



The Supreme Court of South Carolina

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April 4, 2017

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Roosevelt Simmons v. Berkeley Electric
Lower Court Case No. 2008CP1001983
Appellate Case No. 2013-001477

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: John B. Williams, Esquire
Edward A. Bertele, Esquire
Gaines W. Smith, Esquire
J. Jay Hulst, Esquire
Jeffrey C Moore, Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Roosevelt Simmons, Petitioner,

v.

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

Appellate Case No. 2013-001477

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 27674
Heard October 20, 2015 – Filed November 2, 2016

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Edward A. Bertele, of Charleston, for Petitioner.

John B. Williams and J. Jay Hulst, both of Williams &
Hulst, L.L.C., of Moncks Corner; Gaines W. Smith and
Jeffrey C. Moore, both of Legare, Hare & Smith, of
Charleston, all for Respondents.

ACTING CHIEF JUSTICE BEATTY: In this property dispute
concerning utility easements, we granted Roosevelt Simmons' petition for a writ of

certiorari to review the Court of Appeals' decision in *Simmons v. Berkeley Electric Cooperative*, 404 S.C. 172, 744 S.E.2d 580 (Ct. App. 2013). Simmons asserts the Court of Appeals erred in affirming the master-in-equity's grant of summary judgment in favor of St. John's Water Company, Inc. ("St. John's Water") on the basis that it had established a prescriptive easement. Simmons further asserts the Court of Appeals erred in affirming the master's grant of summary judgment in favor of Berkeley Electric Cooperative, Inc. ("Berkeley Electric") on the grounds that it had been granted an express easement and that it had established a prescriptive easement to maintain the power lines in their current configuration. We affirm in part, reverse in part, and remand.

I. Factual/Procedural History

In 2003, Simmons acquired title to two parcels of land, TMS # 283-00-00-498 ("Tract 498") and TMS # 282-00-00-135 ("Tract 135"). Both parcels are undeveloped, wooded, and located along Kitford Road on Johns Island. The parcels are separated by an abandoned railroad right-of-way and were previously part of a larger tract owned by two of Simmons' predecessors-in-title, Edward Heyward and E.C. Brown. In 1956, Heyward granted an easement to Berkeley Electric to construct and maintain transmission lines over what is now Tract 498 and Tract 135. In 1972, Brown granted an easement to Berkeley Electric to construct and maintain distribution lines over Tract 498.

In 1977, Charleston County issued an encroachment permit authorizing St. John's Water to install a water main along Kitford Road pursuant to an accompanying map that illustrated the water main's approved location. St. John's Water finished construction on the water main in 1978. In 2005, Simmons discovered a water meter under bushes on Tract 135. Simmons subsequently contacted St. John's Water, which informed Simmons that it would not move the water main because it believed it had an easement giving it the right to use the property. St. John's Water based its belief on the encroachment permit and its understanding that the water main had been in its current location for more than twenty years. Pursuant to a request by Simmons, St. John's Water "blue-flagged" the property. The blue flags showed the water main crossing both Tract 135 and Tract 498.¹

¹ The blue flags also showed the water main was not located along Kitford Road, but north of Kitford Road across Simmons' property.

In 2008, Simmons commenced this action against Berkeley Electric and St. John's Water alleging trespass and unjust enrichment. Specifically, Simmons alleged Berkeley Electric and St. John's Water trespassed on his property by constructing, placing, and maintaining unauthorized power and water lines. In doing so, Simmons claimed Berkeley Electric and St. John's Water had been "furnished with a non-gratuitous and valuable benefit without paying for its reasonable value." Simmons also sought a declaration that neither utility company had property interests or rights to his property.

Both Berkeley Electric and St. John's Water moved for summary judgment. After presiding over the summary judgment hearings, the master granted both motions for summary judgment. With respect to Berkeley Electric, the master determined any transmission and distribution lines over Simmons' property were permitted under the 1956 and 1972 easements. To the extent the lines were not within the scope of the express easements, the master found Berkeley Electric established a prescriptive easement to the lines in their current configuration. As to St. John's Water, the master determined the encroachment permit served as an express easement granting St. John's Water the right to use Simmons' property to construct the water main. To the extent that the water main was not covered under the express easement, the master held St. John's Water established a prescriptive easement to maintain the water main in its current configuration. Simmons appealed.

The Court of Appeals affirmed the master's grant of summary judgment in favor of Berkeley Electric, finding Berkeley Electric did not exceed the scope of the express easements. *Simmons*, 404 S.C. at 179-80, 744 S.E.2d at 584-85. In addition, the Court of Appeals affirmed the master's finding that Berkeley Electric established a prescriptive easement for the power lines in their current configuration. *Id.* at 181-82, 744 S.E.2d at 585-86. As to St. John's Water, the Court of Appeals affirmed the master's grant of summary judgment in favor of St. John's Water on the basis that it established a prescriptive easement, but reversed the master's finding that it had an express easement after determining Charleston County lacked the authority to grant a right to use property owned by another. *Id.* at 183-85, 744 S.E.2d at 586-87. The Court of Appeals remanded the action to the master for a determination of whether there are additional water lines under Simmons' property. *Id.* at 185, 744 S.E.2d at 587. We granted Simmons' petition for a writ of certiorari following the Court of Appeals' denial of his petition for rehearing.

