THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Mikell Scarborough, Master-In-Equity

Case No.: 2008-CP-10-1983

Roosevelt Simmons.....Appellant

v.

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

BRIEF OF RESPONDENT BERKELEY ELECTRIC COOPERATIVE, INC.

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STATEMENT OF ISSUES ON APPEAL

1. Was the Master in Equity's grant of summary judgment contrary to the Order of Reference? No.

2. Did the Master in Equity err in ruling that Berkeley Electric Cooperative's power lines are authorized by express easements? No.

3. Did the Master in Equity err in ruling that Berkeley Electric Cooperative's power lines are authorized by prescriptive easements? No.

STATEMENT OF THE CASE

This is an appeal from a grant of summary judgment in favor of Berkeley Electric Cooperative, Inc. (hereinafter, "BEC") on January 18, 2010 by the Honorable Judge Mikell R. Scarborough, Master in Equity for Charleston County. (R. pp. 13-21.) Appellant Roosevelt Simmons ("Simmons") commenced this action by filing a complaint on April 9, 2009. (R. p. 24.) Simmons subsequently amended his complaint to correct errors in the identification of his property. (R. p. 24, ¶ 1; p. 28, ¶ 1; p. 32, ¶ 1.) The amended complaints allege the same facts and the same causes of action. (R. pp. 24-27; pp. 28-31; pp. 32-35.)

Simmons' complaint states three causes of action: He alleges that BEC has been trespassing on his properties by "constructing, placing and/or maintaining unauthorized power lines" on his property. (R. p. 33, ¶¶ 5-10.) Simmons further alleges that BEC has been unjustly enriched, claiming that the Cooperative has been "furnished with a non-gratuitous and valuable benefit without paying for its reasonable value" and that it was inequitable for BEC "to use the unauthorized easements without paying reasonable fair market value." (R. p. 33-34, ¶¶ 11-16.) Finally, Simmons seeks a declaratory judgment that BEC "has no property interests or rights in TMS Nos. 283-00-00-498 and 282-00-00-135 located on Kitford Road, Johns Island, South Carolina." (R. p. 34, ¶¶ 17-20.)

BEC filed answers denying the allegations of unauthorized use and setting forth a number of affirmative defenses, including the defense that Simmons' rights in the subject property, if any, were subject to and limited by the terms of written

easements or by prescriptive easements held by Defendant BEC. (R. p. 41, ¶¶ 12, 13.)

On May 7, 2009, BEC served its notice of motion and motion for summary judgment with supporting documents attached. (R. p. 43-44.) BEC further served affidavits from Thomas Seeney and Richard Frank, the then current and recently retired BEC District Superintendents for the Johns Island District where the subject property is located. (R. p. 45, ¶ 2; p. 47, ¶ 2.) Simmons filed an affidavit opposing the motion on July 2, 2009. (R. p. 49-50, ¶¶ 1-4.) On October 7, 2009, the action was referred to the Master in Equity for Charleston County by consent of the parties "to make appropriate findings of fact and conclusions of law regarding the issues of easements, both prescriptive and express, across the lands of Plaintiff." (R. p. 3.)

On November 9, 2010, BEC served an amended motion for summary judgment along with discovery responses and supporting documentation. (R. pp. 81-82; pp. 83-86; pp. 87-104.) BEC's amended motion for summary judgment added a claim that Simmons lacked standing to pursue his claim because he did not own the property. (R. p. 82.)

On November 19, 2010—a Friday—Simmons served his supplemental affidavit opposing BEC's motion for summary judgment along with an affidavit from his attorney with attached exhibits and a memorandum of law. (R. p. 118; p. 120; p. 105.) BEC's and St. John's motions for summary judgment were heard by the Master on the following Monday morning. At the hearing, BEC submitted an

affidavit from Robert Bradley, the Right-of-Way Agent for BEC, in response to the affidavits and other materials recently submitted the preceding Friday by Simmons. (R. p. 154.)

At the close of oral argument, the Master granted both motions for summary judgment from the bench. (R. p. 220, line 22-p. 222, line 10.) He then executed a form order granting the motions which was filed on November 24, 2010. (R. p. 9.) On January 18, 2011 the Master issued a detailed order granting summary judgment to BEC. (R. pp. 13-21.) Simmons then served a motion to alter or amend that order on February 7, 2011. (R. p. 174.) That motion, along with Simmons' motion to alter or amend the order granting summary judgment to St. John's, was heard by the Master-in-Equity for Charleston County on April, 11, 2011. At the close of oral argument, the Master denied both motions. (R. p. 242, lines 14-23.) The order denying Simmons' motion to reconsider was entered that same day and served on all parties by mail on April 13, 2011. (R. p. 22.) Simmons filed and served his Notice of Appeal on May 13, 2011.

STATEMENT OF FACTS

Simmons owns two parcels of property designated as TMS 283-00-00-498 (hereinafter, "parcel 498") and TMS 282-00-00-135 ("parcel 135") located on Kitford Road on Johns Island. (R. p. 118, ¶ 3.) Simmons acquired ownership of the parcels via a quit-claim deed in 2003. (R. p. 118, ¶ 2.) The property had been owned by his family since the 1960's. (R. p. 118, ¶ 2.)

Parcel 498 was originally deeded to Simmons as part of a tract identified as TMS 283-00-00-115, which in turn came out of a 12 acre parcel known as lot 27½ of the California Tract. (R. p. 120 at Exhibit C, p.126.) Lot C of TMS 283-00-00-115 became parcel 498. (R. p. 118, ¶ 3; p. 200, lines 17-24.) Parcel 135 was originally part of a 2½ acre parcel known as lot 27 of the California Tract. (R. p. 120 at Exhibit C, p.126.)

Simmons' attorney describes the property as follows:

> Kitford Road runs down between 498 and some other property that Mr. Simmons owns and then there is the Seaboard Coastline Railroad right-of-way that separates 498 from 135. And Kitford Road, which is a public road up to the end of that section, becomes a private road that Mr. Simmons uses, over 135 to get back to his home which is on another tract.

(R. p. 189, line 23-p. 190, line 5; *see also,* p. 52; p. 130.)

Two written easements provide BEC with express authorization to operate and maintain its power lines on and over Simmons' property. In 1956, the Estate of Edward Heyward granted BEC a seventy-five foot wide easement for the "construction and maintenance of an electric transmission line or lines, towers, poles, anchors and necessary fixtures and wires attached thereto...." (R. p. 131; for a complete copy, see pp. 92-93.) This easement runs generally north-to-south across the northeast corner of parcel 498. (R. p. 52; p. 130.) Simmons concedes that his lawsuit does not challenge BEC's authority to operate and maintain its power lines across his property under the 1956 easement. Appellant's Brief, p. 23. (R. p. 198, lines 22-2; pp.49-50, ¶ 3; pp. 118-119, ¶ 3.)

In 1972, Edward. C. Brown granted BEC a second easement "to place, construct, operate, repair, maintain, relocate, and replace thereon in or upon all streets, roads, or highways abutting said lands and electric transmission or distribution line or system...." (R. p. 132.) This easement covered 4.7 acres. (R. p. 132.) Under this easement, BEC maintains a power line extending along Kitford Road, northeast across parcel 498, and across the Seaboard Coastline Railroad right-of-way onto property belonging to the Estate of Anderson (TMS 282-00-00-136) just north of parcel 135. (R. p. 52; p. 130; p. 154, ¶ 3; pp. 45-46, ¶¶ 3-5; pp. 47-48, ¶¶ 3-5.) Simmons concedes in his opening brief that "it is not disputed" that the 1972 easement from Brown allows BEC to cross parcel 498. Appellant's Brief, p. 23.

