

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Master in Equity err in granting summary judgment to Berkeley Electric on express easements which were not part of its summary judgment motion and contrary to the Order of Reference?
2. Did the Master in Equity err in granting summary judgment to Berkeley Electric that it did not exceed the scope of its express easements because that was not

part of its summary judgment motion and contrary to the Order of Reference and not based upon evidence in the record?

3. Did the Master in Equity err in granting summary judgment to Berkeley Electric that it did not exceed the scope of its express easements because there were disputed issues of fact regarding the scope of the easements?
4. Did the Master in Equity err 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?
5. Did the Master in Equity err in granting summary judgment to Berkeley Electric on a prescriptive easement because there were there disputed issues of fact?
6. Did the Master in Equity err in granting summary judgment to Berkeley Electric because it improperly weighed the evidence instead of finding that there were disputes of material fact?
7. Did the Master in Equity err in granting summary judgment to Berkeley Electric on a prescriptive easement because of the lack of clear and convincing evidence?
8. Did the Master in Equity err by granting summary judgment to St. John's Water Company on an express easement based on no evidence and when not requested by St. John's in its motion?
9. Did the Master in Equity err as a matter of law in granting summary judgment to St. Johns on a prescriptive easement on the basis that claim of right could be based upon an encroachment permit?
10. Did the Master in Equity err in granting summary judgment to St. Johns on a prescriptive easement on the basis that buried water lines were open and notorious

use for the statutory period based on the evidence?

11. Did the Master in Equity err in granting summary judgment to St. John's on a prescriptive easement based upon customer affidavits not in the record?
12. Did the Master in Equity err in granting summary judgment to St. John's on a prescriptive easement because there was a lack of clear and convincing evidence and a dispute of material fact?

STATEMENT OF THE CASE

Roosevelt Simmons filed a three count Complaint on April 9, 2008 seeking unspecified money damages for trespass and unjust enrichment and declaratory relief against Berkeley Electric Cooperative Inc. (Berkeley Electric) and St. John's Water Company, Inc. (St. John's). R. p. 24. The complaint alleged that Simmons was the record owner of two parcels of real property (TMS 283-00-00-498 and TMS 283-00-00-136) adjacent to Kitford Road, Johns Island on which Berkeley Electric and St. Johns had trespassed by installing and maintaining electric power and water lines. R. p. 24, para. 1 to p. 25, para. 10. The complaint demanded a jury trial. R. p. 26, para. 21. Simmons filed an Amended Complaint in substantially the same form shortly thereafter. R. pp.28-31. Simmons filed a Second Amended Complaint in September 24, 2008 in which all references to TMS 283-00-00-136 were replaced by TMS 282-00-00-135 because of a mis-identification of one of the properties. R. p. 32, para. 1, R. p. 33, para. 6. St. John's filed an Answer to the Second Amended Complaint on August 11, 2008 in which it asserted as an affirmative defense that it had a prescriptive easement because its water line had been on Simmons property for twenty years and that Simmons had known of its

existence. R. p. 38, para. 18. Berkeley Electric filed a First Amended Answer on October 6, 2008 in which it alleged that Simmons rights were subject to written easements given to Berkeley Electric and that it had a prescriptive easement across Simmons property. R. p. 41, para.13.

On May 7, 2009, Berkeley Electric filed a motion for summary judgment on the basis that it was entitled to a prescriptive easement across TMS 283-00-00-498 because their utility lines had been existence for at least 20 years. R. pp. 43 - 44. Simmons filed an affidavit on July 2, 2009 denying the existence of the line for 20 years. While this motion was pending, on September 15, 2009, Berkeley Electric filed a motion for an Order of Reference to the Master in Equity. R. p. 55. A Consent Order of Reference was entered on October 13, 2009. R. pp. 3-7. The Order specifically reserved Simmons right to return to the jury trial roster to pursue his damages claims upon the Master's determination. R. pp. 3-4.

After the case was transferred to the Master in Equity, St. John's filed a motion for summary judgment on June 4, 2010 on the basis that it had a prescriptive easement for its water lines. R. p. 57 at para. 2. Simmons filed an opposition and affidavit in support on August 5, 2010. While the motion was pending, the Master in Equity entered a Scheduling Order for the completion of discovery and set November 12, 2010 as the deadline for the filing of any other dispositive motions. R. p. 8.

