

RECEIVED

In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Case No. 2008 - CP -10 - 1983
Hon. Mikell Scarborough, Master in Equity

NOV 17 2016

S.C. SUPREME COURT

Roosevelt Simmons.....Petitioner

Vs.

Berkeley Electric Cooperative, Inc.
and
St. John’s Water Company, Inc.....Respondents

PETITION FOR REHEARING

Petitioner respectfully requests Rehearing of the Court’s Opinion and Decision of November 2, 2016 which affirmed the decision of the Master in Equity granting summary judgment as to Berkeley Electric Cooperative, Inc (Berkeley Electric). Petitioner believes that the Court did not consider all of the facts in the Record and did not apply the correct standards of review as set forth in its Opinion and Decision.

QUESTIONS PRESENTED FOR REHEARING

1. Did the Court misapply the law in affirming a prescriptive easement on Tract 135 in spite of a lack of specificity as to its location and failure to establish the “identity of the thing enjoyed” by clear and convincing evidence?

2. Did the Court overlook the facts and reasonable inferences in the Petitioner's Affidavits in holding that Petitioner did not state the basis for his personal knowledge to rebut Berkeley Electric employees' statements supporting a prescriptive easement?
3. Did the Court err by failing to address the negative inferences from the adjacent property surveys and the Berkeley Electric system maps that would establish a scintilla of evidence?

BASIS FOR THE PETITION FOR REHEARING

The Court's Opinion and Decision

The Court held that its scope of review was limited to "the correction of errors of law, and we will not disturb the master's factual findings that have some evidentiary support", Slip Op. at page 10-11, citing Townsend Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 87, 221 S.E. 2d 773,776 (1976). The Court relied upon the affidavits of Berkeley Electric employees Seeney and Frank as did the Court of Appeals in finding that Berkeley Electric had presented evidence to establish the necessary elements of a prescriptive easement. Slip Op. at 10-11. The Court found that Petitioner had not established a genuine issue of disputed fact through the Galliard and Shuler surveys or the Berkeley Electric system maps. Slip Op. at 11-12. The Court agreed with Petitioner that his Affidavit did state that it was based upon personal knowledge but found that the Affidavit was not sufficient to create a genuine issue of fact because Petitioner "did not state how he personally was aware of the power line's location over the years." Slip Op. at page 12.

Facts in the Record not considered

Petitioner directs the Court's attention to the following facts in the Record which may not have been considered but are relevant to its Court's decision. In describing the locale, the Court found that Tract 135 abuts Kitford Road. Id. As shown on the Lacey 2005 and 2010

Plats, R. p. 52 & 130, Kitford Road ends at the abandoned railroad right of way and Tract 135 is situated on the other side of the right of way. The 2010 Lacey Plat indicates that the line travels beyond Kitford Road into Tract 135 and turns to the north. R. p. 130. The Court also found that the 1972 Brown easement granted Berkeley Electric the right to construct and maintain distribution lines over Tract 498. Id. However, the Brown easement, R. p. 132, does not specifically define the location of the easement since it applies to the larger 4.7 acre parcel from which Tract 498 would later be subdivided. These facts also pertain to the representations made by Berkeley Electric employees Seeney and Frank discussed below.

Berkeley Electric's Motion for Summary judgment was filed when Petitioner was pro se and relied upon the Seeney and Frank Affidavits. R. p. 1-2, 43-54. Petitioner's Affidavit in opposition was based upon personal knowledge and stated that he was the owner since 2003 but that the property has been in his family since the 1960's (twenty years before the alleged line was installed); and that the lines had not been there for the 20 years claimed by Berkeley Electric. R. p. 49, Para 2. Petitioner's Affidavit referred to the 2005 Lacey Plat as locating the distribution line across Tract 498 to which he was objecting. R. p. 49, Para.3 & 52.

When Berkeley Electric refiled its Motion for Summary Judgment, it relied upon the identical Seeney and Frank Affidavits. R. p. 101-104. In opposition, Petitioner submitted the revised HLA 2010 survey, R. page 130, and in a Supplemental Affidavit asserted that Berkeley Electric hadn't addressed Tract 135 and that the power line runs over his driveway and that he has also seen a cable TV line running over the same place in the past. R. p. 119, Para 4. He describes how the lines crisscross his property and interfere with his tree farming operations. Id. Para 5. In reply, Berkeley Electric submitted the Bradley Affidavit, which

only discusses the distribution line extending from the transmission line to the Andersen property and does not mention the age of any part of the line. R. p. 154-155.