Based on and in addition to these express easements, BEC asserted that it had the authority to use Simmons' property under a prescriptive easement. In support of that claim BEC produced sworn affidavits from Thomas Seeney, BEC's District Superintendent for Johns Island, and his predecessor in that position, Richard C. Frank. (R. pp. 45-48.) These individuals were responsible for construction and maintenance of electrical distribution lines in the Johns Island District. (R. 45, ¶ 2; p. 47, ¶ 2.) Seeney has worked in the Johns Island area since 1978. (R. p. 46, ¶4.) Frank worked in the area since 1979. (R. p. 48, ¶ 4.) Both individuals are familiar with the age, configuration, features, and characteristics of the utility line fronting 3507 Kitford Road. (R. p. 45, ¶ 3; p. 47, ¶ 3.) 3507 Kitford Road is the street address for the parcel identified as Lot A of TMS 283-

00-00-115 on the plat attached as Exhibit A to Simmons' original Affidavit. Seeney and Frank both describe the line as being clearly visible from Kitford Road and obvious to anybody inspecting the property. (R. p. 45, ¶ 3; p. 47, ¶ 3.) Seeney and Frank each assert that they believed BEC had an easement for the line. (R. p. 46 ¶ 5; p. 48, ¶ 5.) Neither Seeney nor Frank recall the line ever being moved and both assert they are certain that this utility line has been continuously operated on or above the Simmons property since they started working in the area in 1978-79—well in excess of 20 years. (R. pp. 45-46, ¶¶ 4-5; p. 47-48, ¶¶ 4-5.)

Based on these facts, BEC moved for summary judgment in May of 2009. In response to BEC's motion for summary judgment, Simmons submitted a plat prepared by Richard Lacy in 2005 showing lots A, B, and C of TMS 283-00-00-115. (R. p. 52.) This plat shows an easement extending across the northeast corner of Lot C, identified as "25' BERKELEY CO-OP ESMT (12.5' EACH SIDE)." (R. p. 52.) The plat also shows a power line running along Kitford Road between lots A and C and into the abandoned railroad right-of-way and extending northeast over the western portion of Lot A (i.e., parcel 498.) (R. p. 52.) In his original affidavit, Simmons claimed that his lawsuit was only about BEC's power line crossing the "westerly side" of parcel 498. (R. p. 49-50, ¶3 and p. 52.) Simmons now concedes that Brown's easement allows BEC's power lines to cross parcel 498. Appellant's Brief, p. 23.

On the eve of the hearing on BEC's motion, Simmons submitted another affidavit, claiming that "because this plat did not indicate all of the power lines

which were affecting my property, Mr. Lacy was asked to return to the site to determine the location of any other power lines." (R. pp. 118-119, ¶ 3.) The revised plat—attached to an affidavit submitted by Simmons' lawyer—now depicts BEC's Kitford Road line as continuing across the Seaboard Coastline Railroad right-of-way, into a strip marked as "75' BERKELEY CO-OP POWER EASEMENT," and connecting with a short spur extending in an easterly direction. (R. p. 130.) Simmons contends that this plat "shows another line running from the power distribution line where it crosses TMS 282-88-00-135 over my driveway out to Kitford Road." (R. p. 119, ¶ 4.) Neither this revised plat, nor the plat attached to Simmons' original affidavit, shows the location or boundaries of parcel 135. (R., p. 52; p.130.) It cannot be determined from the information provided on the revised plat whether the Kitford Road line extends over any portion of parcel 135.

In response to Simmons' supplemental affidavit and the revised plat, BEC produced an affidavit from its Right-of-Way agent, Robert Bradley. Bradley states in his sworn affidavit that BEC's line does not encroach on Simmons' property. (R. p. 154, ¶ 3.) The Kitford Road line extends through the railroad easement, over property owned by the Estate of Anderson (TMS -282-00-00-135) to a pole located within BEC's 75 foot wide easement. (R. p. 154, ¶ 3.) The line extends from BEC's easement eastward back onto Anderson's property. (R. pp. 154-155, ¶ 4; pp. 156-157; p. 130.)

Even if it is assumed, for the purposes of argument, that the Kitford Road line crosses some portion of parcel 135, there is no dispute that the line was open, obvious, and operated under a claim of right continuously and without interruption for a period in excess of 20 years. (R. pp. 45-46, ¶¶ 1-5; pp. 47-48, ¶¶ 1-5.) Simmons himself admits that "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." (R. p. 119, ¶ 4.)

ARGUMENT

Simmons' property was originally part of larger tracts of land owned by Heyward and Brown. These predecessors-in-title granted BEC the right to build its power lines across their property to bring power to the area. Over time, these larger tracts were subdivided into smaller and smaller parcels. As a result of this development, it was a matter of geography and geometry that some of the subdivided parcels would have BEC's power lines located on them while others would not. BEC's lines happened to be located on two parcels eventually acquired by Simmons. Those lines were of record, open and obvious, and in place long before Simmons acquired the property. To the extent Simmons insists on assigning blame for the power lines located on this property, he needs to look to predecessors-in-title or—more appropriately—to himself.

In granting summary judgment, the Master found that BEC's power lines were authorized under written easements and that Simmons had failed to establish that BEC had exceeded its authority under those express easements. (R. pp. 17-

18.) The Master further concluded that to the extent the express easements failed to authorize any particular lines or poles as presently located and configured on Simmons' property, the company had acquired a prescriptive easement for equipment. (R. p. 18.) Simmons attacks virtually every aspect of this ruling. In doing so, Simmons repeatedly substitutes baseless allegations for fact and pure conjecture for evidence. Hypotheticals and speculation fail to provide a basis for denying summary judgment. *See* Rule 56 SCRCP

The undisputed facts in this case are clear: Simmons admits that the 1956 Heyward easement authorizes BEC to operate its lines across parcel 498 and parcel 135. Appellant's Brief, p. 23. (R. p. 198, lines 6-15 and lines 22-25.) Simmons admits that it authorizes BEC to run its power lines across parcel 498. Appellant's Brief, p. 23. (R. p. 198, lines 6-15 and lines 22-25.) All that remains is Simmons' unsupported claim that the Kitford Road line extends over his driveway on parcel 135. Although they deny that BEC's lines encroach on parcel 135, BEC's employees state, under oath, that the Kitford Road line has been there continuously since at least 1978. (R. p. 46, ¶ 4; p. 48, ¶4.) Simmons likewise admits that BEC's line over his driveway has been there for years. (R. p. 119, ¶ 4.) Thus, even if we assume that BEC's line actually crosses parcel 135, the Master's ruling is still correct: BEC's use of parcel 498 and parcel 135 was authorized under the express easements and a prescriptive easement. There is nothing left to try in this case.

Simmons claims that he was unaware of the 1972 easement from Brown when he filed his complaint. (R. p. 200, lines 7-10.) He now stubbornly pursues his lawsuit by arguing that BEC somehow exceeded the scope of the written easements. Simmons' "proof" of this unpled cause of action consists of his argument that the lines "crisscross" his property "four times" along with an unsubstantiated claim that it would be "more reasonable" for BEC to run its lines in a different configuration. While BEC's written easements might be broad in scope, that does not mean that the terms are ambiguous. As set forth below, South Carolina law does not require that the location of an easement be specified by metes and bounds. The Master did not need to interpret the language of the grants or try to determine the intentions of the parties. There was no need to "balance the equities" as claimed by Simmons because BEC's use of his property was authorized by contract and by operation of law.

Simmons has identified several issues in his appeal. Those issues are somewhat duplicative and have been consolidated into the three main issues and related sub-issues discussed below.