On November 10, 2010, St. John's filed a motion to dismiss on the grounds that Simmons no longer owned one of the parcels, TMS 283-00-00-498. R 79. Berkeley Electric filed an amended motion for summary judgment again asserting a prescriptive easement across TMS 283-00-00-498 and that Simmons no longer owned it. R. pp. 81-

82. On November 22, 2010, Simmons filed opposition and affidavits in support. R. pp. 105-153.

The motions were heard on November 22, 2010. The court found that there were express and prescriptive easements as to both defendants and that Simmons lacked standing to assert any damages as to TMS 283-00-00-498 except for the time he had owned it. R. p. 221, line 23 - p. 222, line 16. A short form order granting summary judgment was filed on November 24, 2010. R. p. 9. Simmons filed a timely motion for reconsideration under R 59(e), SCRCP on December 20, 2010. R. p. 158. In the interim, St John's counsel submitted a detailed order which was entered by the court and filed December 22, 2010. R. p. 10. Simmons filed a motion for reconsideration of the December 22nd order on January 25, 2011. R. p. 167. Berkeley Electric's counsel submitted a detailed order which was entered by the court and filed on January 18, 2011. R. p. 13. Simmons filed a motion for reconsideration of the January 18th order on February 8, 2011. R. p. 174. Neither defendant filed any response. The Master in Equity heard both motions on April 11, 2011 and denied both motions. R 242, lines 20-23. The court entered short form orders denying both motions which were filed on April 11 and 18, 2011. R. p. 22, 23.

A combined Notice of Appeal from both decisions was served on May 13, 2011. This appeal concerns the existence of express and prescriptive easements as to both defendants on both parcels and whether the Master in Equity's decision correctly dealt with the extent of those easements.

FACTS RELATING TO THE ISSUES ON APPEAL

A. The subject properties.

Simmons acquired the two parcels involved in this suit in 2003 although his family had owned them since the 1960's. R. p. 49, para. 2. The subject properties are undeveloped although there are homes in the area. Id. TMS 283-00-00-498 is bordered by Kitford Road to the south, the abandoned Seaboard Coastline Railroad right of way to the east and TMS 283-00-00-118 owned by Gordon and TMS 283-00-00-319 owned by Frasier to the north. R. p. 52. TMS 282-00-00-135 is bordered by the Seaboard Coastline Railroad right of way to the west, TMS 282-00-00-136 owned by Andersen to the north and TMS 282-00-00-138 where Simmons resides to the east. R. p. 75, para. 2.

B. Power lines affecting the subject properties.

In 1956 the estate of Edward Heyward granted Berkeley Electric a 75' wide easement across land known as lot 27 ½ of the California tract to construct and maintain an electric transmission line. R. p. 131. In 1972, Edward Brown granted Berkeley Electric an easement of unspecified width to construct and maintain a distribution line on property described as consisting of 4.7 acres bounded on the east by the lands of the Seaboard Coast Line Railroad. R. p. 132.

In 2005, Simmons hired Richard Lacey, a licensed surveyor, to prepare a plat of the property he acquired in 2003. R. p. 49, para. 3. Lacey prepared a plat dated May 12, 2005 of part of Simmons property consisting of 3.257 acres west of the Seaboard Coastline Railroad right of way. R. p. 52. When the plat was prepared, the part of Edward Brown's 4.7 acres not owned by Simmons was owned by Christopher Brown. R. p. 52. The plat locates the Berkeley Electric transmission line crossing TMS 282-00-00-

135 and TMS 283-00-00-498 and the Berkeley Electric distribution line crossing TMS 283-00-00-498. The Lacey plat also shows that the distribution line is attached to a power pole on property in the name of Frazier, TMS 283-00-00-319 to the north of TMS 283-00-00-498, which is in a 20' easement created by a 1981 subdivision plat. R. p. 52. The Lacey plat also shows power poles and lines located to the south and west along Kitford Road on property that was the subject of the 1972 easement by Edward Brown. R. p. 52. The subdivision plat referenced in the Lacey plat was done on October 7, 1981 for the Frazier property and shows the existence of the transmission line located across the Frazier property (TMS 283-00-00-117) but not any power pole or distribution line attached to it. R. p. 53. Lacey was asked to return to the site to determine the location of any other power lines affecting Simmons property. R. p. 118, para.3. Lacey supplemented the plat on September 22, 2010 to show Berkeley Electric's distribution lines traversing TMS 282-00-00-135 in two places. R. p. 130. The revised plat shows the power line running from the main transmission line where it crosses TMS 282-00-00-135 over Simmons driveway out to Kitford Road and ending at the pole in front of the Turner residence on the south side of Kitford Road. R. p. 119. Simmons contends that this line running over his driveway has been used by Berkeley Electric for many years to service its customers on the south side of Kitford Road and that there have even been cable TV lines running along this same route and thus Berkeley Electric's use of a line across TMS 283-00-00-498 has not been continuous. R Id.