ARGUMENT

I. THE COURT DID NOT CONSIDER ALL OF THE ELEMENTS OF A PRESCRIPTIVE EASEMENT

Petitioner has contended throughout this appeal that Berkeley Electric had failed to meet its burden of proof by clear and convincing evidence to establish the “identity of the thing enjoyed”, the second element for a prescriptive under Horry County v. Laychur, 315 SC 364, 367, 434 S. E. 2d 259 (1993). Petitioner’s Brief at page 26. Petitioner contends that Berkeley Electric failed to do so because the Seeney and Frank affidavits are not specific as to the location of the line to which they refer and thus cannot be used to satisfy this requirement. Therefore, the Seeney and Frank affidavits cannot establish a prescriptive easement for Berkeley Electric’s distribution line crossing TMS 498 or 135.

The Court did not specifically address this issue in holding that the Seeney and Frank affidavits satisfied the requirement for a prescriptive easement. Slip Op. at page 11. In Bundy v. Shirley, 412 S.C. 292, 772 S.E.2d 163, 170 (2015), this Court noted that “[a]lthough the elements of a prescriptive easement are well-established, the standard of proof as to these elements has given rise to confusion among the bench and bar.” Consequently, the Court held that the standard of proof was “clear and convincing”. There is apparently no reported case in this state which addresses how the “identity of the thing enjoyed” is proven by clear and convincing evidence. This case presents the Court with the opportunity to expand upon the Bundy holding to further explain how these elements are to be proven by clear and convincing evidence.

Petitioner contends that the Court should reconsider and address this issue and require the movant to specify the location, size and/or direction of the easement. If the movant is not required to provide some specificity, the fact finder has no basis to determine the scope and extent and therefore the “identity of the thing enjoyed”. This is particularly important in the case of a prescriptive easement where the “clear and convincing standard “is applicable. Unless the Court reconsiders, the facts contained in this Opinion will provide the standard for the “ identity of the thing enjoyed”. Movants will have no reason to specifically identify the areas within which they claim a prescriptive easement based upon this Court’s holding. Petitioner therefore urges this Court to reconsider the issue and hold that Movants for summary judgment must identify the thing enjoyed with specificity as to location, size, direction or other means of reference.

Petitioner further urges the Court to hold that the Seeney and Frank Affidavits are below this standard for establishing the “identity of the thing enjoyed” by clear and convincing evidence. Their statements that “the line at 3507 Kitford Road is clearly visible from the road . . . and has been used to provide power to residents in the area” do not have the required specificity. Their statements do not give the direction(s) in which the line runs; or say how long or how wide the area encumbered by the easement is; or say where it starts and stops. They do not mention TMS (tract) 498 or 135 on which they claim theses line run. They did not mention that the line ran to the Andersen property because that was to the north and east of the transmission line which they couldn’t see from Kitford Road because the area was wooded. Therefore, their statements are too vague to satisfy the “clear and convincing” standard.

The Seeney and Frank Affidavits do refer to poles on the property which show

“birthmarks of 1984 & 1986”. R. pp. 44, 46, Para. 4. Again there is no reference to what property they are referring and the exhibits to which they refer were not submitted to the Master in Equity and are not part of the Record on Appeal. When Petitioner pointed out in Affidavit in opposition to the Berkeley Electric summary judgment Motion that Berkeley Electric also crossed Tract 135 on both sides of the transmission line easement, R. p. 119, Para. 4, Berkeley Electric submitted the Bradley Affidavit. R. p. 154-155. However, Bradley’s Affidavit does not provide any basis to support a prescriptive easement across TMS 135 since Bradley only discusses the line from the transmission line to Andersen to the east but does not mention any lines running to the west of the transmission line or how long either of them has been in place. Id.

In its Brief, Respondent urged this Court to incorporate the details shown on the 2005 Lacey Plat into the Seeney and Frank affidavits. Respondent’s Brief at page 35. However, if Seeney and Frank wanted to incorporate the details of the 2005 Lacey Plat into their statements about the power line being in existence since the 1980s they could have done so since they provided it as part of their refiled Motion. R. p. 94. Since they did not, it is not reasonable to infer that these details can be made a part of their statements. When Petitioner submitted Berkeley Electric system maps from 1995 and 2010 that Berkeley Electric had produced in discovery, Berkeley Electric claimed below and before this Court that they could not be relied upon to show the configuration of its own system.

In summary, **Berkeley** Electric’s summary judgment motion relied entirely upon the Seeney and Frank Affidavits. Berkeley Electric did not present a single map, diagram or other documentary evidence of the location of the subject distribution line(s) which it says were in existence since the 1980s. In their Affidavits, Seeney and Frank did not explain

exactly where this distribution line was located. All they said was that it was visible from Kitford Road and had been in its present location since the 1980s. If the Seeney and Frank Affidavits were sufficient to establish a prescriptive easement across Tract 135, what was the purpose of the Bradley Affidavit? Petitioner contends that the only reasonable conclusion is that the Denney and Frank Affidavits were not intended by Berkeley Electric to apply to Tract 135.