I. THE MASTER'S GRANT OF SUMMARY JUDGMENT TO BEC WAS NOT CONTRARY TO THE ORDER OF REFERENCE.

In section I(A) of his brief, Simmons asserts that the Master erred in granting relief to BEC "that was never requested in compliance with the Rules of

Civil Procedure and contrary to the Order of Reference."[1] Simmons claims that he introduced the written easements from the estates of Heyward and Brown in his opposition to BEC's motion for the sole purpose of establishing "that there were disputed issues of fact surrounding them since Berkeley Electric had relied upon the express easements for a claim of right." Appellant's Brief, p. 20. Simmons explains that his attorney argued to the Master that "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." Appellant's Brief, p. 21. Therefore, according to Simmons, "the purpose for consideration of the express easements was to indicate that the record needed to be developed and not to argue the merits of summary judgment on express easements." Appellant's Brief, p. 21. Simmons somehow concludes from this that BEC was "attempting to limit the issues contrary to what the parties agreed to in the Order of Reference." Appellant's Brief, p. 21.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke,* 330 S.C. 71, 497 S.E. 731, 733 (1998). "It is the litigant's duty to bring to the trial court's attention any perceived error, and the failure to do so amounts to waiver of the alleged error." *South Carolina*

[1] In his Statement of Issues on Appeal, Simmons asserts in Issues 1 and 2 that the Master's ruling was contrary to the Order of Reference. However, Simmons argues the point only in Section I(A) of his brief relating to Issue 1.

Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903, 907 (2007). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the court with a platform for meaningful appellate review." *South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control,* 380 S.C. 349, 669 S.E.2d 899, 914 (Ct. App. 2008). A post-trial motion must be made when there are errors, inaccuracies, or inconsistencies in a trial court's final order. *See Grant v. South Carolina Coastal Council,* 319 S.C. 348, 461 S.E.2d 388, at 392 (1995); *see also* Jean H. Toal *et al., Appellate Practice in South Carolina, Second Edition* (2002), p. 60. However, a party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial. *See e.g., Patterson v. Reid,* 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995); *C.A.H. v. L.H.,* 315 S.C. 389, 434 S.E.2d 268 (1993); *Hickman v. Hickman,* 301 S.C. 455, 392 S.E.2d 481 (Ct. App.1990).

Simmons raises this issue for the first time on appeal. Simmons' counsel failed to object at the hearing on BEC's motion for summary judgment that the Master was acting contrary to the order of reference. Simmons further failed to raise the issue in his motion for reconsideration. Therefore, this issue has not been preserved for this appeal.

Even if the issue had been preserved, Simmons' arguments are without merit. The language of the Consent Order of Reference determines the Master's authority in this matter:

> 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 and/or express, across the lands of Plaintiff. Once the questions of easements have been resolved, the Plaintiff reserves the right to return to the jury trial roster for pursing the question of damages.

(R. p. 3-4.) The Order clearly gives the Master the authority to make findings of fact and conclusions of law regarding prescriptive and/or express easements across Simmons' land.

It is Simmons, not BEC, who is trying to limit the issues by claiming that the express easements may only be considered "to indicate that the record needed to be developed" in connection with his claim that BEC has exceeded the scope of those easements.[2] Appellant's Brief, p. 21. There is no rule of evidence in South Carolina that allows a party to unilaterally limit the evidence submitted to a certain issue. The Master had a duty to determine the undisputed facts from the admissible evidence submitted by the parties and then apply those facts to the issues before the court. *See* SCRCP Rule 56. The Master was fully authorized under the Order of Reference to consider the express easements (submitted by Simmons and by BEC) in making his ruling.

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[2] Simmons no longer disputes that the 1956 easement from the Estate of Heyward and the 1972 easement from Brown or authorize BEC to run its power lines across his property. *See* Appellant's Brief, p. 23. This claim is therefore moot.

II. THE MASTER DID NOT ERR IN RULING THAT BEC'S POWER LINES ARE AUTHORIZED BY EXPRESS EASEMENTS.

Simmons contends the Master erred in ruling that BEC's power lines were authorized by the written easements of his predecessors in title. As detailed below, Simmons' arguments are without merit and must be rejected.

A. The Master Properly Granted Summary Judgment on the Issue of Express Easements.

Simmons argues that the Master erred in granting summary judgment to BEC "on express easements that it did not request in its motion." Appellant's Brief, p. 20. Simmons contends that BEC sought summary judgment on the grounds of a prescriptive easement, so he did not have the requisite notice under Rule 56 SCRCP. Appellant's Brief, p. 20.

The Master made the following ruling at the close of the hearing:

> So I find both -- I find that there are express easements as to both power lines and water lines. To the extent that the expressed easements do not specifically state where they should be located I find the prescriptive easements exist but the power lines there overhead, they're visible to everybody....

(R. p. 221, line 24 - p. 222, line 3.) As previously stated, a post-trial motion must be made when there are errors, inaccuracies, or inconsistencies in a trial court's final order. *Grant v. South Carolina Coastal Council, supra,* 319 S.C. 348, 461 S.E.2d 388. Furthermore, as previously discussed, a party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial. *Patterson v. Reid, supra* 318 S.C. 183, 456 S.E.2d 436; *C.A.H. v. L.H., supra*, 315

S.C. 389, 434 S.E.2d 268; *Hickman v. Hickman, supra,* 301 S.C. 455, 392 S.E.2d 481. Simmons failed to raise an objection to the Master's ruling regarding express easements at the hearing. The issue was not raised in his motion to reconsider. This issue has not been preserved for appeal and, accordingly, the Court should affirm the Master's ruling on these grounds.

According to Simmons, BEC's use of his property somehow exceeds the scope of its express easements. In making this argument, Simmons necessarily concedes the existence of the express easements and that they apply to his property. Simmons acknowledges that the express easements covering his property provide a basis for BEC's claim of a prescriptive easement—i.e., that the power lines were constructed and maintained under a claim of right. Appellant's Brief, p. 20. However, Simmons claims that he introduced the express easements only "to establish that there were issues of disputed fact surrounding them" and argues that it is impermissible for the Master to consider the easements for any other purpose. Appellant's Brief, pp. 20-21. Simmons fails to offer any authority to support such a novel rule of evidence.

The Master found that BEC had express easements to use Simmons' property, and that Simmons had failed to make any showing that BEC had exceeded the authority granted under those easements. (R. p. 17-18.) Simmons cannot argue that BEC exceeded the scope of its written easements and then complain that he had no notice of the issue when the Master rules against him.

Simmons admits that the 1956 Heyward easement granting BEC a 75 foot easement across his properties is not at issue in this case. (R. p. 198, lines 22-25.) Appellant's Brief, p. 23. Simmons concedes "it is not disputed" that the 1972 easement from Brown allowed BEC to cross parcel 498. Appellant's Brief, p. 23. Given these concessions, Simmons' claim that he did not have notice of the issue he raised as a defense to BEC's motion, or that it was improper for the Master to rule on the issue, is sheer nonsense. The Master properly ruled on the issue of express easements.

B. The Master Properly Granted Summary Judgment on the Scope of the Express Easements.

In section I(A) of his brief, Simmons argues that the Master erred in granting summary judgment regarding BEC's express easements because he introduced those easements only to show that BEC has exceeded the scope of those easements. In section I(B), Simmons proceeds to argue that the Master erred in ruling that BEC had not exceeded the scope of the express easements because BEC had not requested such relief. Appellant's Brief, p. 21.

Simmons failed to raise this issue at the hearing on the motion for summary judgment or in his motion for reconsideration. Therefore, the issue has not been preserved for appeal. *See Grant v. South Carolina Coastal Council, supra,* 319 S.C. 348, 461 S.E.2d 388; *Patterson v. Reid, supra* 318 S.C. 183, 456 S.E.2d 436; *C.A.H. v. L.H., supra*, 315 S.C. 389, 434 S.E.2d 268; *Hickman v. Hickman, supra,* 301 S.C. 455, 392 S.E.2d 481.