In discovery, Berkeley Electric produced documents in response to Simmons request for the location of its power lines affecting Simmons property from 1980 to the present. One of these was a plat dated November 8, 1983 of TMS 283-00-00-118, to the

north of TMS 283-00-00-498, and west of the Frazier property which located the 75' transmission line easement but did not show any power pole or distribution line on that property or on TMS 283-00-00-498 to the south. R. p. 134. Berkeley also produced two "system maps", the earliest of which was dated 1995, which contained different locations for the distribution line that allegedly was constructed over TMS 283-00-00-498 before 1980. R. pp. 135, 136. No system map for the 1980s or any previous period was ever produced.

Simmons also determined from third party discovery that in October 2002, Berkeley Electric granted Comcast Cablevision of Carolina, Inc. a license to attach its TV cables to Berkeley Electric's power poles. R. p. 138. This "pole sharing" agreement provided for the payment of a royalty of \$12.94 per pole shared. R. p. 150. Comcast's map of its cable lines dated May 1, 2007 shows them extending to the end of Kitford Road on Berkeley Electric poles. R. pp.152,153.

It is undisputed that at some time in the past, Berkeley Electric installed power poles on property to the north of TMS 283-00-00-498 and to the south on Kitford Road and a power line traversing TMS 283-00-00-498 and that its power lines follow its poles along Kitford Road east across the Seaboard Coastline Railroad right of way to Simmons property TMS 282-00-00-135 to the east. Simmons contended that Berkeley Electric is making an unreasonable use of the easements given in 1956 and 1972 crossing his property four times, twice across TMS 283-00-00-498 on the east and on the west and twice across TMS 282-00-00-135, on the north and on the south. Simmons contended that this unreasonable use has affected his ability to use or sell this property; that trees he planted to harvest and other vegetation have been destroyed and his property

value adversely affected without any permission or compensation given. R. p. 119, para.4, 5.

C. Berkeley Electric's motion for summary judgment

In its 2009 motion for summary judgment on a prescriptive easement, Berkeley Electric relied solely upon the affidavits of two employees Richard Frank and Thomas Seeney. R. pp. 45-48. Both employees assert (in identical language) that they are familiar with a utility line located at 3507 Kitford Road. R. p. 45, para. 3, R. p. 47, para.3. According to its own system maps, the Berkeley Electric power line at 3507 Kitford Road is in front of property owned by Ivory Turner, R. p. 136, and across the street from Simmons property, TMS 283-00-00-498. R. p. 130. Both Berkeley Electric employees claim that the line has been in existence since “at least 1980” although the poles on which the line is located contain “birthmarks” indicating they were installed in 1984 and 1986. R. p. 45, para.4 ; R. p. 47, para. 4. Nothing contained within Berkeley Electric's 2009 motion or the amended motion filed in 2010, its brief or affidavits referenced Simmons trespass claim concerning TMS 282-00-00-135.

Simmons opposed Berkeley Electric's motion on the basis that there were disputed issues of fact regarding any claim of a prescriptive easement across TMS 283-00-00-498. Simmons contended that Berkeley Electric employees' statements were contradicted by two different plats of adjacent properties, neither of which indicated any poles or wires where they were supposed to be. Simmons also argued out that there was no evidence of any written easement across TMS 282-00-00-135 for any distribution lines since the 1956 easement allowed the installation of a transmission line and the 1972 easement given by Brown only applied up to the Seaboard Coastline Railroad right

of way and TMS 292-00-00-135 was to the east to that. Simmons contended that the Berkeley Electric line connecting power to Andersen was trespassing across TMS 282-00-00-135 and Berkeley Electric had not addressed this claim. Finally Simmons contended that the Master In Equity must hold a hearing to consider all of the circumstances to determine whether Berkeley Electric was exceeding the scope of its written easements in accordance with the terms of the Order of Reference. R. pp. 110-119.

At the motion hearing, counsel for Berkeley Electric confirmed that its motion was for a prescriptive easement and that it was relying upon the 1972 easement for its claim of right. R. p. 193, line 6-7. He conceded that Simmons could recover damages for trespass during the time he owned TMS 283-00-00-498. R. p. 194, line 9-12. In response to Simmons claims about its failure to address TMS 282-00-00-135 at all in its motion papers, Berkeley Electric's counsel attempted to introduce an affidavit from Robert Bradley which allegedly asserted that Berkeley Electric lines to the Anderson property were within the 75' easement granted in 1956 and did not cross TMS 282 -00-00-135 outside the easement. R. p. 195, line 8-20. Berkeley Electric's counsel contended that Simmons had conceded that he did not object to the 75' transmission line and that Berkeley Electric could get to the Anderson property from that easement without crossing Simmons land. R. p. 196, line 21 - p.197, line 4. Simmons counsel objected to the Bradley affidavit on the basis that it introduced new matter; should have been submitted as part of their original motion not as a reply and was not appropriate for the court to consider, R. p. 199, line 24 – p. 200, line 6; and that R 56, SCRCP doesn't permit replies to opposition to summary judgment. R. p. 212, line 24 to p. 213, line 3. The court did