Therefore, Petitioner respectfully urges this Court to reconsider its Opinion and Decision in order to address whether the Seeney and Frank Affidavits have met the standard of clear and convincing evidence to establish the identity of the thing enjoyed for a prescriptive easement.

**II. THE AFFIDAVIT ESTABLISHES THE BASIS FOR
PETITIONER'S PERSONAL KNOWLEDGE
AND SATISFIES R.56 (e), SCRCF**

Petitioner asserts that his Affidavit and Supplemental Affidavit contain sufficient information to establish the basis for his personal knowledge and created a disputed issue of material fact. The Court of Appeals held that Petitioner did not state in his Affidavit in opposition to Summary Judgment that the distribution lines were not there during the prescriptive time period based upon his own personal knowledge. Appendix to Petition for writ of Certiorari at page 9. This Court agreed with Petitioner that the Affidavit did state that it was based upon personal knowledge but found that the Affidavit was not sufficient to create a genuine issue of fact because Petitioner “did not state how he personally was aware of the power line’s location over the years.” Slip Op. at page 12. Petitioner contends that the

Affidavits established the basis for Petitioner's personal knowledge in accordance with R. 56(e), S.C.R.C.P.

R 56(e) S.C.R.C.P. requires that "opposing affidavits shall be made on personal knowledge, set forth such facts as would be admissible and shall show affirmatively that the affiant is competent to testify". Petitioner's Affidavit clearly meets all of these requirements. The Affidavit submitted in opposition to the original summary judgment motion in 2008 is based upon personal knowledge and states that he is the owner of Tracts 498 and 135 since 2003 but that the property has been in his family since the 1960's (twenty years before the alleged line was installed). R. p. 49, Para 2. The Supplemental Affidavit which is also based upon personal knowledge states that the power line runs over his driveway and that he has also seen a cable TV line running over the same place in the past. R. p. 119. Para 4. He describes how the lines crisscross his property and interfere with his tree farming operations. Id, Para 5. Therefore, the Affidavit demonstrates that Petitioner is competent to testify about his knowledge of the lines in question because the property has been in his family for many years before the events in question and it is where he lives and works. ¹

Petitioner urges the Court to reconsider its conclusion that Petitioner's Affidavit did not create a genuine issue of material fact because he did not explain how he had personal knowledge. This formulation of a standard for an Affidavit is not in accord with R. 56(e), S.C.R.C.P. and ignores the requirement that the evidence must be given all reasonable inferences in the light most favorable to the non-moving party. Fleming v. Rose, 350 S.C. 488,493, 567 S.E. 857,860(2002). Since Petitioner's Affidavit was sufficient under R. 56(e),

¹ In another part of its Opinion and Decision, the Court acknowledged that Petitioner claimed he lived in the area. Slip Op. at page 8.

the Court should consider it as a basis for finding a genuine issue of material fact as to the age of the lines in issue.

**THE COURT HAS NOT CONSIDERED ALL OF THE
REASONABLE INFERENCES IN APPLYING
THE MERE SCINTILLA RULE**

In addressing the existence of prescriptive easements, the Court held that its scope of review was limited to “the correction of errors of law, and we will not disturb the master’s factual findings that have some evidentiary support”, Slip Op. at page 10-11, citing Townsend Assocs., Ltd. v. City of Greenville, 266 S.C.81, 87, 221 S.E. 2d 773,776 (1976). However, the Townsend case was referring to the standard of review applicable to findings of fact by a court after a hearing. Id. Petitioner contends that the Court was misguided in its application of that standard of review in affirming the master’s determination that there were prescriptive easements. Slip Op. at page 11-12. Instead, the Court should have focused its analysis of the evidence in accordance with the standard under R 56, S.C.R.C.P. and view all the evidence and all reasonable inferences in the light most favorable to the non-moving party. Fleming v. Rose, 350 S.C. 488,493, 567 S.E. 857,860(2002). This obviously includes the evidence submitted both in support of and in opposition to the motion.

The Court found that the Galliard and Schuler Plats were of neighboring properties and did not create a disputed issue of fact. However, the 2005 Lacey Plat which indicates the location of the distribution line across TMS 498 also indicates that it terminates on the adjacent lot, the Frazier property. R. p. 52. The Galliard Plat was a survey of the Frazier property done in 1981. R. p. 53. It does not show any distribution line on TMS 119, only the transmission line easement. Therefore, the reasonable inference is that the distribution line was installed sometime between 1981 and 2005, creating an issue of fact. The Schuler Plat

was done for Berkeley Electric in 1983 on the same Frazier lot, TMS 119. R. p. 134. This Plat was intended to show the “Area under power line easement”. Id. It shows the 1956 transmission line easement but no other power line. The reasonable inference is that the distribution line was not there in 1983.