This issue is without merit. The Master ruled that Simmons failed to establish that BEC's use of his property exceeded the authority granted under the written easements. (R. p. 18.) Simmons bears the burden of proof on his claim that BEC has exceeded the scope of its easements and he cannot rest on mere allegations or denials contained in his pleadings. *Boone v. Sunbelt Newspapers, Inc.,* 347 S.C. 571, at 578-79, 556 S.E.2d 732, at 736 (Ct. App. 2001). The non-moving party must come forward with specific facts showing there is a genuine issue for trial. *Id.*

Simmons conceded during the hearing that his complaint does not challenge the 75 foot wide easement granted to BEC by the Estate of Heyward in 1972. (R. p. 198, lines 22-25.) Nevertheless, Simmons insists that "the scope of the 1972 easement was in dispute" and that he was entitled to a separate hearing "to understand the full circumstances." Appellant's Brief, p. 22.

The 1972 Brown easement authorized BEC to enter his 4.7 acre tract to "construct operate, repair, maintain, relocate, and replace thereon . . . an electric transmission or distribution line or system" thereon. (R. p. 132.) The language of an easement determines its extent. *Binkley v. Rabon Creek Watershed Conservation District of Fountain Inn,* 348 S.C. 58, 558 S.E.2d 902, 906-907 (Ct. App. 2001). Clear and unambiguous language in grants of an easement must be construed according to terms which parties have used, taken, and understood in the plain, ordinary, and popular sense. *Id.* 907. Moreover, it is not essential to the

validity of a grant of an easement that it be described by metes and bounds or by figures giving definite dimensions. *Id.* 909.

Simmons incorrectly asserts that the Master "found as a matter of law that the 1972 easement was vague as to location." Appellant's Brief, p. 22. The Master ruled that the terms of the easements might be "broad in scope," not that they were "vague."[3] (R. p. 18.) As stated above, the lack of a precise description in the easement does not invalidate the grant. *Id.* 909. The Master concluded that BEC's use of Simmons' property under the express easements was "relatively limited, longstanding, and not unreasonable." (R. p. 18.)

BEC's power line runs along Kitford Road (which belongs to the general public) and extends northeast across the western portion of parcel 498. (R. p. 52.) The line, authorized under the terms of the 1972 Brown easement, crosses parcel 498 *once*. (R. p. 52.) Clearly, such a use is not unreasonable.

Simmons now concedes that the 1956 and 1972 easements authorized BEC to maintain its power lines across his property and therefore this issue appears to be moot. Appellant's Brief, p. 23. The Master properly considered the scope of

[3] Simmons complains loudly about a comment in Master's Order indicating that such express easements were typically broad in scope 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 to specifically locate the right-of-way. Appellant's brief, p. 22. (R. p. 6.) Simmons failed to object when BEC's counsel provided this information and the issue therefore has been waived. In any case, there is no dispute regarding the Master's conclusion that BEC's express easements are broad in scope. The comment was offered to provide some historical context and certainly was not essential to the Master's ruling.

BEC's express easements and his ruling that Simmons failed to establish that BEC exceeded the scope of the express easements should be affirmed.

C. Simmons Failed to Establish a Genuine Disputed Issue of Fact Regarding Whether BEC Exceeded the Scope of its Easements.

In section I(C) of his brief, Simmons argues that disputed issues of fact regarding the scope of BEC's express easements precluded summary judgment. Appellant's Brief, p. 23. Simmons contends that he introduced "extensive evidence" that BEC had exceeded the scope of the 1956 and 1972 written easements. Appellant's Brief, p. 23. Simmons apparently believes that showing BEC exceeded the scope of its express easements somehow forecloses BEC from claiming that its use was adverse or under a claim of right.

Creation of a prescriptive easement requires the following: (1) There must be [a] continued and uninterrupted use or enjoyment of the right for a period of 20 years; (2) the identity of the thing enjoyed must be proven; and (3) the use must have been adverse or under a claim of right." *Matthews v. Dennis,* 365 S.C. 245, 616 S.E.2d 437, 439 (Ct. App. 2005). A claim of right does not have to be based on a legal right or a valid grant. To establish a claim of right, BEC need only demonstrate a substantial belief that it had the right to use the parcel or road. *Id.* 440. A mistaken belief regarding ones' rights in or ownership of a property does not disprove a claim of right. *Id.* The key component is the prescriptive user's belief that he had a right to use the property. *Id. citing Hartley v. John Wesley United Methodist Church of Johns Island,* 355 S.C. 145, 584 S.E.2d 386, at 389.

(Ct. App. 2003). Thus, even if Simmons was able to establish that BEC exceeded the scope of its express easements, such a showing would have no impact whatsoever on BEC's claim of right under those easements.

1. Simmons Failed to Establish that BEC Exceeded the Scope of the 1956 Easement.

Simmons argues that BEC "did not submit any evidence concerning its claim for any easement" on parcel 135. Appellant's Brief, p. 23. He claims that BEC "did not address, whatsoever, Simmons' other claim to the encroachment across TMS-00-00-135 to the west" and contends that it is undisputed on the record that this "encroachment to the west of the 75' easement exceeds the scope of the 1956 easement and is not included in the scope of the 1972 easement." Appellant's Brief, p. 24. Simmons has the burden of proof regarding his claims of trespass and unjust enrichment and on his new claim that BEC exceeded the scope of its express easements. To carry his burden, Simmons must first make a showing that BEC's power lines actually encroach the two parcels at issue as alleged.

First of all, as mentioned above, Simmons conceded during the hearing that BEC's use of his property under the written easement granted in 1956 was not at issue in the case. (R. p. 198, lines 22-25.) Simmons therefore waived any claims arising out of or relating to BEC's use of parcel 135 under that express easement.

Second, Simmons has never established that BEC's power lines actually cross any portion of parcel 135 outside the 1956 easement. An adverse party may

not rest on the mere allegations or denials in its pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Rule 56(d) SCRCP. Simmons failed to produce admissible evidence setting forth specific facts showing that BEC's power lines actually encroaches on parcel 135. The "evidence" offered by Simmons consists of allegations and argument.

In his original affidavit, Simmons makes no claims regarding parcel 135 at all. Rather, he asserts, under oath, that his lawsuit is about that portion of BEC's line extending from Kitford Road across the western side of parcel 498. (R. pp. 49-50, ¶ 3.) Over a year later, in a supplemental affidavit, Simmons changes his testimony, claiming that he had his original plat revised "because it did not indicate all of the power lines affecting my property." (R. pp. 118-119, ¶ 3.) According to Simmons, the revised plat now "shows another line running from the power distribution line were it crosses TMS 282-00-00-135 over my driveway out to Kitford Road...." (R. p. 119, ¶ 4.) The court may disregard attempts to raise a disputed issue of fact by contradicting prior factual representations with subsequent affidavits. *Cothran v. Brown,* 357 S.C. 210, 592 S.E.2d 629, 633 (2004).

The revised plat—attached as an exhibit to an affidavit submitted by his attorney—is unsigned, unrecorded, unauthenticated, and lacks foundation. (R. p. 120, at Exhibit. D, p. 130.) Simmons failed to submit any affidavit or testimony from Lacy (the surveyor who supposedly prepared the plat) describing his

methods, procedures, and what the revised plat depicts, or explaining why certain key features (such as power lines) were initially left unmarked.

The revised plat simply does not show what Simmons claims it shows. The boundaries of parcel 135 do not appear anywhere on the revised plat. (R. p. 130.) Neither the original plat nor the revised plat makes *any reference whatsoever to parcel 135.* (R. p. 52; p. 130.) Simmons' allegations regarding what the plat supposedly shows are entirely unsupported. Simmons' naked claims do not qualify as fact and do not constitute admissible evidence that BEC's lines encroach on parcel 135.

