THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

C.A. No.: 2014-CP-23-5816

Duke Energy Carolinas, LLC ..... Appellant,

v.

Caleb E. Walker and Christina T. Walker ..... Respondents.

INITIAL REPLY BRIEF OF APPELLANT

HAYNSWORTH SINKLER BOYD, P.A.

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As shown in their Respondent's Brief, Caleb and Christina Walker (the "Walkers") do not contest two key points: (1) that the Walkers constructed the fence, retaining wall, and patio (the "Encroachments") at issue in this appeal with knowledge that the Encroachments fell within a Duke Energy Carolinas, LLC ("Duke Energy") easement ("Easement") on their property; and (2) that Duke Energy had no knowledge, actual or constructive, of the Encroachments before they were constructed and completed. Instead, the Walkers argue that the trial court correctly applied the doctrine of laches in allowing the Encroachments to remain because Duke Energy had constructive notice of the Encroachments for some period less than eighteen (18) months prior to bringing suit.

The Walkers' argument, like the trial court's order, fails to address the undisputed fact that Duke Energy's claim was filed within the statute of limitations and fails to address all of the required elements of laches. In addition, the preponderance of the evidence does not support the Walkers' arguments. For all of these reasons, the trial court's order should be reversed, and the Walkers should be required to remove the Encroachments from the Easement.

I. The trial court failed to apply the proper standard in this case, which was filed within any applicable statute of limitations.

Both the trial court and the Walkers cite only to cases involving laches generally. In disregard of the maxim that "equity follows the law," neither makes any reference to the heightened requirements in actions filed within the statute of limitations. In such a case,

> it must further be made to appear that such delay was accompanied either by a failure to perform some legal duty, whereby prejudice has resulted to the person pleading such neglect, or that such delay was accompanied by some act on the part of the person so negligent, which operated to mislead the person pleading such neglect, to his prejudice to such an extent that it would be unjust and inequitable thereafter to permit such negligent party to enforce such right.

Brown v. Butler, 347 S.C. 259, 267, 554 S.E.2d 431, 435 n.19 (Ct. App. 2001) (emphasis added, quoting *Edwards v. Johnson,* 90 S.C. 90, 103-04, 72 S.E. 638, 644 (1911)). It was an error of law for the trial court not to apply this standard.

Moreover, the Walkers do not dispute that this action was filed within any applicable statute of limitations, nor do they point to any evidence that Duke Energy failed to perform some legal duty or that it misled them. There is no such evidence. The record is clear that Duke Energy asked the Walkers to remove the Encroachments as soon as it discovered them and that Duke Energy had no knowledge of the Walkers' plans prior to the completion of construction. As a result, there is no evidence supporting the application of the doctrine of laches in this case. Thus, the trial court's order fails on the law and is not supported by the evidence and must be reversed.

II. The Walkers have limited their argument to perceived delay in filing on the part of Duke Energy and have not addressed prejudice or any knowing relinquishment of rights on the part of Duke Energy.

The Walkers and the trial court define laches as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." (Order at 4, R. at ____; Respondents' Brief at Argument I(b)(1)). This statement, however, is incomplete because "delay alone in assertion of a right does not constitute laches." *Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002). The South Carolina Supreme Court has provided the following list of elements for laches: "(1) delay, (2) unreasonable delay, (3) prejudice." *Hallums v. Hallums*, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988). These standards have been reaffirmed by this Court recently in *Bell Hall Plantation Homeoner's Assoc, Inc. v. Murray*, Op. No. 5467 (S.C. Ct. App. February 8, 2017) (Shearouse Adv. Sh. No.6 at 49).

Although the Walkers acknowledge in Section I(a) of their Argument that "[l]aches is an affirmative defense which must be raised in the pleadings," they ignore an equally fundamental and well settled concept that a defendant asserting an affirmative defense has the burden of proving each element of that defense at trial. *See Emery v. Smith*, 361 S.C. 207, 216, 603 S.E.2d 598, 602 (Ct. App. 2004) (referencing laches as affirmative defense listed in Rule 8(c), SCRCP, and holding "[t]he burden of proof is on the party asserting laches"). The Walkers have not met that burden.

A. There was no prejudice to the Walkers.

The trial court referenced prejudice in its order, but makes no factual findings on that point. (Order at 4-5, R. at ____). For laches to apply, any alleged unreasonable delay must cause the other party "to incur expenses or enter into obligations or otherwise detrimentally change his position[.]" *Chambers of S.C., Inc. v. Cty. Council for Lee Cty.*, 315 S.C. 418, 421, 434 S.E.2d 279, 280–81 (1993).