II. Standard of Review

When reviewing the grant of a summary judgment motion, this Court applies the same standard that governs the trial court under Rule 56(c), SCRPC, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); Rule 56(c), SCRPC. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860.

III. Discussion

A. St. John's Water

Simmons asserts the Court of Appeals erred in affirming the master's grant of summary judgment in favor of St. John's Water. We agree.

"An easement is a right given to a person to use the land of another for a specific purpose." *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169 (2015). "A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner." *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). To establish a prescriptive easement, the claimant must prove by clear and convincing evidence: "(1) the continued and uninterrupted use or enjoyment of the right for a period of 20 years; (2) the identity of the thing enjoyed; and (3) the use [was] adverse under claim of right." *Darlington Cnty. v. Perkins*, 269 S.C. 572, 576, 239 S.E.2d 69, 71 (1977). "[W]hen it appears that claimant has enjoyed an easement openly, notoriously, continuously, and uninterruptedly, in derogation of another's rights, for the full period of 20 years, the use will be presumed to have been adverse." *Williamson v. Abbott*, 107 S.C. 397, 400, 93 S.E. 15, 16 (1917). "[A] party claiming a prescriptive easement has the burden of proving all elements by clear and convincing evidence." *Bundy*, 412 S.C. at 306, 772 S.E.2d at 170.

In *Horry County v. Laychur*, this Court articulated the third element of a prescriptive easement as requiring the claimant's use to be "adverse or under a claim of right." 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993). In relying on this language, the Court of Appeals has recognized two methods of proving the third element: one established through "adverse use" and one through a "claim of

right."² According to the Court of Appeals, "[t]o establish an easement by prescription, one need only establish *either* a justifiable claim of right *or* adverse and hostile use." *Jones v. Daley*, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct. App. 2005) (emphasis added). Therefore, if a claimant cannot prove the elements of adverse use, then, under the Court of Appeals' approach, the claimant could establish a prescriptive easement under a claim of right. "[I]n order for a party to earn a prescriptive easement under claim of right he must demonstrate a substantial belief that he had the right to **use** the [property] based upon the totality of circumstances surrounding his use." *Hartley v. John Wesley United Methodist Church of Johns Island*, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct. App. 2003).

Here, the Court of Appeals determined "St. John's Water established the water main was installed under a claim of right." *Simmons*, 404 S.C. at 184, 744 S.E.2d at 587. To support its determination, the Court of Appeals relied on an affidavit of Hugh S. Miley, an engineer involved in the design, permitting, and construction of the water main. *Id.* In his affidavit, Miley attested that: Charleston County issued an encroachment permit for the water main; construction on the water main began in 1977 and was completed in 1978; and that, to the best of his knowledge, the water main has been used continuously and uninterruptedly for more than twenty years. The Court of Appeals found "Miley's affidavit demonstrates his belief that the encroachment permits obtained from Charleston County covered the installation of the water main as illustrated on the map." *Id.* The Court of Appeals continued, stating "[t]he fact the claim may have been based on a mistake does not negate the claim of right required to establish a prescriptive easement." *Id.*

As a threshold matter, we hold the Court of Appeals erred in recognizing two methods of proving the third element of a prescriptive easement. We acknowledge that this Court's decisions have helped give rise to this error and now take this opportunity to clarify the third element of a prescriptive easement.

While this Court has recently articulated the third element of a prescriptive easement as requiring the claimant's use be "adverse or under a claim of right," this

² See, e.g., *Loftis v. S.C. Elec. & Gas Co.*, 361 S.C. 434, 440-41, 604 S.E.2d 714, 717 (Ct. App. 2004) (finding respondent established a prescriptive easement under claim of right because it believed it had the right to use the property for the power lines); *Revis v. Barrett*, 321 S.C. 206, 210, 467 S.E.2d 460, 462 (Ct. App. 1996) (determining plaintiff established a prescriptive easement to the use of an old road under claim of right based on her belief that she had the right to use the road).

Court has not always articulated the third element this way. In 1823, the Constitutional Court of Appeals of South Carolina determined three things are necessary to establish a right by prescription: (1) use and occupation or enjoyment; (2) the identity of the thing enjoyed; and (3) that it is adverse to the right of some other person. *Lawton v. Rivers*, 13 S.C.L. 445, 451 (2 McCord) (1823). In 1917, this Court relied on *Lawton* and determined: "To establish a right by prescription, it is necessary to prove three things: (1) The continued and uninterrupted use or enjoyment of the right for the full period of 20 years; (2) the identity of the thing enjoyed; (3) that the use or enjoyment was *adverse, or under claim of right.*" *Williamson*, 107 S.C. at 400, 93 S.E. at 15-16 (emphasis added). By placing a "comma" after the term "adverse," this Court intended to modify the term "adverse," not create another method to establish a claim.³ Accordingly, the third element of a prescriptive easement should be interpreted as requiring the claimant's use be adverse or, in other words, under a claim of right contrary to the rights of the true property owner. A brief review of additional authority on this issue is instructive.

