: Your Honor --

9 MR. BERTELE: Judge, that allows them to construct
10 poles on Mr. Brown's property, Mr. Chris Brown's
11 property and to bring power into Christopher Brown's
12 property. It doesn't necessarily tie it into the power
13 coming from any particular point.

14 THE COURT: Wasn't Mr. Brown the predecessor in
15 title?

16 MR. BERTELE: I beg your pardon?

17 THE COURT: Wasn't Mr. Brown the predecessor in
18 title to Mr. Simmons?

19 MR. BERTELE: Going back to what I was discussing
20 before which is the 1972 --

21 THE COURT: Let's answer this question I've got
22 right now. How did Mr. Simmons take title to the
23 property? He took it as trustee -- trustee in 1992.
24 Who did he take title from?

25 MR. BERTELE: He took title from the estate of

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1 Edward Brown. That lot that Christopher Brown lives on
2 was not part of that overall acreage.

3 THE COURT: It was cut out of there at some point
4 in time? Had to have been.

5 MR. BERTELE: In 1972, yes.

6 THE COURT: All right.

7 MR. BERTELE: My point is simple, Judge, that
8 Berkeley Electric could provide power to Christopher
9 Brown from two different places on its main
10 transmission line; along Kitford Road, down on 135, or
11 up from 118. We suggest that they did both at
12 different times and they can't prove when they did
13 either. A work order to install a work or light on
14 Chris Brown's property doesn't satisfy their burden
15 here, which is to show by clear and convincing evidence
16 that as of a certain date they ran a line across
17 Mr. Simmons' property pursuant to some written
18 agreement which was given 20 years before.

19 THE COURT: All right. What about the other lot?
20 135?

21 MR. BERTELE: I beg your pardon, Judge.

22 THE COURT: What about the other lot, 135? What
23 do you have on that one?

24 MR. BERTELE: All right. As far as 135, first, as
25 I said earlier, I object to Mr. Bradley's affidavit

1 being submitted. They are not entitled to any reply in
2 a summary judgment motion. This should have been
3 submitted earlier.

4 And, number two, the work product here of
5 Mr. Bradley is that of a lay person. He's giving an
6 opinion about the location of their easement with
7 respect to the Anderson property which is to the north
8 and Mr. Simmons property. He doesn't demonstrate any
9 particular competence to do that. They had every
10 opportunity to name an expert who could identify that
11 this power line which comes off of their transmission
12 line does not cross Mr. Simmons' property 135, but only
13 crosses Mr. Anderson's property, 136. And, in
14 addition, their lines cross 135 at a different point.
15 If you go back to the 2005 plat you can see that there
16 is a line running along the extension of Kitford Road
17 from their main transmission line to the pole on the
18 south side of Kitford Road.

19 THE COURT: Point C-4, is that where you're
20 starting?

21 MR. BERTELE: Yes, exactly. To the east of that.

22 THE COURT: Runs east.

23 MR. BERTELE: Yes. This is Exhibit D to my
24 affidavit. That's a copy of the current plat which the
25 surveyor prepared and he will testify that they

1 observed that line running from the 75-foot easement
2 across 135, across the abandoned right-of-way, down
3 Kitford Road to point C-4.

4 THE COURT: Does it show as OHL? It's showing on
5 Exhibit D. Over the line?

6 MR. BERTELE: Yes. Now, Berkeley Electric hasn't
7 offered any expert testimony. They haven't given the
8 Court a basis upon which to make a decision as a matter
9 of law and not as a matter of fact regarding the
10 location of either of the power lines that come off
11 that main distribution line, one to Mr. Anderson and
12 one back down Kitford Road. This is a disputed issue
13 of fact with respect to 135. It has nothing to do with
14 498 and any transfer of title.

15 THE COURT: All right. Very good. Let me hear
16 from you, Mr. Smith.

17 MR. SMITH: May it please the Court, first let me
18 say that neither of the easements of Berkeley Electric
19 or St. John's Water Company traverse the other.
20 They're entirely separate.

21 In 1977 our engineers for the Water Company
22 obtained from the County of Charleston an easement for
23 the construction of a water line along Kitford Road on
24 Johns Island. That was a dirt road maintained by the
25 county and it traversed a long distance from Kitford

1 Road and then going north into the residences along the
2 still established dirt road. That water line was layed
3 in 1978. It has not been disturbed since that time.
4 It has not been moved. We've been real lucky, we
5 haven't even had to repair any of it.

6 So our position is that if we don't have an
7 easement from the County along Kitford Road, then we
8 certainly have a prescriptive easement of more than 20
9 years. The line has been there undisturbed, been used
10 by people on that road and that use of those lines have
11 been in excess of 20 years. We think that we have a
12 prescriptive easement if nothing else.

13 Now, in regard to --

14 THE COURT: A water line's a little harder to see
15 than the overhead power lines.

16 MR. SMITH: That is correct. We're not under any
17 of the power lines. They don't interfere with any of
18 our line whatsoever.

19 THE COURT: You-all are running along Kitford Road
20 somewhere?

21 MR. SMITH: Yes, sir.

22 THE COURT: Either in or outside of the
23 right-of-way.

24 MR. SMITH: Let me see that one right there.

25 (Hands up document.)

1 MR. SMITH: Kitford Road running right here.
2 Extension of the dirt road line from there then goes
3 north up through there.

4 THE COURT: So your easement is running along that
5 dirt road back to the back parcel?

6 MR. SMITH: That's correct. And there are six
7 homes back in here. Four of them we have been
8 servicing for over 20 years.

9 THE COURT: Okay.

10 MR. SMITH: So if the Court pleases, the claim of
11 St. John's Water Company, as I said, is that
12 prescriptive easement, together with the written
13 easement from the Charleston County or the County of
14 Charleston -- I sincerely believe that the fact that
15 Mr. Simmons no longer owns that property, that he does
16 not have any standing to maintain this lawsuit. If he
17 later on become titled owner to it then he might have
18 some action then, but right at this period of time
19 where we're concerned he has no standing and no right
20 to be in this court.