Absent a showing that BEC's lines encroach on parcel 135, Simmons cannot establish that BEC's lines on that property exceeded the scope of the 1956 easement. By claiming that BEC failed to provide any evidence of an easement across parcel 135, Simmons essentially demands that BEC disprove what Simmons failed to prove.

According to Simmons, the 1956 easement was not at issue in this action. (R. p. 198, lines 22-25.) Simmons admits in his brief that the 1956 easement gave BEC the right to run its lines across parcel 135. Appellant's brief, p. 23. Based on these admissions, and because Simmons failed to establish that BEC's use of parcel 135 exceeded the scope of the 1956 easement, BEC had no reason and certainly no obligation to come forward with any evidence showing that its use of parcel 135 was authorized under the terms of that express easement.

Finally, Simmons' argument that BEC failed to submit *any* evidence regarding this issue is wrong. Simmons shares his driveway with his neighbors to the north—the Andersons—who use the road to access their adjacent property to the north of parcel 135. (R. p. 229 line 20-p. 230, line 4.) BEC submitted the affidavit of Robert Bradley, BEC's right-of-way agent, whose sworn statements and attached exhibits show the Anderson property (TMS 282-00-00-236) adjacent to the abandoned railroad right-of-way to the north of parcel 135 ending in a line extending southeast from Kitford Road. (R. p. 154; pp. 156-157.) Bradley states that "our line extends from a pole located within the 75' wide easement directly on to the property of Estate of W. M. Anderson." (R. p. 154, ¶ 4 and Exhibits A and B at p. 156 and p. 157.) Thus, BEC did submit evidence on the issue of whether its use of parcel 135 exceeded the scope of its 1956 written easement. The evidence submitted by BEC is that its power lines do not trespass on parcel 135 at all.[4]

2. Simmons Failed to Establish that BEC Exceeded the Scope of the 1972 Easement.

In Section I(C)(2) of his brief, Simmons claims that disputed issues of fact precluded summary judgment on whether BEC exceeded the scope of the 1972

[4] Of course, even if it were determined that Simmons' claims about parcel 135 raised a genuine issue of fact as to whether BEC use exceeded the scope of its express easements, the Master found that BEC's use was authorized under a prescriptive easement. BEC's alleged lack of authority to use Simmons' property under an express easement does not preclude the finding of a prescriptive easement for the use.

easement. In support of this claim, Simmons asserts that BEC installed power lines across parcel 498 and parcel 135 " to serve residents on both sides of Kitford Road from multiple locations." Appellant's Brief, p. 24. Simmons provided no evidence to support such a contention, and fails to explain how this bare allegation supports his claim that BEC has exceeded the scope of its express easements. Simmons repeats his argument that the 1972 Brown easement is "vague" and had to be "reasonably interpreted." Appellant's Brief, p. 24. As previously discussed, the extent of the 1972 easement can be determined from its language. *See Binkley v. Rabon Creek Watershed Conservation District of Fountain Inn, supra,* 348 S.C. 558 S.E.2d 906-907. The 1972 easement from Brown is clear and unambiguous in granting BEC the right to build a transmission or distribution line or system across the identified property. Mr. Brown—Simmons' predecessor-in-title—evidently had no problem with the scope of the easement. It is not essential to the validity of a grant of an easement that it be described by metes and bounds or by figures giving definite dimensions. *Id.* 909.

Simmons' argument that the 1972 easement is "vague" is not evidence and does not create a genuine issue of fact on his claim that BEC has exceeded the scope of that grant. Simmons' argument that BEC "used these easements to justify crossing Simmons' property in four separate locations" is immaterial and fails to support his contention that BEC exceeded the scope of the 1972 easement. Appellant's Brief, p. 25. Simmons misleads the court by aggregating the number of times BEC's power lines cross each of his properties under both of the

easements. The fact that Simmons saw fit to acquire different properties affected by the same easements does not support his claim that BEC's use exceeds the scope of those easements. Each easement and each property must be considered separately.

Simmons' claims regarding his surveyor's anticipated testimony (Appellant's Brief, p. 25) is pure conjecture, not fact, and is not admissible as evidence. As previously stated, Simmons failed to submit an affidavit or deposition testimony from this surveyor. Simmons' contention—raised years after he acquired the property and decades after the lines were constructed—that it is unreasonable for BEC's lines to "crisscross" his property, or that there might be a more reasonable route for the lines, is pure argument and fails to state specific facts showing that BEC's use exceeds the scope of the 1972 easement.

BEC established that its power lines along and extending from Kitford Road are open and obvious and have been in place for over 20 years. (R. pp. 45-46, ¶ 3-4; pp. 47-48, ¶3-4.) The express easements authorizing those lines were recorded and have long been a matter of public record. (R. pp. 92-93; 132-133.) The extent of an easement is determined by its language, and the language of the easements is clear and unambiguous. Express easements do not have to provide definite dimensions or describe their locations by metes and bounds. The Master was not obliged, as claimed by Simmons, to consider the "totality of the circumstances." Appellant's Brief, p. 25. The Master properly determined that BEC's use of Simmons' property was authorized under the terms of its express

easements and that Simmons had failed to establish that BEC exceeded the scope of those easements. The Court should affirm that ruling.

D. The Master Properly Considered the Bradley Affidavit.

Simmons objects to the affidavit of Robert Bradley submitted by BEC, claiming that it "was not properly before the court and should not have been considered." Appellant's Brief, p. 26, at section I(D). Simmons believes that the Master "may have relied" upon the affidavit. Appellant's Brief, p. 26. The Bradley affidavit is not mentioned in the Master's order granting summary judgment to BEC. (R. pp. 13-21.)

Simmons argues that the Bradley affidavit "should have been" part of BEC's original motion "since it relates to their defenses to the allegations of the Second Amended Complaint asserting trespass" on parcel 135. Appellant's Brief, p. 26. At the same time, Simmons asserts that the affidavit was "obviously . . . a last minute" response to the papers he served in opposition to BEC's motion. Appellants Brief, p. 26. Simmons' original affidavit in response to the motion for summary judgment made no reference to any encroachment on parcel 135 by BEC. (R. p. 49-59, ¶¶ 1-4.) The original plat attached to Simmons' initial affidavit opposing BEC's motion makes no reference to parcel 135 nor does it depict any power lines in the general area of that property. (R. p. 52.) BEC had Bradley prepare his affidavit to address comments made by Simmons in his supplemental affidavit regarding what was supposedly "shown" on the revised plat that had recently been submitted. The Bradley affidavit was served on Simmons'

counsel and provided to the Master during the hearing. (R. p. 195, lines 5-9; p. 244, lines 17-19.)

Simmons incorrectly argues that the Bradley affidavit was filed after the November 12, 2010 deadline set for dispositive motions in the scheduling order and, further, that only an adverse party to a summary judgment motion may serve reply. Appellant's Brief, p. 26. BEC's original notice of motion and motion for summary judgment was filed May 7, 2009. BEC's amended notice of motion and motion for summary judgment was filed November 12, 2010. (R. pp. 81-104.) BEC's notices and motions were therefore timely under the terms of the scheduling order.

Simmons claims that he timely served his supplemental affidavit, attorney's affidavit, and opposition on November 19, 2010. Appellant's Brief, p. 26. SCRCP Rule 56(c) provides that "the court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories, or further affidavits." Pursuant to Rule 6(d), "the moving party may serve reply affidavits at any time before the hearing commences." SCRCP Rule 6(d). BEC was the moving party on this motion. Therefore, BEC's submission of the Bradley affidavit at the hearing was proper.