³ *Williamson* is not the only case in which this comma appears after the term "adverse." For example, in *Brasington v. Williams*, 143 S.C. 223, 261, 141 S.E. 375, 387 (1927) (Watts, C.J., dissenting), *Poole v. Edwards*, 197 S.C. 280, 283, 15 S.E.2d 349, 350 (1941), and *Sanitary & Aseptic Package Co. v. Shealy*, 205 S.C. 198, 203, 31 S.E.2d 253, 255 (1944), this Court cited the *Williamson* test, with the comma, verbatim. Approximately eight months before *Sanitary*, however, this Court cited the *Williamson* test, but, for the first time, without the comma behind the term "adverse." See *Steele v. Williams*, 204 S.C. 124, 133, 28 S.E.2d 644, 648 (1944) ("Three things are necessary to establish a right by prescription: . . . (3) that the use or enjoyment was adverse or under claim of right."). The Court offered no explanation for dropping the comma. While the comma reappeared after the term "adverse" in *Sanitary* eight months after *Steele*, it is around this time when this Court moved away from articulating the third element with a comma following the term "adverse." See, e.g., *Babb v. Harrison*, 220 S.C. 20, 24-25, 66 S.E.2d 457, 458 (1951) ("It has long been recognized that the requirements necessary to establishing a right by prescription are: . . . (3) that the use or enjoyment was adverse or under claim of right." (citing *Lawton*, *Williamson*, *Poole*, *Steele*, and *Sanitary & Aseptic Package Co.*)). Because this Court offered no explanation for dropping the comma, and because, in later cases, this Court relies on decisions in which the comma appears, we believe the failure to cite the third element with the comma behind "adverse" was unintentional.

First, the terms "adverse use" and "claim of right" are, in effect, quite similar. For example, Black's Law Dictionary defines "adverse use" as "a use without license or permission." *Black's Law Dictionary* 1681 (9th ed. 2009). "Claim of right" is defined as: (1) The possession of a piece of property with the intention of claiming it in hostility to the true owner; or (2) A party's manifest intention to take over land, regardless of title or right. *Black's Law Dictionary* 283 (9th ed. 2009). *American Jurisprudence* also recognizes that "[u]nder the law of prescriptive easements, the essence of a 'hostile' use, which has been referred to interchangeably in the case law as 'adverse,' 'hostile,' 'nonpermissive,' or 'under a claim of right,' is a lack of permission from the true owner." 68 Am. Jur. *Proof of Facts* 3d 239 § 15, at 287 (2002). *American Jurisprudence* further states: "Many courts have phrased the issue of adverse use in terms of a claim of right. Although some have phrased the elements of prescription to include both adverse or hostile use and a claim of right, in practice, proof of adverse use and of a claim of right merge." 2 Am. Jur. *Proof of Facts* 3d 125 § 5, at 144 (1988).

Secondly, it "is well-established that evidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse." *Bundy*, 412 S.C. at 310, 772 S.E.2d at 173; see 2 Am. Jur. *Proof of Facts* 3d 197 § 6, at 218 (1988) ("Any use of property which is not hostile or adverse to the interests or title of the property owner cannot ripen into a prescriptive right."). Therefore, to the extent that there is a difference between the two terms, there still could not be a legitimate claim of right without adverse use.

Accordingly, we hold adverse use and claim of right cannot exist as separate methods of proving the third element of a prescriptive easement as the two terms are, in effect, one and the same. Thus, we overrule those decisions that express a contrary conclusion of law. We also take the opportunity to emphasize that a claimant's belief regarding the permissiveness of his use of property is irrelevant when determining the existence of a prescriptive easement. Instead, courts in this state should only determine whether the claimant's use was indeed adverse.

In sum, we conclude that when analyzing the third element of a prescriptive easement, courts in this state should apply the test for adverse use. See *Williamson*, 107 S.C. at 400, 93 S.E. at 16 ("[W]hen it appears that claimant has enjoyed an easement openly, notoriously, continuously, and uninterrupted, in derogation of another's rights, for the full period of 20 years, the use will be presumed to have been adverse."). However, because the "continuous" and "uninterrupted" elements for adverse use are already required to establish a prescriptive easement, the subtest for "adverse use" only further requires the

claimant's use be "open" and "notorious." Thus, we believe the test for a prescriptive easement can be simplified as follows:

In order to establish a prescriptive easement, the claimant must identify the thing enjoyed, and show his use has been open, notorious, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty years.