21 THE COURT: All right, sir.

22 MR. SMITH: Thank you.

23 THE COURT: Now, let me get to your clear grant of
24 easement. You make reference to a 1977 express
25 easement. Is that in the record as well?

1 MR. SMITH: Yes, sir. There is an affidavit in
2 there of the engineer who designed the line and had the
3 line installed. It should be attached to the motion
4 for summary judgment, if the Court pleases.

5 THE COURT: Okay.

6 MR. SMITH: If you do not have it I have another
7 one I can provide to the Court.

8 THE COURT: Along Kitford Road. Clearly along
9 Kitford Road. But then what you handed me was this,
10 basically, the same plat we've been working from with a
11 yellow highlighter along that road that shows the back.

12 MR. SMITH: That is correct.

13 THE COURT: No express easement for that but that
14 water line's been there --

15 MR. SMITH: Only express easement was -- that was
16 considered a part of Kitford Road. At the time the
17 County included a part of Kitford Road.

18 THE COURT: That was constructed at the same time?

19 MR. SMITH: Yes, sir. Absolutely. It took two
20 years to come through there with that line and it was
21 completed.

22 THE COURT: Very good. All right. Mr. Bertele?

23 MR. BERTELE: Thank you, Judge.

24 Again, I respectfully ask that the Court deny the
25 St. John's Water Company motion because of material

1 facts in dispute.

2 Mr. Miley, the engineer who apparently was in
3 charge of bringing water from main road down Kitford
4 Road, has stated that line was installed in Kitford
5 Road in 1978. Now, taking him at his word, he doesn't
6 say anything about bringing water across 498 across the
7 Seaboard Coastline Railroad right-of-way, across 135
8 and up to the Anderson property, which is way up there
9 in the north.

10 Now, his affidavit, assuming everything he says is
11 true, doesn't deal with the ultimate issue, namely,
12 when did St. John's Water Company bring its water lines
13 across 498, across 135 to serve all those people up
14 there? I think the answer is given to us by their
15 business records which show that the people that
16 received service from those water lines, which we found
17 in 2005 or -- 2005 -- Ms. Anderson, 1987. That's when
18 she got service, 1987. Ms. Frasier, 1987. Ms. Gordon,
19 1986. Those are the people that received water
20 service.

21 Now, St. John's doesn't have a document which says
22 that it ever provided water service before that time to
23 anybody, and I submit to Your Honor that the water
24 company wouldn't have any reason to cross Mr. Simmons'
25 property in 1978 and bring a line up in the middle of

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1 nowhere if there were no customers there, and do the
2 same down the dirt road across 135 and back up to
3 Ms. Anderson.

4 In fact, the Anderson property was not even
5 created as a separate lot until 1981 or 1982. It was
6 apparently occupied in 1987. So here, again, the
7 statement by the individual claiming to have personal
8 knowledge is not complete. And the Court is entitled
9 to draw inferences from the lack of any other record or
10 the fact that the documents which have been provided in
11 discovery show that service was actually provided many
12 years after 1978.

13 Number two, as the Court pointed out earlier,
14 these water lines are all under ground. There are no
15 markings. There is no way for anybody to detect
16 they're there. Mr. Simmons, while he was on his
17 property, happened to come upon a meter which was
18 concealed in the bushes and wrote a letter to St.
19 John's district manager Ms. Robishad(phonetic) in
20 2005 -- I think we attached it to an earlier affidavit
21 from Mr. Simmons -- complaining about this water line.
22 And Ms. Robishad said, oh, we have an easement, we have
23 an easement. Well, they don't have an easement. They
24 wish they had an easement. They could have asked for
25 an easement but they never did.

1 Now, if these lines were brought to serve
2 customers through Mr. Simmons' property on other
3 properties, where were the easements from those
4 customers? All of this looks like it was just done on
5 a whim and without any legal justification at all.
6 Certainly St. John's should have provided the Court
7 with easements from all those property owners who are
8 getting the water saying, yes, in 1978 I gave St.
9 John's Water Company an easement for water, or in
10 1979 -- et cetera, et cetera. Where are they? They
11 haven't produced them. They're not part of the record.

12 I submit to Your Honor, that the mostly telling
13 thing about the record is that the only dates that can
14 be confirmed that water service was actually on the
15 property, past Mr. Simmons' lot, is 1986 and 1987.

16 THE COURT: Prior to Mr. Simmons owning it?

17 MR. BERTELE: Exactly. But we objected in 2005.
18 We tolled the Statute of Limitations so they can't get
19 their 20 years. Either way, Judge, this is not a
20 matter for summary judgment. The lines were under
21 ground --

22 THE COURT: I disagree. I'll grant summary
23 judgment as to all causes of action. I think that the
24 record before me is this. I'll set this up and ask the
25 prevailing parties to draft me an order long these

1 lines.

2 There was a tract of land which was at one time a
3 larger tract of land, approximately five acres. While
4 it was five acres it appeared that there were adjoining
5 land owners. Those adjoining land owners wanted both
6 power and water. They got permission from the Browns,
7 predecessors in interest to Mr. Simmons, to grant that
8 easement. They are not the best easements in the world
9 but they granted easements to get service to those
10 people who live in those areas.

11 Prior to that, prior to 1977, prior to -- I forgot
12 the dates, the 1950's, I guess, these people had no
13 power, no water. Just because they put power, water
14 lines in didn't mean people tapped into them. They
15 tapped into electricity but not water. Water they
16 tapped into once they got a grant which I assume
17 happened in the late 80's. That's not in the record.
18 That's just me knowing what happens out there in the
19 country. So there were water lines put there. You've
20 got to have water lines installed for people to have
21 water lines. You determine there is water there by
22 turning the spigot and not having a well.