not indicate then whether it would consider upon the affidavit. Simmons counsel asserted that Berkeley Electric hadn't named an expert to opine about the location of its lines across TMS 282-00-00-135 and Bradley was not qualified to give an opinion. R. p. 213, line 4 -13. Simmons counsel also asserted that there was another Berkeley Electric power line that crossed TMS 282-00-00-135 from the transmission line which ran to the west down Kitford Road, in addition to the line that ran to the Anderson property. R. p. 198, line 10-21, R. p. 213, line 13 -18; that the Lacey survey shows its location and that it is connected to the same pole that the line across TMS 283-00-00-498 is connected to. R. p. 202, line 4-10. Counsel also asserted that the 1972 Brown easement did not extend to TMS 282-00-00-135 since it was expressly limited to lands to the west of the Seaboard Coastline Railroad right of way and TMS 282-00-00-135 was to the east. R. p. 204, line 6 – p.205, line 9.

During the motion hearing, the court inquired about the lack of specifics in the 1972 easement and Simmons counsel contended that it was vague in its language and raised questions of fact as to its implementation. R. p. 204, line 13 - p. 205, line 15. Therefore, counsel argued, it had to be reasonably interpreted. Counsel proffered that Brown's subdivision in 1972 (which the court had encountered in another case) extended Kitford Road through his property and that Kitford Road as extended was the appropriate location for Berkeley Electric power lines. Counsel urged that these were issues properly the subject of a hearing pursuant to the Order of Reference. R. p. 202, line 25 – p.203, line 20. Finally counsel requested that the court deny summary judgment in order to consider the effects of the Berkeley Electric easements on Simmons property. Simmons counsel proffered an expert report which would show that the two power lines

crossing TMS 283-00-00-498 which contained 1.375 acres, effectively reduced its use to a third of an acre. R. p. 206, line 9-21.

During rebuttal, the court asked Berkeley Electric's counsel about the scope of the 1972 easement. He asserted that it was left general because property owners back then didn't want to pay for surveys. R. p. 207, line 6-24. Berkeley Electric submitted no evidence in its motion to support this allegation. Berkeley Electric's counsel also claimed that they had work orders to show that a power line was brought across TMS 283-00-00-498 in 1972 to serve property owned by Chris Brown, R. p. 208, line 4-9, but these were not part of the motion record. Simmons counsel contended that these records indicated only that a power line was brought to the Brown property but didn't prove it crossed TMS 283-00-00-498. R. p. 211, line 9-13. Simmons counsel contended that Berkeley Electric had not refuted Simmons assertions or the Lacey survey that it had run power lines west from TMS 282-00-00-135 along Kitford Road. Simmons counsel contended that based upon the undisputed facts, Berkeley Electric could have used that line to serve the Chris Brown property at some time in the past instead of crossing TMS 283-00-00-498. R. p. 212, line 7- 18.

At the end of the hearing, the court granted Berkeley Electric's motion for summary judgment and found that Simmons would have been entitled to damages during the time he owned the property but had no claim . R. p. 222, line 13-16.

D. The Order granting summary judgment to Berkeley Electric

The Court subsequently entered an Order Granting Summary Judgment to Berkeley Electric filed January 18, 2011, containing findings of fact and conclusions of law. R. p. 13. The court found that Berkeley Electric had written easements for its utility

lines to cross both of Simmons properties; that the plats Simmons offered to dispute the testimony of Berkeley Electric employees did not raise an issue of fact as to the existence of a prescriptive easement across TMS 283-00-00-498. The Order referred to another document, an easement granted by the heirs of William Andersen in 1956 which was not submitted with Berkeley Electric 's motion for summary judgment. R. p. 15 para 3. Simmons filed a timely motion pursuant to R 59(e), SCRCF for reconsideration on the basis that Berkeley Electric had not requested relief for any express easement, the written easement did not allow it to cross TMS 282-00-00-135 several times; that the evidence as to the location of a power line across TMS 283-00-00-498 was conflicting and that the court need to evaluate the easements to determine whether Berkeley had unreasonably exceed their scope as required by the Order of Reference. Simmons also renewed his objection to the Bradley Affidavit and requested that the court give him the opportunity to address the claims made in the Bradley Affidavit since the court appeared to rely upon it in its decision. Since the order contained reference to the Anderson easement which was not part of the motion record , Simmons asserted that the order should not contain any reference to it. R. pp. 162-166, 175-186. Berkeley Electric did not file any opposition papers.

At the motion hearing, the court denied Simmons motion without opinion. R. p. 242, line 15-21. The short form order which was entered did not address any of the issues Simmons raised in his R 59(e) motion.