Applying this test to the case at hand, as will be discussed, we find there is a genuine issue of material fact as to whether St. John's Water can prove the "open" and "notorious" elements of a prescriptive easement; therefore, we conclude the Court of Appeals erred in affirming the master's grant of summary judgment in favor of St. John's Water.

1. Open

"Open" generally means that the use is not made in secret or stealthily. It may also mean that it is visible or apparent." Restatement (Third) of Property (Servitudes) § 2.17(h) (2000). Here, the water main is located underground. Both Tract 498 and Tract 135 are heavily wooded and undeveloped. According to Simmons, the water meter was hidden under bushes when he first discovered it. The water main also had not been "blue-flagged" at that time. Considering these conditions, we find there is a genuine issue of material fact as to whether St. John's Water's use was open. While this finding is sufficient to warrant a reversal of the Court of Appeals' decision to uphold the master's grant of summary judgment in favor of St. John's Water, we proceed to address the "notorious" element of a prescriptive easement for the benefit of the parties on remand.

2. Notorious

"Notorious" generally means that the use is actually known to the owner, or is widely known in the neighborhood." Restatement (Third) of Property (Servitudes) § 2.17(h) (2000). Simmons claims he was unaware of the water main because he lived on another parcel located further up Kitford Road, which used well water. Nevertheless, the master determined that because a majority of the area's residents are getting their water out of a spigot, the fact that there is a water main being used to supply the water is widely known, or "notorious." We disagree with this determination because Simmons' water also came from a spigot, but was supplied by a water well. Further, even if it is widely known that a majority of the neighborhood's water comes from a water main that does not necessarily mean the

location of the water main is widely known. Or, in other words, it does not necessarily mean it is widely known that St. John's Water is using Simmons' property for the use of the water main.

Consequently, we hold there is a genuine issue of material fact as to whether St. John's Water has established each element of a prescriptive easement by clear and convincing evidence.⁴ Thus, we reverse the portion of the Court of Appeals' decision affirming the master's grant of summary judgment in favor of St. John's Water and remand this matter for additional proceedings consistent with the test for a prescriptive easement as articulated in this opinion.

⁴ Our holding is consistent with other jurisdictions that have considered this issue. As articulated in American Law Reports:

Where the pipes or other conduits as to which easements have been claimed were buried underground and their presence was not physically apparent throughout the prescriptive period, the courts have generally concluded that there was insufficient notoriety of the user to permit prescription to run against the servient estate. This result has often been reached where there was an absence of substantial evidence that the servient parties had any notice or information of the existence of the facility and its user.

J. H. Crabb, Annotation, *Easement by prescription in artificial drains, pipes, or sewers*, 55 A.L.R.2d 1144, 1167 (1957 & Supp. 2015); see *City of Montgomery v. Couturier*, 373 So. 2d 625, 628 (Ala. 1979) (affirming the trial court's finding that the City of Montgomery did not establish a prescriptive easement to an underground pipe because the pipe was hidden under a large hedgerow and because water flowed through the pipe only during heavy rains); *Holman v. Richardson*, 76 So. 136, 138 (Miss. 1917) (holding a prescriptive easement was not established over underground drain tiles since they were unknown to the property owner until three years prior to the start of the litigation and their existence was not open and notorious); *Maricle v. Hines*, 247 S.W.2d 611, 613 (Tex. Civ. App. 1952) (determining claimant did not establish a prescriptive easement to the use of an underground sewer line because he failed to prove his use was "open, notorious and adverse").

B. Berkeley Electric

1. Express Easements

Simmons next contends the Court of Appeals erred in determining Berkeley Electric did not exceed the scope of the express easements. To support his contention, Simmons relies on language from this Court's opinion in *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 28 S.E.2d 545 (1943). In *Hill*, we stated, "a grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated." *Hill*, 204 S.C. at 96, 28 S.E.2d at 549. While Simmons recognizes that the 1972 easement permits Berkeley Electric to maintain distribution lines over Tract 498, Simmons asserts Berkeley Electric exceeded the scope of the easement by unreasonably extending distribution lines over a portion of Tract 498. Specifically, Simmons argues Berkeley Electric could have placed its distribution lines in a way that would have been less burdensome to the use and enjoyment of his property. We decline to reach the merits of this argument. Because Simmons failed to raise this issue in his petition for rehearing before the Court of Appeals, we find it unpreserved for our review. See *Sloan v. S.C. Dep't of Transp.*, 365 S.C. 299, 307-08, 618 S.E.2d 876, 880 (2005) (providing that in order for an issue to be preserved for the Supreme Court's review, the issue must have been raised in a petition for rehearing before the Court of Appeals).