23 So I find both -- I find that there are express
24 easements as to both power lines and water lines. To
25 the extent that the expressed easements do not

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1 specifically state where they should be located I find
2 the prescriptive easements exist but the power lines
3 there overhead, they're visible to everybody; for the
4 water lines they're visible by the inverse which Mr.
5 Bertele was heading with this. There's water lines at
6 the spigot and there's no well, if there is not pumps
7 sitting over there and you have a well to start pumping
8 out, but -- okay.

9 So based upon that I'll grant the motion for
10 summary judgment and go from there.

11 As an additional grounds Mr. -- unfortunately,
12 Mr. Simmons is no longer the owner of Lot 498 and so he
13 lacks standing. However, he would have standing to
14 pursue damages for the time period he owned it. I'm
15 finding there are no damages because there is no cause
16 of action.

17 Thank you all.

18 MR. WILLIAMS: Thank you, Your Honor.

19 With Your Honor's permission we'll prepare a draft
20 of the order, submit a copy of it to Mr. Bertele and
21 with Thanksgiving coming up if Your Honor would be kind
22 enough to give us 30 days.

23 THE COURT: Absolutely.

24 (Hearing adjourned.)

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November 22, 2010

STATE OF SOUTH CAROLINA)

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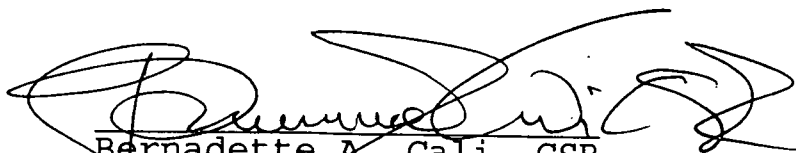
C E R T I F I C A T E

COUNTY OF CHARLESTON)

I, Bernadette A. Cali, Notary Public, do hereby certify that the within hearing was taken and transcribed by me; and that the foregoing pages are a true and accurate transcript of the within proceedings. I further certify that the persons were present as stated.

I further certify that I am not of counsel or kin to any of the parties to this action, nor am I interested in the result of the said action.

IN WITNESS WHEREOF, I have hereunto subscribed my name, this November 24, 2010.


Bernadette A. Cali, CSR
Notary Public
My Commission Expires
April 5, 2020

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

ROOSEVELT SIMMONS,

Plaintiff,

VS.

BERKELEY ELECTRIC,

Defendants.

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CASE NO.: 2008-CP-10-1983

Hearing before the
Honorable Mikell R. Scarborough, reported by Bernadette A.
Cali, CSR and Notary Public, on April 11, 2011
at 100 Broad Street, Charleston, South Carolina.

A P P E A R A N C E S

For the Plaintiff: Edward Bertele, Esq.
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Charleston, S.C. 29492

For the Defendant: John B. Williams, Esq.
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For Water Co.: Gaines W. Smith, Esq.
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Bernadette A. Cali, CSR
Notary Public

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1 (Hearing commenced.)

2 THE COURT: This is Roosevelt Simmons
3 versus Berkeley Electric, '08-1983. I think I
4 recognize the parties in this one. This is
5 Roosevelt Simmons versus Berkeley Electric; is
6 it not?

7 MR. BERTELE: It is. Good morning.

8 MR. SMITH: Yes, sir.

9 THE COURT: I did get your motions. This
10 is case number 2008-CP-10-1983. It's Roosevelt
11 Simmons versus Berkeley Electric Coop
12 represented by Mr. Williams, if I remember
13 right.

14 MR. WILLIAMS: That is correct, Your
15 Honor.

16 THE COURT: St. John's Water Company
17 represented by Mr. Gaines Smith. Is that
18 correct?

19 MR. SMITH: Yes, sir.

20 THE COURT: Mr. Bertele for Plaintiff.

21 MR. BERTELE: Thank you, Judge.

22 THE COURT: It's a motion to reconsider
23 under Rule 59.

24 MR. BERTELE: Yes, Your Honor, it is.

25 If I might present the Court with a copy

1 of the transcript of the motion hearing. It's
2 referred to in the motion papers. I think I
3 did attach the relevant pages.

4 THE COURT: Let me see if I can get a hold
5 of it.

6 (pause)

7 THE COURT: Got it. Looks like a full
8 transcript in here as well. So I should have a
9 copy.

10 MR. BERTELE: Thank you, sir.

11 THE COURT: All right. Mr. Bertele?

12 (Discussion off the record.)

13 THE COURT: You may proceed.

14 MR. BERTELE: Thank you, Your Honor.

15 We were here before you on November 22nd
16 of last year in response to motions for summary
17 judgment by both defendants in the case,
18 Berkeley and St. Johns Water Company. With
19 respect to the results of that hearing or as a
20 result of that hearing the Court entered
21 summary judgment against Plaintiff on all
22 counts of the Complaint, dismissed the
23 Complaint. A form order was entered, then
24 subsequently counsel provided detailed findings
25 of fact and conclusions of law which Your Honor

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1 entered at two different times and from which
2 we took exception and filed motions under Rule
3 59 as to each, concerning the Court's finding
4 of facts and conclusions of law.

5 Judge, let me just say by way of preface
6 that with respect to Berkeley Electric it
7 was -- the reason why we're here is that
8 counsel for Berkeley Electric and I agreed that
9 this Court should have ~~the opportunity~~ to
10 consider the ~~scope~~ of the Berkeley Electric
11 easements and ~~determine~~ whether they had been
12 exceeded in connection with the use of
13 Mr. Simmons' property and there was an
14 appropriate order of reference entered.

15 We were in the jury pool. We were
16 scheduled to go to trial, I think it was 2009.
17 And based upon some discovery that had been
18 exchanged, Mr. Williams and I agreed that this
19 would be the appropriate place to deal with
20 that issue.

21 Now, coming into the motions for summary
22 judgment I think that we understood that the
23 Court was going to decide whether, in effect,
24 Berkeley Electric had prescriptive easements on
25 Mr. Simmons' property, but that was not to be

1 the end of the case.

2 Now, if the Court had decided that
3 Berkeley Electric did not have prescriptive
4 easements we would have gone back to the trial
5 list and the Court would have heard our damages
6 testimony.