Simmons further contends that Bradley was not listed as an expert witness in BEC's responses to his discovery and that his affidavit is an expert opinion. Appellant's Brief, p. 27. Simmons' interrogatory sought the names of experts who

will testify *at trial*. (R. pp. 84-85.) Bradley's affidavit was submitted in support of BEC's motion for summary judgment. There has been no trial in this case.

Furthermore, Bradley was listed as a witness in BEC's supplemental responses to Simmons' First Set of Interrogatories which were filed along with BEC's amended motion for summary judgment. (R. p. 85.) Bradley's statements in his affidavit are based on his own observations, perceptions, and personal knowledge. (R. 154, ¶¶ 1-4.) He does not offer an opinion in his affidavit. As a right of way agent for BEC, he certainly has in-depth knowledge and experience in locating easements, but that would go to the weight, not the admissibility of his affidavit.

As a final point, it should be noted that Simmons served his supplemental affidavit, his attorney's affidavit with exhibits, and his memorandum in opposition to BEC's motion by fax and by mail on the afternoon of November 19, 2010. That was the Friday preceding the hearing on Monday morning, November 22, 2010. Pursuant to Rule 6(d) SCRCP, "additional or opposing affidavits may be served not later than two days before the hearing." Rule 6(d) SCRCP. In calculating the amount of time required under the South Carolina Rules of Civil Procedure, "when the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation." Rule 6(a) SCRCP. The affidavits Simmons served on November 19th were therefore untimely. The Master was authorized under Rule 56(c) SCRCP and Rule 6(a) and (d) SCRCP to completely disregard these papers.

Based on the foregoing, the Court should reject Simmons' claims regarding the Bradley affidavit and affirm the Master's grant of summary judgment to BEC.

III. THE MASTER DID NOT ERR IN RULING THAT BEC'S POWER LINES ARE AUTHORIZED BY A PRESCRIPTIVE EASEMENT.

The Master's grant of summary judgment to BEC was framed in the alternative: He ruled that BEC's use of Simmons' property was authorized under express easements and that Simmons failed to establish that its use exceeded the scope of those easements. (R. p. 17-18.) The Master further ruled that even if BEC's express easements failed to authorize the power lines and poles as configured on Simmons' two parcels, BEC had acquired a prescriptive easement for its use of his property. (R. pp. 18-19.)

Simmons admits in his brief that

> It is not disputed that the 1956 Heyward easement allowed Berkeley Electric to erect a transmission line through TMS 282-00-00-135 and 283-00-00498; or that the 1972 Brown easement allowed Berkeley Electric to cross TMS 283-00-00-048.

Appellant's Brief, p. 23. Given that the Master's ruling was in the alternative, and given Simmons' concession that BEC's power lines across parcel 498 and parcel 135 were indeed authorized by express easements, there is no point in arguing over whether BEC's use of Simmons' property was authorized under a prescriptive easement. Simmons' appeal on this issue has been abandoned and the Court should therefore affirm the Master's ruling.

Nevertheless, Simmons' arguments that the Master erred in ruling that BEC had a prescriptive easement to use his property are without merit.

A. Simmons Failed to Raise a Genuine Issue of Material Fact Regarding BEC's Claim of a Prescriptive Easement.

Simmons' arguments fail to establish any genuinely disputed material facts concerning whether BEC's use of his property was authorized under a prescriptive easement.

1. The Absence of a Feature on a Plat Does not Mean that the Feature is Absent.

Simmons contends in section I(E) of his brief that the plats prepared by W. L. Gaillard and Robert Shuler of other properties in the area were not given proper consideration by the Master. Appellant's Brief, pp. 27-28. Simmons argues that the plats show that there were no power lines across parcel 498 when they were prepared. Appellant's Brief, p. 28. Simmons contends that it is reasonable to infer that the lines were not there when the plats were prepared. Appellant's Brief, p. 29. Therefore, Simmons concludes, the plats contradict the sworn statements of BEC's employees regarding the length of time its lines have been in place on parcel 498. Appellant's Brief, p. 28. Simmons accuses the Master of improperly weighing the evidence and that "the plats and the reasonable inferences drawn from them raise a question of fact which precludes summary judgment." Appellant's Brief, p. 29.

As previously stated, the Master granted summary judgment from the bench and explained the basis for his ruling at that time. (R. p. 220, line 22-p. 222

line 16.) Simmons failed to object to the Master's ruling on these grounds at hearing and first raised the issue in his motion for reconsideration. A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial. *Patterson v. Reid, supra* 318 S.C. 183, 456 S.E.2d 436; *C.A.H. v. L.H., supra*, 315 S.C. 389, 434 S.E.2d 268; *Hickman v. Hickman, supra,* 301 S.C. 455, 392 S.E.2d 481. Therefore, this issue has not been preserved for appeal.

For Simmons, the failure of a plat to reference a feature on a property constitutes evidence that the feature did not exist when the plat was prepared. As observed by the Master in his order granting summary judgment, the Gaillard and Shuler plats depict other properties, not Simmons' property, and they do not purport to portray all of the features on those properties, much less the features at issue on Simmons' property. (R. pp. 19-20.) The Master ruled that the plats did not, as contended by Simmons, conflict with the affidavits of Seeney and Frank regarding the length of time the lines had been in place over parcel 498. (R. pp. 19-20.)

The Gaillard plat was attached as Exhibit B to Simmons' initial affidavit. (R. p. 53.) In his original and supplemental affidavits, Simmons argues that the Gaillard plat shows the location of one of BEC's express easements crossing his property but that it does not show any other power lines. (R. p. 50; ¶ 3; p. 118, ¶ 2.) Simmons provides no comment regarding the Shuler plat; the drawing is merely identified in and attached to the affidavit submitted by Simmons' attorney. (R. p. 121, ¶ 8; p. 134.) Neither Simmons nor his attorney claim to have been

involved in the preparation of either of these plats and neither claim any personal knowledge, experience, or understanding regarding these renderings. Simmons failed to provide any affidavits or testimony from either Gaillard or Shuler, or from any other surveyor, so there is no foundation regarding how the plats were prepared, what the plats are meant to depict, and the significance of the features noted on each plat or—in this instance—not noted.[5]

Simmons cites no authority to support his claim that the absence of a feature on a plat means that the feature was absent. A plat shows as much or as little as its preparer—and his customer—wants it to depict. With a proper foundation, a plat might be offered into evidence for consideration of features shown, but they cannot be reasonably used as evidence of a feature not shown unless there is sufficient testimony that the surveyor considered the feature and did not include it because it was not there.

This can best be demonstrated by reference to the initial and revised plats produced in this case by Simmons. The plat submitted with his initial declaration shows the Kitford Road power line ending in the abandoned Seaboard Coastline Railroad right-of-way. (R. p. 52.) The "revised" plat submitted by Simmons

[5] Simmons asserts that 'there is no evidence in the record to provide any explanation of these plats which would enable the Court to disregard them. Appellant's Brief, p. 29. Simmons has the procedure backward. Simmons submitted the plats and is responsible for providing a proper foundation for the evidence. Simmons' bare argument of what he thinks the plats establish is not evidence. There is no foundational testimony or sworn affidavits which would enable the Court to consider the plats as admissible evidence that the line did not exist at the time the plats were prepared.

attorney shows the Kitford Road line extending beyond the railroad right-of-way and through BEC's 75' foot easement into unspecified territory. (R. p. 130.) According to Simmons' logic, the Court can infer that the Kitford Road line did not extend across the abandoned railroad right-of-way when the plat was originally prepared in 2005. Furthermore, using Simmons' logic, it could be inferred that the BEC easement as referenced on both plats evidently increased by fifty feet in width from the time of the original plat to the revised version. (R. p. 52; p. 130.) Likewise, one could infer that the water line and setbacks noted on "Lot C" in the revised plat apparently did not exist when the original plat was prepared. (R. p. 52; p. 130.) Such inferences are clearly unreasonable. As demonstrated by Simmons' own materials, the lack of a feature on a plat does not mean that it was not there.