2. Prescriptive Easement

Finally, Simmons asserts the Court of Appeals erred in affirming the master's grant of summary judgment in favor of Berkeley Electric because Berkeley Electric failed to prove each element of a prescriptive easement by clear and convincing evidence. In addition, Simmons argues he presented more than a scintilla of evidence to survive Berkeley Electric's summary judgment motion. Simmons believes that, in finding otherwise, the Court of Appeals improperly weighed the evidence instead of deciding whether there was a material dispute of fact. We disagree.

"[T]he determination of the existence of an easement is a question of fact in a law action." *Jowers v. Hornsby*, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987). This Court reviews the trier of fact's determination of whether an easement exists as an action at law. *Id.* Therefore, our scope of review is limited to the correction of errors of law, and we will not disturb the master's factual findings that have

some evidentiary support. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 87, 221 S.E.2d 773, 776 (1976).

Simmons contends, and Berkeley Electric agrees, that Berkeley Electric must show that any distribution lines crossing Tract 135 are covered under a prescriptive easement since neither the 1956 easement nor the 1972 easement grants Berkeley Electric the right to run distribution lines over Tract 135. To support Berkeley Electric's position that any distribution lines crossing Tract 135 were acquired under a prescriptive easement, Berkeley Electric submitted affidavits from Thomas Seeney and Richard Frank, one current and one former supervisor over Berkeley Electric's operations in the Johns Island District. Both Seeney and Frank worked for Berkeley Electric since the late 1970's. Both stated: they were familiar with the age, configuration, and characteristics of the distribution line located at 3507 Kitford Road; the line is clearly visible from Kitford Road; to the best of their recollections, the line had never been moved; the power poles for the line have birthmarks of 1984 and 1986; and that they believed the line has been in its current configuration since at least 1980. Based on this testimony, both the master and Court of Appeals determined Berkeley Electric established a prescriptive easement to the distribution line in its current configuration.

We decline to overrule the portion of the Court of Appeals' decision affirming the master's grant of summary judgment on this issue. Both Seeney and Frank were able to identify the power line, both attested the line had been in its current location for at least twenty years without interruption, and that the line was visible from Kitford Road. Thus, we conclude Berkeley Electric has presented evidence to prove each element of a prescriptive easement.

Simmons contends he presented enough evidence to contradict the two affidavits and survive Berkeley Electric's motion for summary judgment. To support his contention, Simmons relies on two plats, two system maps, and an affidavit. The plats Simmons relies on are of neighboring properties. A portion of Simmons' property, however, is illustrated on the plats. That portion does not show all of the power lines Simmons contends run across his property. According to Simmons, this discrepancy is enough to create a material dispute of fact. Viewing the evidence in a light most favorable to Simmons, we disagree. As discussed, the plats were not created to show Simmons' property, nor do they purport to illustrate all of the power lines encumbering the area. Thus, we find these plats do not create a dispute of material fact.

Simmons next relies on two system maps Berkeley Electric produced during discovery. According to Simmons, these maps show the distribution line in two different locations which creates a dispute of material fact as to whether the distribution line has been in the same location for over twenty years. We disagree. The system maps are not drawn to scale, nor do they identify any property lines. Without additional testimony as to what these maps depict, we find these maps do not create a dispute of material fact.

Finally, Simmons relies on his affidavit, which he contends contradicts Frank's and Seeney's affidavits by stating he had personal knowledge the distribution line was not in the same location in 1980. While Simmons did attest that he had personal knowledge the distribution line in question has not been in its current location for over twenty years, in support of that statement he references and relies on one of the plats discussed above. He does not state how he personally was aware of the power line's location over the years. Therefore, we conclude Simmons has not presented evidence which gives rise to a dispute of material fact.

Consequently, we hold the Court of Appeals properly affirmed the master's grant of summary judgment in favor of Berkeley Electric.

IV. Conclusion

In conclusion, we affirm the portion of the Court of Appeals' decision that upheld the master's grant of summary judgment in favor of Berkeley Electric. We reverse the portion of the Court of Appeals' decision that upheld the master's grant of summary judgment in favor of St. John's Water and remand for additional proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KITTREDGE and HEARN, JJ., concur. Acting Justices Jean H. Toal and James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roosevelt Simmons, Appellant,

v.

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

Appellate Case No. 2011-192409

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 5099

Heard January 8, 2013 – Filed March 20, 2013

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Edward A. Bertele, of Charleston, for Appellant.

John B. Williams, of Williams & Hulst, LLC, of Moncks
Corner, for Respondent Berkeley Electric Cooperative,
Inc., and Jeffrey C. Moore, of Legare Hare & Smith, of
Charleston, for Respondent St. Johns Water Company,
Inc.