7 If the Court had decided, as it did
8 apparently, that there was prescriptive
9 easement, I believe the next appropriate step
10 would have been for a hearing to be held
11 concerning whether Berkeley Electric exceeded
12 the scope of those easements.

13 I remember during the motion hearing, and
14 I think I can point it out if Your Honor
15 wishes, but you raised the question of how
16 vague the easements were drafted and what they
17 really were intended to do. Now, in the
18 context of this case that really is the
19 essential issue at this point.

20 Now, ~~we're not conceding~~ that the record,
21 ~~the~~ motion record, as it existed back in
22 November, was sufficient for the Court to find
23 that there were prescriptive easements or
24 written easements sufficient to allow Berkeley
25 Electric, as a matter of law, to have the right

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1 to locate its power lines across Mr. Simmons'
2 property. However, the issue as to the scope
3 of those easements and whether they were
4 exceeded, to me, is still viable.

5 Now, since the case was dismissed we think
6 that the Court should reconsider that part of
7 its decision and schedule a hearing with
8 respect to the Berkeley Electric easement and
9 the facts that are going to come out concerning
10 their use of two easements which are granted
11 quite sometime ago.

12 With respect to the merits of the claim
13 that there are prescriptive easements, we've
14 addressed that particularly in our moving
15 papers. We feel that with respect to TMS
16 Number 135, which is the property that is off
17 Kitford Road -- and I can refresh your
18 recollection -- Your Honor's recollection about
19 the topography here.

20 Essentially, the two pieces of property
21 involved in the Complaint are TMS Number 498,
22 which abuts Kitford Road, and TMS Number 135
23 which does not abut Kitford Road, because there
24 is an old railroad right-of-way in between.
25 TMS Number 135 is part of a larger tract of

1 property owned by Mr. Simmons. It's used as
2 access by the Anderson property and they
3 apparently granted some easements in the past
4 as well.

5 But our point in this motion for
6 reconsideration, Your Honor, is that, number
7 one, there was no evidence with respect to TMS
8 Number 135 upon which the Court could find that
9 there was a prescriptive easement in favor of
10 Berkeley Electric. With respect to TMS Number
11 498 our position is that we presented facts
12 sufficient to create a rebuttal to the argument
13 that they had a written easement across 498.

14 We presented surveys that were done in the
15 past that indicate that they were no power
16 poles or power lines that would have crossed
17 498 and that was in contradiction to the
18 testimony of the Berkeley Electric supervisors.

19 We also presented other evidence that came
20 from Berkeley Electric's own files to show that
21 the location of those lines were varied over
22 time. The documents we presented were entitled
23 maps. We believe that the meaning of the word
24 map is fairly standard; that it's supposed to
25 represent a graphical depiction that is

1 supposed to be accurate and comparing the two
2 maps, they indicate that the lines that
3 existed -- that the powers lines that existed
4 in the past were not in the same location.

5 Those, I think, are the salient points.
6 In addition, Mr. Simmons has provided an
7 affidavit concerning his recollection of where
8 these lines were.

9 And last, but not least, we have the issue
10 of cable lines being strung by Comcast pursuant
11 to some license agreement, which were located
12 on other poles, which we contend support our
13 position that the power lines were not where
14 they claimed they were for all the time that
15 they needed to create a prescriptive easement.

16 Judge, the law with respect to summary
17 judgment, I think, is well known; that whatever
18 evidence there is, that the inferences and the
19 presumption that arise from that evidence must
20 be looked at in most favorably towards the
21 non-moving party. There are facts which are
22 contradicted based upon information that we've
23 presented from Mr. Simmons and also from
24 Berkeley Electric's own records.

25 We ask the Court to reconsider its

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1 decision. Certainly with respect to 498, the
2 issue of fact is in dispute. With respect to
3 135 there are no facts in dispute, because
4 nothing was presented in the initial moving
5 papers to establish that there was a right to
6 have an easement across 135. There is no doubt
7 that there were two easements granted by
8 Berkeley Electric.

9 And I'll just finish on this point. One
10 was done in 1956, I believe, to create --
11 essentially, to bring power to Johns Island.
12 The other was created, I believe, in 1972 which
13 was at the same time that the prior owner
14 opened up the property, dedicated the road to
15 the county and granted a generic easement to
16 Berkeley Electric to bring power off of that
17 main distribution line to one of the lots that
18 he was selling at that time.

19 Now, there was -- there is nothing to
20 establish that Berkeley Electric could use that
21 easement to go in two different directions. It
22 doesn't create two easements. It creates one
23 easement. That's really the point of our case
24 with respect to Berkeley Electric, Judge.

25 THE COURT: What you mean -- tell me what

1 you mean by that; doesn't create one going in
2 two directions. If it's all within the same
3 easement can't they do what they want within
4 the easement?

5 MR. BERTELE: An easement has to have some
6 specificity. A easement can't occur in a
7 vacuum. It's a right-of-way that occurs across
8 the property of the grantor, and there isn't
9 any way to establish, from what's in the
10 record, that that easement in 1972 was intended
11 to go in one direction and another direction.
12 There is just no way that the Court could
13 understand that. That's Berkeley Electric's
14 interpretation or they just put up a power line
15 thinking that they had the right-of-way.

16 Now, I believe from looking at
17 Mr. Williams' subsequent
18 subordination(phonetic) we objected to, which
19 was an affidavit from one of his supervisors,
20 they claim that that property, that easement
21 crosses -- belongs to the Andersons. We don't
22 agree with that. The point being that Berkeley
23 Electric is going to take the position that
24 it's not Mr. Simmons' property, then they have
25 to prove it. It is on Mr. Simmons' property,

1 according to his testimony and according to the
2 Complaint. It's not reasonable, I think, to
3 interpret an easement as creating the rights to
4 use two different pieces of property and go in
5 two different directions.

6 Thank you, Judge. I'll reserve my
7 comments with respect to St. Johns Water
8 Company until we finish up with this part of
9 the case, if that's okay.