E. Water lines affecting the subject property.

In February 1977, St John's obtained an encroachment permit from Charleston County. Under the terms of the permit, St John's was to "install water mains . . . along

Kitford Road as shown on sheet U 25.” R. pp. 67, 69. According to the engineer in charge of the installation, “ the first construction project began in 1977 and included the installation of a water line in and along Kitford Road.” R. p. 59, para. 3. St John’s business records indicate that water service was not connected to its customers to the north of TMS 283-00-00-498 until 1986 (Gordon) and 1987 (Frazier) and to the north of TMS 282-00-00-135 until 1987 (Anderson). R. p. 65. Simmons lived to the east of Kitford Road on an unimproved private road and had well water as did many of the other property owners in the area. R. p. 75, para. 2. Simmons was unaware of St John’s water lines until he accidentally discovered a St. John’s water meter on TMS 282-00-00-135 in 2005 while he was planting trees. R. p. 75, para. 3, p. 76, para.5 . Simmons questioned Ava Robichaux, the St. John’s general manager on Johns Island about the water meter on this parcel and told them to remove it. Id at p. 1. Robichaux sent Simmons a letter saying that the water line had been there for 20 years. R. p. 77.

At the request of Simmons prior attorney, Ayesha Washington, Esq., St. John’s marked the location of their water lines with blue flags; these showed that St John’s water lines had crossed both TMS 282-00-00-135 and TMS 283-00-00-498. R. p. 76, para. 4. This was the first that Simmons knew that there were water lines across both parcels. Id. A survey was prepared for St. John’s showing the location of its water line across TMS 283-00-00-498 under a dirt road. R. p. 78. Both properties are undeveloped and TMS 282-00-00-135 is heavily wooded. R. p. 76, para. 5.

Simmons contends that St John’s never obtained an easement to cross his property to connect its water line to the Andersen property to the north or to the property owners to the rear of TMS 283-00-00-498. Simmons asserts that he had no reason to

know that St John's was providing water service to property owners using his land for access because St John's never marked the location of their lines or asked his permission or told him about the location of their lines until he asked Ms. Robichaux about the water meter on TMS 282-00-00-135 in April 2005. R. p. 76, para. 6.

F. St John's motion for summary judgment

In its summary judgment motion brief, St John's relied on the encroachment permit from Charleston County to install a water line along Kitford Road in 1977 under Simmons property. R. pp. 62-63. St Johns contended that "a minimum amount of diligence would have revealed the fact that plaintiff's neighbors received their water from St Johns Water Company. This fact establishes the plaintiff's constructive notice of St. Johns use of the easement." R. p. 63. The only evidence that St. Johns submitted to support its contention that it had a right to install its lines under TMS 283-00-00-498 and TMS 282-00-00-135 was an affidavit of Hugh Miley, Jr., the engineer in charge of the installation who states that the water main was installed in 1977-78 in and around Kitford Road R ; it doesn't locate where the work was done or that it was done on either parcel owned by Simmons. R. p. 59, para. 3, p. 62. St John's brief also included a copy of the encroachment permit but not the map referred to in the permit; and list of its customers on Kitford Road provided in discovery. R. pp. 65-69.

Simmons denied that there was any written easement allowing water lines across his property, asserted that the encroachment permit was limited to Kitford Road, that St John's customer lists indicated that the water lines to the customers served by the lines under Simmons property were installed in 1986-87; that both lines were underground

and not obvious and that he did discover the existence of one of the lines , crossing TMS 282-00-135 until 2005. R. p. 71, p. 75, para. 3 - p. 76, para.6.

During oral argument, St John's counsel contended that there was a the dirt road extending from Kitford Road which Charleston County considered to be part of Kitford Road. R. p. 217, line 8-17. He referred to a map that was not part of the motion record. R. p. 215, line 24 – p. 216, line 3. However, there was nothing in the encroachment permit to support this contention. R. pp. 67-69. Simmons counsel pointed out that the Miley affidavit didn't identify where the encroachment permit allowed St Johns to install its water main or where the water lines were located, R. p. 218, line 2-14; and that the only evidence of water use showed it commenced in 1986 &1987. R. p.218, line 14 - p. 219, line 12.

G. The Order granting summary judgment to St John's

The Court entered an Order Granting Summary Judgment to St. Johns Water Company filed December 21, 2010. R. p. 10. The Order states that St. John's Water Company obtained an express easement to install water lines along Kitford Road "which included a portion of the road extending north from the main portion of Kitford Road to residences along said roadway". R. p. 11. The order states that St John's use has been open and notorious under the encroachment permit and without the use of any wells; and to the extent that the express easement is silent as to the specific location, St. Johns holds a prescriptive easement. Id. The order further states that there are affidavits from customers to attest to twenty years of uninterrupted use in the motion record. Id.