KONDUROS, J.: Roosevelt Simmons appeals the master-in-equity's grant of summary judgment in favor of Berkeley Electric Cooperative, Inc. (Berkeley Electric) and St. John's Water Company, Inc. (St. Johns Water) in this action regarding utility easements over his property. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

In 2003, Simmons acquired title to two parcels of land in Charleston County, TMS #283-00-00-498¹ and TMS #282-00-00-135. The two parcels are separated by Kitford Road. In 1956, Simmons's predecessor in interest, Edward Heyward, granted a seventy-five-foot-wide easement to Berkeley Electric for the "construction and maintenance of an electric transmission line or lines; towers, poles, anchors and necessary fixtures and wires attached thereto" The easement runs north to south over the northeast corner of -498. In 1972, a subsequent owner of the property, Edward Brown, granted Berkeley Electric 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" This easement gave permission to again cross -498. According to Simmons, power lines cross -135 twice and -498 twice and unreasonably affect his ability to sell or use his property.

St. John's Water installed a water main along Kitford Road between 1977 and 1978 to service customers in that area. The water main was placed there after the water company sought and was granted an encroachment permit from Charleston County. A portion of the water main runs under -498. Simmons stated that in 2003 he was walking on -135 when he discovered water meters. This prompted him to contact St. John's Water, which indicated the water main had been in its current location for more than twenty years and customers living around Simmons's property who received water service had granted easements for lines to tap into the water main. Simmons indicated he was not aware of the location of the water main or the existence of any water lines on his property because the lines are underground, and the meters were covered by brush and unflagged. He further indicated his home uses well water.

Simmons filed a complaint alleging trespass and unjust enrichment and seeking a declaratory judgment that neither utility had any property rights with respect to his

¹ Simmons lost title to tract -498 in 2010, a matter that is being litigated. St. John's Water mentions this issue in its brief in a conclusory manner. We decline to address it as a possible additional sustaining ground. See *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 252 n.3, 734 S.E.2d 161, 164 n.3 (2012) (deeming conclusory and unsupported claims abandoned); *I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds.").

land. Berkeley Electric and St. John's Water filed motions for summary judgment, each arguing it had an easement over Simmons's property, thereby defeating his claims. The matter was referred to the master-in-equity for a determination of the existence of any easements but reserving the issue of damages for the circuit court should Simmons prevail.

After considering the motions and arguments, the master concluded Berkeley Electric had been granted an express easement and Simmons produced no evidence it had exceeded the scope of that easement. The master further concluded that even if Berkeley Electric had somehow exceeded the scope of the easement, the current situation had existed openly for more than twenty years, entitling Berkeley Electric to a prescriptive easement to maintain the lines and poles in their present location. Consequently, the master dismissed Simmons's claims against Berkeley Electric.

With respect to St. John's Water, the master concluded it had an express easement to establish the water line under Simmons's property. He further found that even if it did not have an express easement, St. John's Water had acquired a prescriptive easement via the continuous use of the water main for more than twenty years and because the existence of the water main was obvious to any surrounding landowner demonstrating a minimal amount of diligence. Accordingly, the master dismissed Simmons's claims against St. John's Water. This appeal followed.

STANDARD OF REVIEW

A trial court may grant a party's motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "[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). Summary judgment is not appropriate where further inquiry into the facts of the

case is desirable to clarify the application of the law. *Lanham v. Blue Cross & Blue Shield of S.C.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002).

LAW/ANALYSIS

I. Berkeley Electric

A. Consideration of Express Easement

Simmons contends the master erred in granting summary judgment to Berkeley Electric on an express easement theory because the argument was not part of its summary judgment motion and contrary to the order of reference. We disagree.

The record illustrates the matter of whether Berkeley Electric held an express easement was argued at the summary judgment hearing without objection. Issues not raised by the pleadings but tried by the consent of the parties are treated as if they had been raised in the pleadings. *See* Rule 15(b), SCRPC. Therefore, we conclude this issue is without merit.

Additionally, the order of reference to the master specifically indicated that the issue of "both prescriptive and/or express" easements would be considered by the master. Therefore, we find this contention to be meritless as well.

B. Consideration of Scope of Express Easement

Simmons argues the master erred in granting summary judgment to Berkeley Electric finding it did not exceed the scope of its express easements because that issue was not part of its summary judgment motion, the issue was contrary to the order of reference, and the decision was not based upon evidence in the record. We disagree.

The scope of the express easement held by Berkeley Electric was argued and considered at the summary judgment hearing without objection. Consequently, the matter was treated by the master if it had been raised in the pleadings. *See* Rule 15(b), SCRPC ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). Furthermore, the order of reference was broadly worded to cover issues relating not only to the existence of an easement, but its scope as well. The fact that the only issue reserved for the circuit court was

damages also demonstrates that all issues related to the existence and use of any easement were before the master.

C. Scope of Express Easement

Simmons next maintains the master erred in granting summary judgment to Berkeley Electric finding it did not exceed the scope of its express easements because issues of fact regarding the scope of the easements were disputed. We disagree.