10 THE COURT: All right. Mr. Williams?

11 MR. WILLIAMS: Thank you, Your Honor. If
12 it please the Court.

13 Mr. Bertele made reference to plats.
14 There is a 19, I think, 83 plat prepared by
15 Everett Shuler which shows the 75-foot
16 right-of-way coming through the property.
17 Mr. Simmons does not object to that 75-foot
18 right-of-way. He has specifically said that in
19 his deposition.

20 That plat was only to show the 75-foot
21 right-of-way. It was not prepared to show any
22 distribution lines coming off of it.

23 Your Honor, it would be similar to having
24 a perimeter survey of your property done ten
25 years ago and then you're coming in and saying,

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1 yes, my house has been there for ten years and
2 they say, well, it doesn't show on the plat so,
3 therefore, it couldn't have been there. The
4 perimeter survey wasn't to show and locate your
5 house. This survey was not intended to show
6 distribution lines. It was strictly to show
7 the 75-foot right-of-way through there. That's
8 all that that was. So as far as distribution
9 lines it's totally irrelevant.

10 The next plat that Mr. Bertele referred
11 to, and one that he attached to his motion, I
12 think it's Exhibit D, which shows the property
13 line across, I think it's 498 and there are two
14 tracts. One is west of the abandoned railroad
15 right-of-way and one is to the east. And I
16 think 135 is the one to the east. Any how,
17 that plat purports to show the line across
18 there onto the east of the right-of-way, but
19 ~~there are no~~ property lines. If Mr. Simmons
20 knew that we were on his property improperly
21 the thing to do was when he was having all that
22 survey done, have it shown on his plat. There
23 is just a line going out to the right, to the
24 east showing absolutely nothing on that.

25 We would submit to Your Honor that with

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1 the absence of it that should be construed
2 against Mr. Simmons, because he had the
3 opportunity and the work done and it does not
4 show anything.

5 The affidavit by Mr. Bradley was submitted
6 on November 22nd, the same day that Mr. Simmons
7 submitted his affidavit here. So the
8 timeliness of it, you know, they are objecting
9 to us doing what they did, and that's submit
10 documentation at the time of the hearing.

11 Mr. Bradley's deposition, he's a
12 right-of-way agent for the Coop, he has
13 expertise in reading plats that I would submit
14 are outside the common knowledge of the
15 ordinary man, which I think whether it's
16 admissible or not we would submit it is. The
17 weight of it, of course, is up to the Court,
18 but the affidavit clearly points out that we
19 are not on Mr. Simmons' property outside of the
20 75-foot easement. He says that's your
21 easement, you've got that. I don't object to
22 that. There is nothing, absolutely nothing to
23 show that we have crossed his property over
24 there on the east side of the abandoned
25 right-of-way.

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1 Back to, I think it's 498, forgive me
2 if -- yes, 498. With the plat -- and
3 Mr. Bertele keeps talking about prescriptive
4 easements when they are actually written
5 recorded easements that Mr. Simmons easily
6 could have determined, could have found had he
7 had a title exam done on the property. They
8 are there recorded showing this property, 498,
9 with the easement across it.

10 Your Honor, I would like to hand up a
11 recent case. Ironically, Your Honor, it was
12 handed down by the State Supreme Court the same
13 day that you issued your Order here, so it's
14 subsequent decisions that were not available to
15 us at that time.

16 It's the case of South Carolina Department
17 of Transportation versus Horry County, et al.
18 It had to do with easements. And in the case
19 the appellants contend that the boundaries of
20 the easement did not -- that they were vague.
21 And the Court found in quoting -- let me back
22 up. This case is 705 Southeastern 2nd at page
23 21 and decided January 18 by the Supreme Court.
24 And in this they referred to the case of
25 Binkley versus Raven Creek Watershed, 558

1 Southeastern 2cnd 902, but the language is
2 this: It is not essential to the validity of a
3 grant of an easement that it be described by
4 meets and bounds or by figures giving definite
5 dimensions of the easement.

6 He was on notice the easement was there.
7 He had some obligation as to inquire on that if
8 he had some question about it. I would like to
9 hand this up, Your Honor.

10 (Hands up document.)

11 THE COURT: Thank you.

12 MR. WILLIAMS: Thank you, sir.

13 THE COURT: Horry County case.

14 MR. WILLIAMS: Yes, the one -- an old
15 recorded easement 1930 went through where
16 people built houses over there.

17 THE COURT: Where the Chief Justice said
18 she realized the result was difficult, but we
19 recognize this as a harsh result for the
20 appellants. I seem to recall this one; pure
21 legal issue.

22 (Reading)

23 Not-applicable. All right. Thank you.

24 MR. WILLIAMS: Your Honor, in Mr. Simmons'
25 deposition he was asked, and this is on page 20

1 of the deposition and we're talking about tract
2 135, and your testimony -- and we were talking
3 about the line being there. Well, do you know
4 how long those lines have been in existence?
5 His answer: Well, to my recollection it has
6 been there before this house -- the Anderson --
7 the line provided Anderson feed (inaudible)
8 Anderson's electricity? Your testimony is you
9 cannot recall how long that line has been
10 there? I don't want to guess on the pole
11 marking. I think they have 84. Says, does
12 that sound reasonable to you? Says, it could
13 be.

14 No testimony that says it was not there
15 and it's quite obvious that he doesn't know
16 when it was there, so we have, in our motion,
17 we have established the easement, the lines,
18 the affidavits supporting those, and so then
19 the burden shifts to him.

20 We would submit that we are entitled to
21 the summary judgment in this matter based on
22 the testimony that -- excuse me -- based on the
23 documents, the recorded documents, the
24 easements, the plats, and there is nothing to
25 contest and also, of course, we raised the

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1 issue last time, Mr. Simmons doesn't own the
2 property. He owned it for a period of I think
3 6 years, something of that nature and, of
4 course, we're at the summary judgment stage and
5 I understand -- but we would submit that there
6 is nothing here, Your Honor, that has been
7 brought up that should change Your Honor's
8 prior decision in this matter. The easements
9 are recorded. They are in the chain of title.
10 The lines have been there. The affidavits from
11 the Coop employees as to the location and the
12 existence of the lines have clearly been
13 established, and I don't want to assume but I
14 assume that that carried weight in Your Honor's
15 prior decision.