South Carolina courts have made it clear that to support a finding of laches, the requisite prejudice must be caused by the unreasonable delay. *Id.*; *Rabon v. Mali,* 289 S.C. 37, 344 S.E.2d 608 (1986); *Mack v. Edens,* 306 S.C. 433, 412 S.E.2d 431 (Ct. App.1991). There can be no laches under the following circumstances:

> On the other hand, **one who openly defies known rights, in the absence of anything to mislead him or to indicate assent or abandonment of intent to oppose on the part of others, is not in a position to urge as a bar failure to take the most instant conceivable resort to the courts**. After the right has been invaded under circumstances which would not defeat a plaintiff in seeking relief, and no substantial harm is shown to have accrued to the wrongdoer from delay, there is not the same imminent necessity for early enforcement of demands as exists before conditions have become fixed. Mere lapse of time, although an important, is not necessarily a decisive, consideration.

Archambault v. Sprouse, 215 S.C. 336, 341, 55 S.E.2d 70, 72 (1949) (emphasis added, citations omitted). This is exactly what happened in this case as admitted by the Walkers.

It is this distinction that separates this case from *Arceneaux v. Arrington*, 284 S.C. 500, 503, 327 S.E.2d 357, 359 (Ct. App. 1985). There, "[T]he Plaintiffs waited over two years after they knew or should have known the restrictive covenants were being violated to assert their rights. They suffered Arrington to incur the expense of erecting the metal building without protest. It would be unjust to permit them now to enforce their claimed rights against him." Here, there is no allegation that Duke Energy had constructive knowledge of the Encroachments before they were constructed. The rule in *Arceneaux* was designed to prevent prejudice, not to allow a party to willfully violate another's rights. Equity will not protect a party from its own wrongdoing. *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994) ("He who seeks equity must do equity.").

The Walkers do not respond to Duke Energy's argument on this point. This is because there was no prejudice—the Walkers had already knowingly built the Encroachments in the Easement as of the time they claim Duke Energy should have had constructive knowledge. As admitted by the Walkers in Section I(b)(1) of their Argument, "Duke Energy did not have advance notice that the Walkers were going to build the [Encroachments]." As a result, there was no expenditure of funds or change in position by the Walkers based on anything Duke Energy did or did not do. Therefore, laches cannot apply.

B. There was no unreasonable delay on the part of Duke Energy.

As an initial matter, this Court has equitable review of this appeal and may take its own view of the preponderance of the evidence. *Townes Assocs. Ltd. v. Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). As shown below, the preponderance of the evidence does not support a finding of unreasonable delay by Duke Energy.

1. The testimony does not show that Duke Energy had constructive notice of the Encroachments.

As far as the timeline, the Walkers did not seek a permit for construction until March 2013. (Pl. Ex. 2, R. at ____). There is no evidence that the work began prior to that time as suggested by the Walkers' Brief in the Statement of Facts. Duke Energy first told the Walkers to remove the Encroachments in January 2014, less than a year later. (Tr. at 24-25, R. at ____). Duke Energy then attempted to negotiate with the Walkers to no avail and brought this action in October 2014.

With respect to the flyover testimony, it is quoted in full below:

Q Do you remember ever making a comment to him that we do flyovers and we would have caught this?

A Sure.

Q You said that?

A I said that we do flyovers.

Q Okay.

A I didn't say that we would have caught it. I may have said something along those effects. I just don't remember word for word.

Q Well, I mean, did you tell him that we do flyovers, and during those flyovers, we catch these ---

A We look for encroachments, looking for several things.

Q Okay. And are you in charge of the flyovers during this period of time?

A I'm not in charge of the flyovers, no. I get the reports.

Q Do you know if there were any flyovers that were done during this period of time?

A Not when I was out there. They fly periodically, so . . .

Q Okay. But what I'm saying is, at some point in time, this work was done, and then you came out to be able to look at the property. I think it was on 1/27/2014.

A That's correct.

Q So during the period of time when it was done to when it was built to the time you came out, are you aware of any flyovers during that period of time?

A There was flyovers before that. I don't know if they took place before or after construction. I can't verify that.

Q Okay. Well, then tell me, did any of this -- in any of those flyovers, was it ever drawn to your attention that there was an encroachment?

A The first of my knowledge was when he called me.

Q Okay. So if a flyover was done, then nobody reported any type of encroachment, because you would be the one that would get that information.

A I would get that information.

Q Okay. So you hadn't received that?

A There are times where that, you know, depending on where the helicopter flies, the skew, the angle, they may not see something. That's why they fly it multiple times periodically to catch things they may not have seen. Because one flight doesn't do you justice along a transmission line when you're flying at speed.

(Cross Examination of Steven Pryor, Tr. at 56-57, R. at ____)

Q Mr. Ariail asked you about flyovers. Your first knowledge, I believe you testified in your testimony, of these encroachments was at the end of January 2013; is that what you testified to?

A That is correct.

Q And you sent your letter a few days later in early February. Do you know when the pool was built?