"The language of an easement determines its extent." *Plott v. Justin Enters.*, 374 S.C. 504, 513, 649 S.E.2d 92, 96 (Ct. App. 2007) (quoting *Binkley v. Rabon Creek Watershed Conservation Dist.*, 348 S.C. 58, 67, 558 S.E.2d 902, 906-07 (Ct. App. 2001)). "The general rule is that the character of an express easement is determined by the nature of the right and the intention of the parties creating it." *Id.* at 514, 649 S.E.2d at 96 (quoting *Smith v. Comm'rs of Pub. Works of Charleston*, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994)). "The intention of the parties must be determined by a fair interpretation of the grant or reserve creating the easement." *Springob v. Farrar*, 334 S.C. 585, 595, 514 S.E.2d 135, 141 (Ct. App. 1999) (Anderson, J. dissenting). "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 of the easement." *Binkley*, 348 S.C. at 72, 558 S.E.2d at 909 (quoting 28A C.J.S. *Easements* § 54, at 233 (1996)).

The express easements to Berkeley Electric were broad. However, the original parties to the easements could have used more specificity if they intended the use to be more restricted. The evidence presented established the electric lines had been in their current configuration for an extended period of time. This demonstrates the easement holder and the landowners' understanding that such configuration did not exceed the intended scope of the easements. Additionally, the affidavit of Robert Bradley, a right-of-way agent for Berkeley Electric, indicated the power lines did not exceed the scope of the easement. Therefore, we conclude the master did not err in finding Berkeley Electric had not exceeded the scope of the easements.

D. Affidavit of Robert Bradley

Simmons contends the master further erred in granting summary judgment to Berkeley Electric that it did not exceed the scope of its express easements because it relied on an affidavit that was not properly before the court. We disagree.

"As a general rule, the admission of evidence is a matter addressed to the sound discretion of the trial court." *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 241, 616 S.E.2d 431, 435 (Ct. App. 2005). "The trial judge's decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision." *Id.* at 242, 616 S.E.2d at 435.

At the summary judgment hearing, Berkeley Electric presented the affidavit of Robert Bradley who stated the pole and power lines on Simmons's property did not go outside the seventy-five-foot easement. Simmons objected to the introduction of this affidavit arguing it was improper because it was "new matter." The thrust of Simmons's argument on appeal is that moving parties cannot serve reply affidavits at the summary judgment stage and that Bradley's affidavit contained information Berkeley Electric could have submitted with its initial summary judgment motion.

Rule 6(d) of the South Carolina Rules of Civil Procedure addresses the time for reply affidavits to be filed. "The moving party may serve reply affidavits at any time before the hearing commences." Rule 6(d), SCRPC. Bradley's affidavit was served at the Monday summary judgment hearing after Simmons's opposing affidavits were faxed to Berkeley Electric the preceding Friday afternoon. Under the circumstances, the master's consideration of Bradley's affidavit was not an abuse of discretion. Furthermore, the affidavit is not mentioned in the master's order so no clear evidence was presented that the master relied on the affidavit. Additionally, in Simmons's complaint, he did not allege Berkeley Electric exceeded the scope of the express easement it had been granted. His allegation was that the easement was unauthorized. The issue of whether power lines encroached outside the easement was not specifically asserted until Simmons's memorandum in opposition to Berkeley Electric's summary judgment motion was filed. Therefore, Bradley's affidavit in reply, expressing an opinion as to the scope of the easement, was responsive. Based on all of the foregoing, we conclude the master did not err in considering Bradley's affidavit.

E. Proof of Prescriptive Easement²

Next, Simmons argues the master erred in granting summary judgment to Berkeley Electric on a prescriptive easement because issues of fact were disputed, he improperly weighed the evidence instead of finding there were disputes of material fact, and clear and convincing evidence was lacking. We disagree.

² This analysis combines Simmons's issues 5, 6, and 7 on appeal.

"An easement is a right given to a person to use the land of another for a specific purpose. An easement may arise in three ways: (1) by grant; (2) from necessity; and (3) by prescription." *Kelly v. Snyder*, 396 S.C. 564, 572, 722 S.E.2d 813, 817 (Ct. App. 2012). "A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner." *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). "To establish a prescriptive easement the party asserting the right must show: (1) continued and uninterrupted use of the right for twenty years; (2) the identity of the thing enjoyed; and (3) use which is either adverse or under a claim of right." *Kelly*, 396 S.C. at 572, 722 S.E.2d at 817 (citing *Horry Cnty. v. Laychur*, 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993)). "To establish an easement by prescription, one need only establish either a justifiable claim of right *or* adverse and hostile use." *Id.* (quoting *Jones v. Daley*, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct. App. 2005)). "The party claiming a prescriptive easement bears the burden of proving all of the elements." *Id.*

Berkeley Electric presented affidavits of two long-time Berkeley Electric employees stating the power lines had been in place in the current configuration for a period of more than twenty years. In rebuttal, Simmons presented a 1981 plat, which did not show all of the power lines currently existing on his property. However, this plat was not for purposes of identifying the location of power lines or features on Simmons's property. The plat related to a neighboring owner deeding a fifty-foot right-of-way to the public and the subdivision of the property. Simmons also submitted a 1983 plat performed for Berkeley Electric that does not show all of the current power lines. However, again, this plat was not of Simmons's property and does not purport to establish the location of all power lines. After reviewing the record, we agree with the master's conclusion that these plats did not provide contradictory evidence to the Berkeley Electric employee affidavits. Additionally, Simmons did not state in his affidavit the lines were not there during that period based on his own personal knowledge. We conclude Simmons's evidence does not raise the required scintilla of evidence to create a genuine issue of fact on this point. Additionally, the lines and poles were open and obvious and were made under a claim of right via the easements granted by previous owners. Therefore, we affirm the master's finding a prescriptive easement in Berkeley Electric's favor.