16 And, Your Honor, getting over to the water
17 company's case, the water company position is
18 their pipes went in about 1980, through this
19 tract 498, to service houses back behind that.

20 Your Honor, I think it would be fair and
21 right and equitable to assume that there were
22 houses back there at that time. The water
23 company didn't put in a line to nowhere. It
24 put in a line to serve houses back there;
25 houses that had been served by electrical line

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1 crossing over Mr. Simmons' property back before
2 1980. So with all of those -- electricity
3 comes first, especially in the rural areas.
4 Water and sewer may get there eventually. But
5 in this aspect they extended the line through
6 Mr. Simmons' property and I think it's safe to
7 assume they extended it to houses back there
8 that were receiving electric service from the
9 distribution lines crossing Mr. Simmons'
10 property.

11 I would be be glad to answer any questions
12 Your Honor has, but that's basically it.

13 THE COURT: We talked about this last time
14 from a common sense standpoint. The power
15 lines you can see. Water lines you don't
16 always see.

17 MR. WILLIAMS: That is correct. I'm glad
18 you brought that up, Your Honor. This pole,
19 when Mr. Simmons acquired the property, was in
20 clear view. And he has -- I think case law
21 will establish he has some obligation to
22 inquire and say, wait a minute where, is this
23 line crossing my property? Do you have an
24 easement? What's it doing there? He did none
25 of those things until 2010 -- 2008 when he

1 filed suit. That would be our position.

2 THE COURT: All right. Mr. Bertele, let
3 me here from you on that.

4 MR. BERTELE: Just a few things in reply.
5 I don't think that the Horry County case
6 changes anything here, Judge. It basically --
7 and I haven't -- Mr. Williams didn't let me
8 know ahead of time he was going to cite this
9 case, so I'm not aware of it specifically, but
10 generally speaking if an easement is vague it's
11 vague. The grantee of the easement is entitled
12 to interpret it in some way that makes sense to
13 all parties concerned, but I don't think that
14 effects my position with respect to this
15 Court's obligation to consider the two written
16 easements and whether they have been exceeded
17 in this case by Berkeley Electric. And let me
18 say again that the evidence presented indicates
19 that we have lines going across 135. ~~We have~~
20 lines going across 498. We have cable lines
21 crossing other poles which are not even on 135
22 or 498, and our position is that given the
23 circumstances under which these easements were
24 granted and the subsequent use made of them by
25 Berkeley Electric, this Court has to consider

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1 all the facts.

2 Now, for example, in 1972 the owners of
3 the property weren't even there. They lived
4 someplace else. They were granted an easement.
5 They didn't observe how the lines were strung
6 and so on and so forth. What they understood
7 and what the utility company understood was
8 going to be done at the time, I think, has to
9 be considered.

10 Again, we have lines going across 135 and
11 498 as well as cable lines.

12 THE COURT: Let me stop you right there.
13 You keep talking about cable lines. That's a
14 whole different area of law, as I understand
15 it. The cable lines are within the easement,
16 then you've got a different problem, but if you
17 have a problem with cable lines you have to sue
18 the cable company. You haven't done that here.

19 MR. BERTELE: Our point is, the existence
20 of the cable lines is evidential to our point
21 that Berkeley Electric used poles along Kitford
22 instead of crossing 498 at some point in the
23 past, or they used them both and that's an
24 abuse of the easement that was granted to them
25 in 1972. That's part of our argument. We're

1 not suing the cable company because we think
2 Berkeley Electric is at fault here. We think
3 Berkeley Electric exceeded the scope of its
4 easement because it had lines running in two
5 directions on -- from the same easement. We
6 don't think that's appropriate from what was
7 granted to them in 1972. We're -- there is no
8 issue about the 1956 easement. The
9 distribution lines were there.

10 Now, again, getting back to Mr. Williams'
11 statement earlier, Mr. Bradley's affidavit
12 should have been part of their original motion
13 for summary judgment. It wasn't in response to
14 anything I submitted. It's their case to prove
15 that they had an easement across 135 or that
16 their lines are not across 135.

17 Now, I didn't get this until I stood here
18 in the courtroom and this came as a surprise to
19 me, number one. And number two, there is
20 nothing in this affidavit that allows
21 Mr. Bradley to give opinions about where
22 property lines are located. I don't care what
23 his experience is in terms of stringing cable
24 and locating poles. He is not a surveyor. He
25 has no experience, based upon the face of this

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1 affidavit, to give opinions about where
2 Mr. Simmons' property line is. Mr. Simmons
3 says that line is on his property. Now,
4 Mr. Bradley doesn't -- is not entitled to offer
5 a different opinion as the basis for this Court
6 to say that that line is not on Mr. Simmons
7 property. That's a fact issue.

8 Mr. Simmons still owns 135. He didn't
9 lose title to 135. He lost title to 498.

10 Again, in conclusion, Judge, I think
11 Mr. Williams is presenting arguments and
12 suppositions and interpretations of the limited
13 record that has been submitted in support of
14 their motion for summary judgment. They
15 initially provided only two affidavits from two
16 individuals who said that the poles were in
17 place even though the birthmarks were different
18 on the poles, but the poles were in place
19 earlier and that the line was strung there.

20 We submit that the survey -- that one of
21 the plats, excuse me, Item G, which is titled
22 area under power line easement -- it doesn't
23 say it's only under the distribution line. It
24 doesn't say anything. The author of this
25 didn't submit an affidavit. All we have is

1 Mr. Williams' interpretation of why a power
2 pole and a pole is not shown on this plat,
3 which was done at a point in time which two
4 employees of Berkeley Electric claim that pole
5 and that line was there.