Simmons filed a timely motion pursuant to R 59 (e), SCRCP to alter and amend the order. Simmons contended that the decision was not supported by the motion record

and encompasses legal claims which were not asserted in St. John's summary judgment motion. R. pp 159- 162, p.167-173. At the motion hearing, the court denied Simmons motion without opinion. R. p. 242, line 15-21. The short form order which was entered did not address any of the issues Simmons raised in his R 59(e), SCRC motion.

ARGUMENT

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO BERKELEY ELECTRIC

Simmons contends that the court erred by granting summary judgment to Berkeley Electric based upon the evidence submitted. Berkeley Electric's motion for summary judgment was limited to its claim of a prescriptive easement as to TMS 283-00-00-498 but the court granted it summary judgments as to express easements for which it had not requested. Simmons contends that court improperly granted summary judgment to Berkeley as to the scope of its express easements when it had not requested such relief and not based upon evidence in the record which established that Berkeley Electric exceeded the terms of the express easements in crossing TMS 282-00-00-135 and 283-00-00-498 multiple times with its power lines. In so doing, the court relied upon an affidavit that was not part of the motion record and not before the court. Simmons contends that the court improperly granted summary judgment to Berkeley Electric on a prescriptive because the court weighed the evidence instead of finding that there were material issues of disputed fact. Lastly, the court erred because Berkeley Electric failed to meet its burden to produce clear and convincing evidence of open and continuous use for the prescribed period.

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRPC: 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. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn there from must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000).

A. There was no basis for the court to grant summary judgment on express easements that were not brought before the court by Berkeley Electric

Simmons contends that the court erred by granting summary judgment to Berkeley Electric on express easements that it did not request in its motion. The only issue on which Berkeley Electric sought summary judgment was on a prescriptive easement. Rule 56, SCRPC requires notice and an opportunity to respond. Absent compliance with the rule, Berkeley Electric was not entitled to relief that it never requested and for which Simmons had not opportunity to respond.

Simmons had introduced the express easements to establish that there were disputed issues of fact surrounding them since Berkeley Electric had relied upon the express easements for a claim of right. Simmons counsel discussed the express easements in that

context and asserted 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. He further pointed out that the language of the 1972 easement was non specific as to location and magnitude. " If the language [of an easement] is uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect." 25 Am.Jur.2d Easements § 18, at 516 (2004). Therefore, 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 granting summary judgment on express easements.

Berkeley Electric was attempting to limit the issues contrary to what the parties intended by the Consent Order of Reference. The matter was originally on the jury list and the parties agreed to an Order of Reference to the Master in Equity because the extent of an easement is a question to be resolved by an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997). By skirting the express easements, Berkeley Electric tried to avoid doing what was supposed to be done. Therefore, the court erred in granting relief to Berkeley Electric that was never requested in compliance with the Rules of Civil Procedure and contrary to the Order of Reference.

B. There was no basis for the court to grant summary judgment on the scope of the express easements that were not brought before the court by Berkeley Electric

Similarly the court granted summary judgment to Berkeley Electric that it had not exceeded the scope of its express easements, relief that it had not requested. Since the

issue of the express easements was not properly before the court, it should not have reached any decision concerning the scope of these easements as well. Moreover, Simmons contends that the evidence does not support this conclusion, see Section C below.

In determining that Berkeley Electric did not exceed the scope of the easements, the court found as matter of law that the 1972 easement was vague as to location because property owners then didn't want to incur the cost of surveys. R. p. 18. This conclusion is not based upon the record but upon a comment made by Berkeley Electric's counsel about the indefinite nature of the 1972 easement. R. p. 207, line 20-24. Simmons R 59 (e), SCRCF motion asserted that this conclusion of law was unsupported in the record and should result in reconsideration. The court did not address this or any issue in its denial of this motion. Simmons contends that the court erred as matter of law because this conclusion is unsupported in the motion record. Berkeley Electric did not offer any testimony from any property owners about this. The court simply relied upon the representation of Berkeley Electric's counsel at the hearing in the absence of any facts. Arguments of counsel do not provide the factual basis for summary judgment. Trivelas v. South Carolina Dept. of Transp., 348 SC 125,141,558 SE 2d 271,279 (Ct.App.2001). The Court also referred to the Anderson easement in its decision but that too was not part of the record and thus cannot be a basis for any finding. Therefore, the court erred by adopting assertions of counsel or facts not in the record as a basis for a legal conclusion.