However, the Court rejected these reasonable inferences and found that the Plats do not purport to illustrate all of the power lines encumbering the area. Slip Op. at page 11. There is no basis in the Record to suggest that conclusion. The Galliard Plat shows the transmission line on TMS 119 which makes it reasonable to assume that it would show another power line if it were there. The Schuler Plat specifically states that it contains the area under power line easement and presumably covered all power line easements of which the distribution line would have been one. These Plats are each entitled to weight in the decision on summary judgment. They are relevant because they tend to prove the existence or non existence of the thing in question, i.e., whether the distribution line claimed to be in existence by Seeney and Frank in 1980 was there where it was found on the Lacey Plat done in 2005.

The Court has drawn inferences from these Plats based upon what it found to be missing information about what the Plats are intended to describe. However, the Court can do so only under certain circumstances: “[W]hen only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court.” Hart v. Doe, 261 S.C. 116,120 198 S.E.2d 526,528 (1973) . Petitioner contends that the inferences to be drawn from the Galliard and Schuler Plats are matters to be decided by the finder of fact, the Master in Equity. See Andersen v Augusta Chronicle, 355 S.C. 461, 475, 585 S.E.2d 506, 513 (Ct.App.2003) (credibility determinations and the drawing of legitimate inferences from the facts are jury functions). There may be

other inferences which can be drawn from them but this Court should not be deciding which ones to accept and which ones to reject because the Court is thereby weighing the evidence. There are no reported South Carolina cases which address when a negative inference may reasonably arise. Accordingly, Petitioner urges this Court to reconsider its Opinion and Decision and explain when negative inferences can and should be recognized.

In conclusion, the Court has taken away the fact finding responsibility from the Master in Equity by disregarding reasonable inferences arising from the Galliard and Schuler Plats . These reasonable inferences create more than a scintilla of evidence which justifies denial of summary judgment. "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In Taylor v. Atlantic Coast Line Ry., 78 S.C. 552, 556, 59 S. E. 641, 643 (1907), this Court said: "A scintilla of evidence is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror."

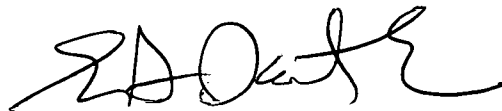
The application of the scintilla rule depends upon the facts and evidence of the specific case. See e.g. Turner v. Am. Motorists Ins. Co., 176 S.C. 260, 180 S.E. 55 (1935) . Here all of the evidence relied upon by Berkeley Electric is in the form of statements from its employees not a single map or document. Berkeley Electric objected to the use of its own systems maps and claimed that they could not be relied upon to show the configuration of its own system. However, it failed to address what Petitioner pointed out were inconsistencies in them. Again this Court adopted the Respondent's contention instead of allowing the discrepancies to be decided by the fact finder.

Finally, Petitioner's Affidavits were sufficient as a mere scintilla of evidence alone. In Zurich American Ins. Co. v. Tolbert, 387 S.C. 280, 692 S.E.2d 523 (2010), this Court affirmed the Court of Appeals reversal of summary judgment on an issue of coverage for a substitute vehicle. The Court held that the insured's affidavit only stating that the vehicle being driven was a "substitute vehicle" was a scintilla of evidence sufficient to deny the insurer's motion. 692 S.E. 2d at 525.

Accordingly, Petitioner respectfully urges the Court to reconsider its Opinion and Decision and as to the lack of a genuine issue of material fact based upon the adjacent property plats and system maps and the inference arising therefrom.

CONCLUSION

For the reasons set forth herein, Petition respectfully requests that this Court grant this Petition for Rehearing.



Edward A. Bertele, Esq.
SC Bar. No. 72521
1812 Pierce Street
Charleston, SC 29492
843-471-2082
Attorney for Petitioner
Roosevelt Simmons

November 16, 2016

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Hon. Mikell Scarborough, Master in Equity

Appellate Case. No. 2013-001477

RECEIVED

NOV 17 2016

S.C. SUPREME COURT

Roosevelt Simmons..... Petitioner

Vs.

Berkeley Electric Cooperative, Inc.

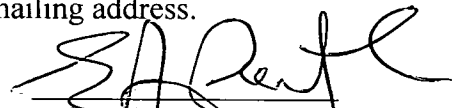
and

St. John's Water Company,

Inc..... Respondents

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the Petitioner's Petition for Rehearing of the Order and Decision of November 2, 2016 as to Berkeley Electric Cooperative, Inc. was served upon the Respondents' attorneys, John B. Williams, Esq. and Gaines Smith, Esq. by regular mail postage prepaid at their last known mailing address.


Edward A. Bertele, Esq.

November 16, 2016
Charleston, SC