6 Now, again, this is supposition.

7 THE COURT: What do you have in opposition
8 to that, I guess is my question? I'm trying
9 to -- I've got a couple of questions for you
10 but, number one, what is it that allows you to
11 go forward -- clearly you're disagreeing with
12 that. I understand that. But what evidence do
13 you have in opposition to that?

14 MR. BERTELE: It's their obligation as the
15 moving party to show that the facts are not in
16 dispute. They haven't don't that. If I get
17 Mr. Finny and the other gentleman on the stand
18 I can cross examine them with this document to
19 test their credibility that those lines and
20 those poles were there for more than the
21 appropriate time for them to have a
22 prescriptive easement. The Court can determine
23 whether you believe them or not. But at this
24 stage, summary judgment, I don't think that
25 Your Honor should be giving every inference and

1 every supposition in favor of the moving party.
2 It's just not appropriate.

3 THE COURT: It requires -- the rule
4 requires you to come forward and dispute that;
5 does it not?

6 MR. BERTELE: We did by presenting other
7 evidence. These gentlemen have sworn those
8 lines and poles were there in the late 70's
9 before the dates on the poles. The poles have
10 these birthmarks. They acknowledge that the
11 birthmarks --

12 THE COURT: Poles get replaced.

13 MR. BERTELE: -- are in the 80's.
14 According to their own testimony, unless the
15 pole wears out it's not going to be replaced.
16 That's what they said. If the poles went in
17 the 70's why were they replaced in 1984? They
18 can't explain that. It's inconsistent.

19 THE COURT: Okay. All right. So as we
20 stand here today the allegation has to do with
21 two lots, 498 and 135. Does Mr. Simmons own
22 498 today?

23 MR. BERTELE: No.

24 THE COURT: That case is gone; correct?
25 We agree with that?

1 MR. BERTELE: No. The last time, Judge,
2 we had this discussion, and I submit an
3 argument that said Mr. Simmons is entitled to
4 damages on 498 for the time he owned 498. We
5 have litigation pending with respect to 498.
6 So that case may prove that we do own 498.

7 THE COURT: All right. Very good. All
8 right.

9 MR. BERTELE: Thank you, Judge.

10 THE COURT: Let's hear from you on the
11 other one, on the St. John's Water.

12 MR. BERTELE: With respect to the Court's
13 Order granting summary judgment in favor of St.
14 John's Water Company we have a different
15 situation. There is no written easement
16 granted by a predecessor in title to
17 Mr. Simmons. That's clear. The argument or
18 the assertion by St. Johns that they have a
19 written easement is based upon a utility
20 easement that was granted to them by the county
21 to install their water lines in Kitford Road.

22 Now, the water lines in issue cross 498.
23 In fact, they go all the way across 498 to
24 property owners to the rear. They also extend
25 down Kitford Road across the railroad

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1 right-of-way onto 135 and then up to serve the
2 Anderson property.

3 Now, there is nothing in this motion
4 record that establishes that St. Johns has the
5 right to go on 498 to install water to the
6 houses in the rear. That was not what the
7 county granted St. Johns. The county can't
8 grant an easement across someone else's
9 property. And it's just not a valid
10 interpretation of a utility easement granted by
11 the county to argue that they were entitled to
12 cross 498 to serve other property owners in the
13 area. And 498 is not public property, it's
14 private property.

15 Similarly, with respect to 135, no written
16 easement in place. The county can't grant St.
17 Johns the right to cross Mr. Simmons' property
18 to serve the Anderson property in the rear,
19 irrespective of whether those individual
20 property owners granted written easements to
21 St. Johns. That's number one.

22 Number two, the lines are all under
23 ground. They were only discovered recently by
24 Mr. Simmons when he found that water was
25 damaging his property. He then retained

1 counsel, contacted St. Johns. They claim that
2 they had a written easement but, of course,
3 they didn't. And they subsequently provided or
4 obtained a plat showing where their water line
5 was located and it was at that point that
6 Mr. Simmons found out that they cross 498.
7 This suit was brought thereafter.

8 So the issue with respect to St. Johns is
9 fairly clear. No written easement, number one.
10 Number two, the water lines are underground.
11 They are not obvious. It's not well known in
12 the neighborhood that there are water lines
13 there for the simple fact that property owners,
14 including Mr. Simmons, have wells. So it's not
15 as if he would have had to know that everybody
16 back off 498 had water from St. Johns, because
17 the property owners back there are basically
18 hundreds of feet from the road. You can't tell
19 what they are using for water, whether it's
20 well or whether it's water by St. Johns. So,
21 the water company can't establish that their
22 use was open and notorious and adverse for the
23 required period.

24 I think this case is fairly straight
25 forward in terms of the legal issues. It

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1 doesn't really require any more facts, I
2 believe, for the Court to decide that St.
3 John's has not obtained a prescriptive easement
4 based upon either a written right to use
5 Mr. Simmons' property or some justification to
6 cross Mr. Simmons' property. They are in the
7 business of getting easements. They couldn't
8 in their own mind justify crossing his property
9 to get to someone else's property.

10 Lastly the issue of --

11 THE COURT: Who owned the property in 1977
12 when the water lines were layed?

13 MR. BERTELE: That was Mr. Brown.

14 THE COURT: Predecessor in title?

15 MR. BERTELE: Yes, sir.

16 THE COURT: Okay. Very good. Mr. Smith?

17 MR. SMITH: May it please the Court.

18 On behalf of St. Johns I would
19 respectfully say to the Court that this was an
20 easement along Kitford Road which (inaudible)
21 by Charleston County. If by any chance we did
22 encroach upon Mr. Simmons' property along that
23 little dirt road there, we did that in 1987,
24 long before Mr. Simmons brought this lawsuit,
25 and we think that for no other reason we have a

1 prescriptive easement for this water line. The
2 water line was in use in 1987 when it was
3 completed. The residences along Kitford and
4 the little dirt road that Mr. Bertele has
5 addressed, all of those homes were served water
6 from the water company. It was the only public
7 water that was available. So it is our
8 position that we have a prescriptive easement
9 in excess of the 20 years that is required
10 under the statute and under the statutory laws.