Likewise, the inferences that Simmons draws from the Gaillard and Shuler plats are unreasonable. Simmons failed to provide any foundational testimony for his unsupported claims regarding supposedly "missing" features on the Gaillard and Shuler plats. Moreover, as noted by the Master in his Order, the plats are not of Simmons' property. (R. pp. 19-20.) Simmons' inferences are based on pure conjecture and have no basis in fact. It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine. *Thompkins v. Festival Centre Group*, 306 S.C. 193, 194, 410 S.E. 3d 593, 593-94 (Ct. App. 1991). The Master did not improperly *weigh* this evidence as claimed by Simmons.

Even when viewed in a light most favorable to Simmons, these plats alone do not constitute admissible evidence that BEC's lines were not located on Simmons' property when those plats were created.[6] The Master properly rejected Simmons' faulty logic and spurious inferences as baseless and unreasonable. The Court should do the same.

2. Simmons Failed to Provide any Evidence or Testimony to Support his Arguments Regarding the "System Maps."

Simmons contends that the "system maps" he submitted create a dispute of fact regarding BEC's contention that the line extending from Kitford Road over parcel 498 had not been moved for over thirty years. Appellant's Brief, p. 30. These maps were attached to Simmons' attorney's affidavit. (R. pp. 135-137.) Simmons argues that the power line shown on Exhibit H is "in a substantially different location" than the line shown in Exhibit I. Appellant's Brief, p. 30.

Simmons failed to object on these grounds when the Master granted BEC summary judgment at the hearing. (R. p. 220, line 22- p. 222, line 24.) A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial. *Patterson v. Reid, supra* 318 S.C. 183, 456 S.E.2d 436; *C.A.H. v. L.H., supra*, 315 S.C. 389, 434 S.E.2d 268; *Hickman v. Hickman, supra,* 301 S.C. 455, 392 S.E.2d 481. Therefore, the issue has not been preserved for appeal.

[6] The Shuler plat, attached to the affidavit of Simmons' attorney, was submitted late and may be disregarded by the Court. *See* Section II(D), *supra,* at.29-30.

Simmons again argues that the Master weighed this evidence instead of "recognizing that it created a dispute of fact. Appellant's Brief, p. 30. The Master made the following ruling on this issue:

> 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 might not have been there for at least twenty years remains that—just a theory.

(R. p. 20.) As indicated in the order granting summary judgment, the Master did not weigh this evidence. He ruled that the "system maps" were inadmissible as evidence because there was no testimony to establish how they were created, what they show, or how accurate the depiction. (R. p. 20.) Simmons' unsupported argument about what these alleged maps show is not fact, is not based on facts, and does not constitute evidence.

Simmons claims that he was entitled to rely on these drawings as 'maps' because he requested that BEC produce all maps showing the locations of the disputed power lines in discovery and "these documents were provided in response." Appellant's Brief, pp. 30-31. Simmons failed to present any evidence regarding the source of these maps to the Master.

Furthermore, it is Simmons' obligation to provide a factual basis for his arguments regarding what the maps supposedly depict. Simmons did not prepare the renderings and he provided no information which would allow him to reach his conclusions regarding any purported differences. Simmons' unsupported claims

regarding what these maps show are pure argument and are not based on any facts before the court.

Finally, Simmons' claim of a "significant discrepancy" between the maps is patently incorrect. (R. 135-137.) Exhibits H and I are different in terms of scale, level of detail, and perspective. With those differences in mind, a quick comparison of the exhibits reveals no "significant" difference in their schematic depictions of BEC's continuous and uninterrupted use of Simmons' property.[7] Simmons' bare claim that there is a significant discrepancy between the maps does not make it a fact, and he is not entitled to a trial simply because he claims it is so. A factual dispute is not raised simply because the opposing party makes inaccurate and unreasonable characterizations of the evidence. The issue must be genuine. *Thompkins v. Festival Centre Group, supra,* 306 S.C. 193, 194, 410 S.E. 3d 593-94.

As stated in the Order, the Master did not consider the maps submitted by Simmons because he failed to supply any kind of proper factual foundation for the documents. (R. p. 20.) Simmons failed to provide any factual basis for the inferences he wants drawn from the maps. The maps alone fail to support a reasonable inference that the line might have been moved as argued by Simmons.

[7] Minor changes in the location of the power line or poles on or across Simmons' property would not preclude a finding of a prescriptive easement as long as BEC's use remains continuous and uninterrupted for the requisite period.

The Master properly granted summary judgment, and the Court should affirm that ruling.[8]

3. BEC Submitted Evidence to Support its Claim of a Prescriptive Easement Across Parcel 135.

Simmons incorrectly contends that BEC introduced "no facts" supporting the existence of a prescriptive easement on parcel 135. Simmons failed to object on these grounds when the Master granted BEC summary judgment at the hearing. A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial. *Patterson v. Reid, supra* 318 S.C. 183, 456 S.E.2d 436; *C.A.H. v. L.H., supra*, 315 S.C. 389, 434 S.E.2d 268; *Hickman v. Hickman, supra,* 301 S.C. 455, 392 S.E.2d 481. Therefore, the issue has not been preserved for appeal.

As previously discussed, BEC disputes Simmons' unsupported allegation that its lines encroach on parcel 135. *See* section II(C)(1). Further, as previously discussed, the affidavits of Seeney and Frank establish BEC's continuous and uninterrupted use of the Kitford Road line under a claim of right for in excess of 20 years. (R. pp. 45-46, ¶¶ 3-5; pp. 47-48, ¶¶ 3-5.) The Kitford Road line is the line that Simmons contends crosses parcel 135 over his driveway. (R. p. 119, ¶ 4; and p. 130.) Simmons' own plat shows the Kitford road line extending northeast across parcel 498 and eastward across the abandoned railroad right of way through

[8] The "system maps," attached to the affidavit of Simmons' attorney, were submitted late and may be disregarded by the Court. *See* Section II(D), *supra,* at 29-30.

BEC's 75 foot easement. (R. p. 130.) Simmons even admits that "the line running over my driveway has been used by Berkeley Electric to my knowledge for years to service its customers on the south side of Kitford Road." (R. p. 119, ¶ 4.) Thus, to the extent that BEC's Kitford Road line actually crosses parcel 135, the facts establish that BEC enjoys a prescriptive easement for its use of that property. The Master properly granted summary judgment and the Court should affirm his ruling.

B. The Master did not Weigh the Evidence or Ignored the Existence of Material Disputed Facts.

In section I(F) of his brief, Simmons repeats his earlier arguments that the Master improperly weighed the evidence and ignored material facts in dispute. Appellant's Brief, p. 32. BEC addressed these issues in the preceding sections of this brief and will not waste the Court's time rehashing Simmons' baseless arguments.

The only "new" issue raised by Simmons in this section is his argument regarding statements made by BEC employees concerning "birthmarks" on the power poles supporting the lines on or across Simmons' property. (R. pp. 45-46, ¶ 4; pp. 47-48, ¶ 4.) Simmons argues that the dates on the poles could mean that those poles were placed there to "service customers in the immediate area and not necessarily provide a route across TMS 282-00-00-498 as alleged by Berkeley Electric employees." Appellant's Brief, p. 33. Simmons failed to object on this ground when the Master granted BEC summary judgment at the hearing and the

issue has not been preserved. *Patterson v. Reid, supra* 318 S.C. 183, 456 S.E.2d 436.