The scope of the 1972 easement was in dispute. Simmons contended that a hearing was required in order for the court to understand the full circumstances. Simmons counsel proffered some of the pertinent facts surrounding the grant of the easement. The

court had no reason to accept Berkeley Electric's counsel opinion surrounding the events of the 1972 easement instead of Simmons counsel since neither were evidence. The Court had to rely upon competent evidence in the record and since there was none , it should have determined not to grant summary judgment as to the scope of the 1972 easement. Since the court's conclusion of law is unsupported in the record, the court erred by granting summary judgment instead of conducting a hearing concerning the scope of the 1972 easement.

C. There were disputed issues of fact as to whether the easements were exceeded

Because Berkeley Electric had asserted that the express easements created a claim of right for a prescriptive easement, Simmons introduced extensive evidence that Berkeley Electric had exceeded the scope of both the 1956 and 1972 grants.

1. Berkeley Electric exceeded the 1952 easement across TMS 282-00-00-135

It is not disputed that the 1956 Heyward easement allowed Berkeley Electric to erect a transmission line through TMS 282-00-00-135 and 283-00-00-498; or that the 1972 Brown easement allowed Berkeley electric to cross TMS 283-00-00-498. However, Simmons contended and the evidence established that the 1972 Brown easement extended only up to the Seaboard Coastline Railroad right of way and that TMS 282-00-00-135 is to the east of that right of way. The Lacey plat shows that Berkeley Electric power lines run from the transmission line beyond the 75' easement west toward Kitford Road and east to the Anderson property. Berkeley Electric did not submit any evidence concerning its claim for any easement on TMS 282-00-00-135; its motion was addressed solely to its claim of a prescriptive easement across TMS 283-00-00-498. The express easements were introduced in Simmons reply papers to show that

Berkeley Electric had exceeded the written easements and that any potential prescriptive easements which Berkeley might claim were unreasonable.

After Simmons raised the lack of evidence pertaining to any prescriptive easement on TMS 282-00-00-135, Berkeley attempted to respond, inappropriately Simmons contends, by submitting an affidavit from an employee claiming that its power lines to Anderson were not on Simmons property but on Anderson's. Berkeley Electric did not address whatsoever, Simmons other claim to the encroachment across TMS 282-00-00-135 to the west. Therefore, Simmons claim that an 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 is undisputed in the record.

2. Berkeley Electric exceed the scope of the 1972 easement

Simmons also contended that Berkeley Electric exceeded the scope of the 1972 written easement by installing power lines across TMS 283-00-00-498 and onto TMS 282-00-00135 to serve residents on both sides of Kitford Road from multiple locations. During the motion hearing, Simmons counsel proffered that that the 1972 easement was vague in its language and as to its implementation ; therefore counsel argued, it had to be reasonably interpreted. "Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention." Smith v. Comm.'s of Pub. Works of City of Charleston, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct.App.1994); Ten Woodruff Oaks, LLC v. Point Development, LLC, 385 S.C. 174, 181 (Ct. App. 2009). Neither of the easements contains a definite location where the power line is to be located. " If the language is

uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect.” 25 Am.Jur.2d Easements § 18, at 516 (2004).”

Although Berkeley Electric obtained two separate easements to install power lines across the Simmons property, it used these easements to justify crossing the Simmons property in four separate locations. Simmons contended that Berkeley Electric unreasonably implemented these easements and granted pole sharing rights over multiple locations across Simmons land for a fee to serve its purposes without regard to Simmons property rights or the effect of its actions upon them. Simmons contends that there is an alternative to crossing TMS 283-00-00-498, i.e. the route which Berkeley Electric has used in the past which would less severely impact his property, i.e. over his driveway along the south side of Kitford Road. Simmons’ surveyor will testify consistent with his supplemented plat that the total area of TMS 283-00-00-498 (1.375 acres) is effectively reduced to .342 acres due to the existence of Berkeley electric’s two overhead power lines. Simmons contends that the court had to consider the totality of the circumstances surrounding the express easement in order to determine the scope and intent of the parties. Since Berkeley Electric did not offer any evidence regarding the scope or intent of either easement, the court had no basis to determine whether they were exceeded.

D. The Bradley Affidavit was not properly before the court and was not the basis for finding that the easements were not exceeded.

Simmons appeals the court’s order as to express easements on the additional ground that the Bradley affidavit upon which the court may have relied was not properly

before the court and should not have been considered. Simmons initially objected to Berkeley Electric's counsel submitting the Bradley Affidavit and after the court granted summary judgment, renewed his objection and requested an opportunity to respond in a motion for reconsideration. That motion was denied.