II. St. John's Water

A. Consideration of and Ruling on Express Easement

Simmons maintains the master erred by granting summary judgment to St. John's Water on an express easement because evidence was lacking and it was not requested by St. John's Water in its motion. We agree in part and disagree in part. This issue was argued by the consent of the parties at the summary judgment hearing. *See* Rule 15(b), SCRPC (issues not raised by the pleadings but tried by consent of the parties shall be treated as if they had been raised in the pleadings). However, Simmons's argument that the master erred in concluding at the summary judgment stage that St. John's Water had an easement across -498 for water lines is persuasive. The only party who could give an express easement to St. John's Water to cross -498 or -135 would be the landowner. St. John's Water presented no evidence and did not argue this was done. Therefore, we conclude the master erred in finding St. John's Water held an express easement to install the water main or water lines on Simmons's property.

B. Prescriptive Easement^{3, 4}

Finally, Simmons argues the master erred in granting summary judgment to St. John's Water on the basis of a prescriptive easement and dismissing his claims. We agree in part and disagree in part.

A trial court may grant a party's motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. "An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David v. McLeod Reg'l Med. Ctr.*,

³ Simmons's issue 11 appears to arise from the order prepared by counsel for St. John's Water. It alludes to customer affidavits, but the record does not establish that any customer affidavits were presented at the summary judgment hearing. We do not rely on customer affidavits in reaching our decision in this case, and this apparent error in the written order does not prejudice Simmons. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

⁴ This analysis combines Simmons's issues 9, 10, and 12 on appeal.

367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact." *Lanham v. Blue Cross & Blue Shield of S.C.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* at 362, 563 S.E.2d at 333.

With respect to the first requirement for a prescriptive easement, St. John's Water presented undisputed evidence a water main was placed along Kitford Road between 1977 and 1978 to service residents in the area. The affidavit of Hugh S. Miley, Jr., an engineer involved in the design, permitting, and installation of the water main, indicates the water main has remained in that location since that time, and a map illustrating the planned installation of pipe shows the water main running under -498. Consequently, St. John's Water established the water main had been in place under -498 and continuously used by the company for the required twenty-year period. Furthermore, St. John's Water established the water main was installed under a claim of right. Miley's affidavit demonstrates his belief that the encroachment permits obtained from Charleston County covered the installation of the water main as illustrated on the map. The fact the claim may have been based on a mistake does not negate the claim of right required to establish a prescriptive easement. *See Loftis v. S.C. Elec. & Gas Co.*, 361 S.C. 434, 440, 604 S.E.2d 714, 717 (Ct. App. 2004) (finding a utility's mistaken belief it had a valid right of way to use property could constitute a "claim of right" sufficient to establish a prescriptive easement).

However, the record is unclear as to whether additional water lines allowing neighboring residents to tap into the water main are on Simmons's property and if so, how long they have been in place. Simmons asserted water lines of some type run under -135 because he located a water main there and the blue flags placed by St. John's Water after his complaint were on both -498 and -135. In its brief, St. John's Water contends no lines are located on -135 and argues this is established by a survey performed by the water company in 2008. This survey shows the location of the water main. However, the survey does not show parcel -135, nor is it clear that it addresses whether lines supplying neighboring parties cross -498. Therefore, based on Simmons's assertion that additional water lines are on -498 and -135 and a paucity of evidence as to whether that is true, a genuine issue of fact existed as to what water lines, besides the water main, are on his property and how long they may have been there. Consequently, we affirm the partial grant of summary judgment to St. John's Water that it established a prescriptive easement on Simmons's property for the water main installed between 1977 and 1978.

However, any remaining claims Simmons has that St. John's Water has further trespassed on his property with additional water lines should not have been dismissed at the summary judgment stage.

CONCLUSION

We affirm the master's grant of summary judgment in favor of Berkeley Electric on the basis that it was granted an express easement over Simmons's property and that it had established a prescriptive easement for the power lines in their current configuration. We reverse the master's finding that St. John's Water had an express easement to cross Simmons's property, and affirm his determination that St. John's Water established a prescriptive easement, but only as to the water main. Consequently the master's ruling is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

SHORT and LOCKEMY, JJ., concur.