11 So I respectfully ask that -- you were
12 correct when you granted summary judgment
13 earlier and should reaffirm your decision.

14 THE COURT: Thank you, Mr. Smith.

15 Mr. Bertele, I'm going to find, under the
16 circumstances, that -- I understand where
17 you're going with this but I just -- I don't
18 see anything here to get me to change my
19 opinion.

20 So I'm going to deny your motion to
21 reconsider. You-all just proceed as you will.

22 MR. BERTELE: As to both defendants?

23 THE COURT: Yes, sir.

24 MR. BERTELE: Thank you.

25 THE COURT: I'll do a Form 4. You can go

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1 from there.

2 MR. BERTELE: Your Honor, can I make one
3 last request? I just want to be sure that the
4 motion transcript from November 22nd is in the
5 file.

6 THE COURT: It's attached to your motion.

7 MR. BARNWELL: Okay. I forgot whether I
8 had or not.

9 THE COURT: It's in there. Very good.
10 Okay. Good luck.

11 (Hearing concluded.)

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STATE OF SOUTH CAROLINA)

)

C E R T I F I C A T E

COUNTY OF CHARLESTON)

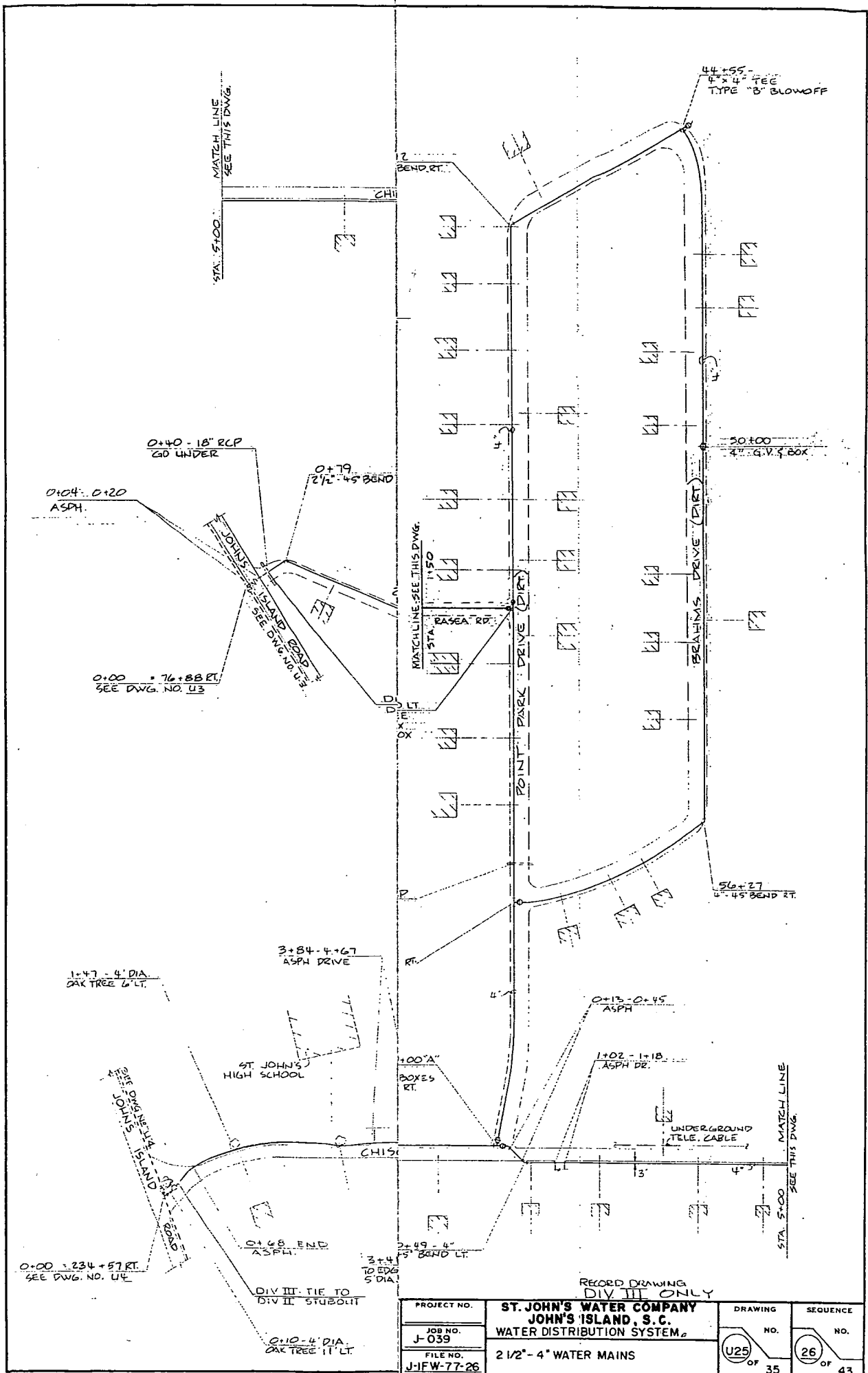
I, Bernadette A. Cali, Notary Public, do hereby certify that the within hearing was taken and transcribed by me; and that the foregoing pages are a true and accurate transcript of the within proceedings. I further certify that persons were present as stated.

I further certify that I am not of counsel or kin to any of the parties to this action, nor am I interested in the result of the said action.

IN WITNESS WHEREOF, I have hereunto subscribed my name, this June 3, 2011

Bernadette A. Cali, CSR
Notary Public
My Commission Expires
April 5, 2020

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PROJECT NO.		ST. JOHN'S WATER COMPANY		DRAWING		SEQUENCE	
JOB NO.		JOHN'S ISLAND, S.C.		NO.		NO.	
J-039		WATER DISTRIBUTION SYSTEM		U25		26	
FILE NO.		2 1/2" - 4" WATER MAINS		OF 35		OF 43	
J-FW-77-26							