Simmons' bare argument regarding what the birthmarks *could* mean is pure speculation and not a substitute for the specific facts necessary to defeat summary judgment. Rule 56(c) SCRCP. The sworn statements by Seeney and Frank regarding the birthmarks on the poles and what those markings mean were not contradicted by the Gaillard or Shuler plats, or by the "system maps" as argued by Simmons. The failure of those plats and maps as evidence supporting Simmons' claims has already been discussed in detail. *See* section III(A)(1) and (2), *supra.* Simmons' unsupported inferences were not reasonable and were insufficient to defeat summary judgment.

Essentially, Simmons argues that a jury might not believe the statements of Seeney and Frank. One may not avoid summary judgment by asserting that a jury might disbelieve uncontradicted evidence. *Hoard v. Roper Hospital, Inc.,* 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010). The party opposing summary judgment must do more than show that there is some metaphysical doubt as to the material facts, but must come forward with specific facts showing that there is a genuine issue for trial. *Hedgepath v. American Tel. & Tel. Co.,* 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct.App.2001)

The Master did not improperly weigh this evidence. There were no genuine issues of material fact in dispute on this point. The inferences that Simmons wants drawn in his favor were not based on facts in the record and are unreasonable.

The Master properly granted summary judgment to BEC and the Court should affirm that ruling.

C. BEC Established a Prescriptive Easement for its Use of Simmons' Property.

In Section I(G) of his brief, Simmons argues that BEC failed to establish a prescriptive easement for its use of Simmons' property by clear and convincing evidence. Appellant's Brief, p. 34. Simmons circular proof on this point is the same "evidence" discussed at length above which the Master purportedly disregarded, ignored, improperly weighed, etc.

Simmons made no objection on this ground when the Master granted BEC summary judgment at the hearing. Further, he failed to raise this argument in his motion for consideration. Therefore, this issue has not been preserved for appeal. *See Grant v. South Carolina Coastal Council, supra,* 319 S.C. 348, 461 S.E.2d 388; *Patterson v. Reid, supra* 318 S.C. 183, 456 S.E.2d 436.

Addressing the merits of this issue, Simmons cites *Davis v. Monteith,* 289 S.C. 176, 345 S.E.2d 724 (1986) as authority for his proposition that a prescriptive easement must be established by clear and convincing evidence. The *Davis* case involved adverse possession. Acquiring land by adverse possession is not the same as acquiring a right to use property through a prescriptive easement and the requirements are not the same. As stated previously, BEC must show that it ran its power lines over Simmons' property under a claim of right continuously and

uninterruptedly for a period of 20 years. *See Matthews v. Dennis, supra*, 616 S.E.2d 437at 439.[9]

The Master properly granted summary judgment to BEC on the issue of prescriptive easement. The uncontradicted affidavits of Seeney and Frank establish that BEC has continuously and uninterruptedly operated and maintained the Kitford Road line over and across Simmons' property since at least 1978—30 years before Simmons filed his complaint. (R. pp. 45-46, ¶ 4; Frank Affidavit, ¶ 4. The power lines and poles are open and obvious. (R. p. 45, ¶ 3; p. 47, ¶ 3.) Both of these District Supervisors believed that BEC had an easement to operate and maintain the line on Simmons' property. (R. p. 46 ¶ 5; p. 48, ¶ 5.) Thus, BEC showed continuous and uninterrupted use of the Kitford Road line (which extends over parcel 498 and, according to Simmons, over his driveway on parcel 135) for 20 years under a claim of right.

Simmons had an obligation to come forward with specific facts in order to defeat summary judgment. Rule 56 SCRCP. Simmons' arguments and allegations regarding the plats and "system maps" attached to his attorney's affidavit lack proper foundation and are not fact. Simmons' own statement that the line over his driveway "has been used by Berkeley Electric to my knowledge for many years to service customers on the south side of Kitford road" supports BEC's claim of a prescriptive easement for that line. (R. p. 119, ¶ 4.)

[9] BEC was unable to locate any cases in South Carolina stating that a prescriptive easement must be established by clear and convincing evidence.

Accordingly, the Master properly granted summary judgment that BEC had a prescriptive easement to use Simmons' property and the Court should affirm that ruling.

CONCLUSION

Based on the foregoing, BEC respectfully requests that the Court affirm the Master's ruling granting summary judgment to BEC.

Simmons failed to properly raise and obtain a ruling on the alleged errors made by the Master in making its ruling in favor of BEC. Therefore those issues, as set forth above, have not been preserved for appeal.

Simmons admits in his brief that the 1956 Heyward easement authorized BEC to erect a transmission line through parcel 498 and parcel 135. Simmons further admits in his brief that the 1972 Brown easement allowed BEC to run an electric transmission or distribution line or system across parcel 498. Given these admissions, there is no basis for Simmons' appeal of the Master's ruling that BEC's use was authorized under its express easements.

In opposing BEC's motion for summary judgment, Simmons argued that BEC's use of his property exceeded the scope of the express easements. Simmons bears the burden of proof on this issue and the Master properly found that he failed to produce any evidence that BEC exceeded the scope of its express easements.

The remaining issue is whether the Master properly determined that BEC has an express or prescriptive easement for that portion of its line extending from Kitford Road across the abandoned railroad right-off-way and, according to

Simmons, over his driveway on parcel 135. Simmons failed to present any evidence that this particular portion of his driveway is actually located on parcel 135; instead, he relies on a "revised" plat which, he contends, shows the line crossing his driveway on parcel 135. In fact, the plat makes no reference whatsoever to parcel 135.

BEC's employees provided sworn statements that the line extending from and along Kitford Road line has been in operation for at least 30 years. Simmons admits that the line crossing his driveway and extending out along Kitford Road has been there for years. The Master's Ruling—that to the extent BEC did not have an express easement for this line, the company's use was authorized under a prescriptive easement—was proper and should be affirmed.

Alternatively, pursuant to Rule 220(c), SCACR, BEC asks that the Court affirm the trial court's ruling on any other ground appearing on the record.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Mikell Scarborough, Master-In-Equity

Case No.: 2008-CP-10-1983

Roosevelt Simmons.....Appellant

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211 (b), SCACR.

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Moncks Corner, South Carolina
April 20th, 2012

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PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Respondent Berkeley Electric Cooperative, Inc., with regard to the above cited matter on all parties by depositing a copy of said Final Brief of Respondent in the United States Mail, postage prepaid, on April 25, 2012 addressed to the attorney for the Appellant, Edward A. Bertele, 1812 Pierce Street, Charleston, SC 29492 and to the attorney for St. John's Water Company, Inc., Gaines Smith, 720 St. Andrews Boulevard, Charleston, South Carolina, 29407.

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April 25, 2012

The Honorable Jeanette Barber
Clerk of Court SC Court of Appeals
Post Office Box 11629
Columbia, SC 29201

RE: Simmons v. Berkeley Electric Cooperative, Inc., et al.
Case Tracking No.: 192409

Dear Ms. Barber:

Enclosed with regard to the above cited matter are 14 bound copies of the Brief of Respondent Berkeley Electric Cooperative, Inc., along with one unbound copy and an original and one copy of a Certificate of Service. I have also enclosed an additional bound copy of the Brief to be filed and returned to our office.

Please return a filed copy of the Brief and Certificate of Service to me in the self-addressed stamped envelope provided.

By copy of this letter I am serving counsel for the Appellant, and counsel for St. John's Water Company, Inc., with a copy of the Brief of Respondent.

Thank you for your assistance. Please do not hesitate to contact me should you have any questions.

With kindest regards, I remain

Sincerely,

WILLIAMS AND HULST, LLC

John B. Williams

JBW:shs
Enclosures as stated
cc: Edward A. Bertele, Esq.
Gaines Smith, Esq.
(via U.S. mail w/ enclosures)