A I don't recall the date.

Q We'll ask Mr. Walker those questions.

A Yeah.

Q Do you know what specific flyovers occurred between the time this was built and when you met with Mr. Walker?

A We have our spring and our fall flights. Mid-spring, like May, April.

(Redirect of Steven Pryor, Tr. at 67, R. at ____).

Q. Now, the flyovers, if I'm understanding, May, April is when one of the flyovers is done?

A The time frame fluctuates a little bit. It's generally spring and fall. Then they plan out those dates. As we get closer to the flights, they plan them out, so I don't have the exact date.

Q Right. And I'm going to make sure I'm correct on the dates. But you went out there on January 27th or 29th of 2014?

A Right.

Q Okay. So if the work was done, let's say, the year before, January, February of 2013, then there would have been two flyovers, correct?

A That's a possibility.

Q Possibility.

A Yeah.

Q Okay. When you say "possibility," is it not – I mean, it's not a definite that flyovers were done on these lines?

A No. There are flyovers done, but I need to know that they flew that line. I can't sit here and tell you that they flew that line on a specific date or when. What I'm questioning in my head is I don't know when the pool was built, so I can't tell you if two flyovers or three flyovers or one or none. I don't know.

(Recross of Steven Pryor, Tr. at 70-71, R. at ____).

Q Do you have any knowledge of Duke Energy's internal policies and procedures related to helicopter flyovers or inspection of rights-of-way?

A No, sir.

Q Do you have any knowledge of the timing of those?

A Other than what Mr. Pryor has testified to, no, sir.

Q But as to your personal knowledge, you don't have any?

A No, sir.

(Cross of Caleb Walker, Tr. at 199, R. at ____).

A review of this testimony shows that there *may* have been one or more flyovers (or no flyovers) during the period between the construction of the Encroachments after March 2013 and Duke Energy's meeting with the Walkers in January 2014. The testimony further shows that flyovers do not catch everything that may encroach on a right of way. Lastly, the testimony shows that even if there was a flyover, there was no encroachment reported on the Walkers' property. In any event, regardless of whether there was a flyover, there was no unreasonable

delay given the fact that the Walkers had already completed the construction of the Encroachments and Duke Energy told them to remove them within a few months.

2. The Easement itself provides that there was no knowing relinquishment of any right on the part of Duke Energy.

In addition and as previously argued, laches is akin to waiver and requires a knowing abandonment of a right. *Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470-71 (2007) Here, the Easement provides, "[i]t is understood and agreed that the failure of neglect of the grantee, its successors or assigns, at any time to exercise any of the rights herein granted shall not be construed as a waiver or abandonment of the right at any time thereafter to exercise any or all of such rights and privileges." (Pl. Ex. 1, R. at ____). Thus, the Easement expressly prevents the application of laches in this case. The Walkers do not address the "savings clause" in their Brief. Beyond the language of the Easement, there is no evidence Duke Energy intended to relinquish its rights in the Easement as shown by the immediate demand for the removal of the Encroachments. (Tr. at 24-25, R. at ____).

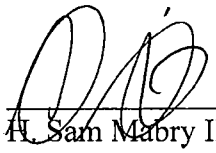
As a result, the trial court erred in finding unreasonable delay on the part of Duke Energy.

CONCLUSION

Duke Energy bought rights under the Easement. It is entitled to enforce those rights. It is irrelevant whether the Encroachments are large or small or whether Duke Energy needs every inch of its Easement at all times. There are no circumstances present here that would support a finding of laches as a defense to those rights. For these reasons and those presented in its Appellant's Brief, Duke Energy asks that the trial court's ruling be reversed and that the Walkers be directed to immediately remove the Encroachments from within its Easement.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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February 16, 2017
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PROOF OF SERVICE

This is to certify that I caused a copy of the foregoing *Initial Reply Brief of Appellant Duke Energy Carolinas, LLC* to be served on the following individual on this the 16th day of February, 2017, by depositing a copy of the same in the United States mail, first class, postage prepaid and addressed as follows:

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February 16, 2017

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Re: ***Duke Energy Carolinas, LLC v. Caleb E. Walker and Christina T. Walker***
Appellate Case No. 2016-002062

Dear Ms. Kitchings:

Enclosed herewith for filing is an original and one (1) copy of the *Initial Reply Brief of Appellant Duke Energy Carolinas, LLC* in the above-referenced case together with a Proof of Service. Please file the originals and return clocked copies to me in the enclosed self-addressed stamped envelope.

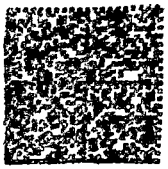
Sincerely yours,

HAYNSWORTH SINKLER BOYD, P.A.

Sarah P. Spruill

SPS/jmb
Enclosures

cc: R. Mills Ariail, Jr., Esquire



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