The Bradley Affidavit should have been part of the Berkeley Electric's original motion since it relates to their defenses to the allegations of the Second Amended Complaint asserting trespass on TMS 282-00-00-135. The court's Scheduling Order required all dispositive motions to be filed by November 12 and this affidavit was not part of it. Summary judgment motion materials must have been filed. Loyd's Inc. v. Good, 306 S.C. 450, 412 S.E.441,443 (Ct. App. 1991). Rule 56, SCRCP provides only that an adverse party to a summary judgment motion may serve a reply within 2 days of the hearing. Simmons counsel served his responsive brief and affidavits in a timely manner. R 56, SCRCP does not provide for any further reply.

Obviously Berkeley Electric's counsel received Simmons opposing papers before the motion hearing and realized that the lack of evidence as to TMS 282-00-00-135 needed to be addressed. Obviously, they crafted a last minute affidavit by a Berkeley Electric employee attempting to interpret the boundary line between Simmons and Andersen property and saying that the offending power line is totally on Andersen's property. Berkeley Electric did not name any experts in their responses to discovery requests and the Bradley affidavit is an expert opinion in interpreting the Simmons and Anderson boundary lines. Simmons had no notice or opportunity to respond. Therefore his affidavit attempting to express an expert opinion should be rejected for that reason also.

In summary, to the extent that the court's Order relies on the Bradley affidavit and opinions asserted therein, which were not properly before the Court, Simmons contends that the court erred in granting summary judgment.

E. There were disputed issues of fact as to the existence a prescriptive easement across TMS 283-00-00-498 and TMS 282-00-00-135

Berkeley Electric's motion for summary judgment on prescriptive easement was limited to TMS 283-00-00-498 because the two affidavits of employees submitted only referred to a single line in the vicinity TMS 283-00-00-498 (although the witnesses did not refer to it specifically) which they claimed had been there since before 1980. Simmons contends that the two plats he submitted together with other Berkeley Electric documents were sufficient to create a dispute of fact so that the court should not have granted summary judgment as to that parcel. Berkeley Electric introduced no facts as to the existence of a prescriptive easement on TMS 282-00-00-135 so there was no basis for the court to find in its favor.

1. The Gaillard and Schuler plats do not contain any poles for a power line from Simmons property

The court found that two plats of adjacent property prepared in 1981(Gaillard) and 1983 (Schuler) were not supportive of Simmons claims that Berkeley Electric power line did not cross the westerly portion of TMS 498 until after the date of these surveys. The Court found that these plats were not of Simmons property and did not contradict the testimony of Berkeley Electric supervisors Seeny and Frank. R. pp.19- 20.

Simmons contends that the court improperly weighed the evidence instead of merely accepting it as creating a dispute of fact.

The Gaillard plat purports to create an easement for a road and shows the location of the Berkeley Electric transmission line across TMS 283-00-00-117 and the transmission line as well as a dirt road across TMS 283-00-00-498 to which that proposed road is to connect. The Schuler plat was purportedly done to establish the area under easement on TMS 283-00-00-319 and indicated the location of the transmission line across TMS 283-00-00-498 (then designated as part of TMS 283-00-00-115) as well.

Even though these plats were prepared for other purposes, the court had no basis to find that the details shown on them were inaccurate or incomplete. Neither plat shows another power line or pole on the plat being surveyed even though that that was where the poles birth marked 1984 or 1986 were located according to Berkeley Electric employees. Simmons offered these plats to show that there was no power line across TMS 283-00-00-498 when Berkeley Electric said it was there. If the poles on the property where the line connects are not shown on plats of those properties , how can the line supposedly attached to those poles have actually been there? The Lacey survey includes details of surrounding properties including those properties shown on the Gaillard and Schuler plats. The Lacey plat locates the power poles on those properties to which the line across TMS 283-00-00-498 was attached. The court had only to recognize the inconsistency shown on these plats and not try to resolve any inconsistencies.

The role of the Court is to determine whether a dispute of material fact exists, not whether one party's evidence is better than the others. Both plats are evidential of the

condition and existence (or not) of a power line situated on a pole to the north of TMS 498 since both plats show that area. The explanation in the Order that the plat was not of Simmons property is an inadequate explanation for the discrepancy and should have been rejected. These plat raise a question of fact as to when the power line was installed because it contradicts Berkeley Electric employees' testimony.

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn there from must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

Simmons contends that these plats and the reasonable inferences drawn from them raise a question of fact which precludes the granting of summary judgment. There is no evidence in the record to provide any explanation of these plats which would enable the Court to disregard them. The Order contains factual findings and a conclusion of law disregarding the evidential value of these plats. These findings and conclusion are not based upon the record, are not supported by any reasonable inferences drawn from the record and are not a proper basis for the granting of summary judgment.

Therefore, these findings cannot support a conclusion of law rejecting evidence that contradicts BEC's supervisors' testimony.

2. Berkeley Electric's system maps contradicted its employees' testimony

Simmons also contends that the court erred by finding that the Berkeley Electric system maps did not create a dispute of fact regarding Berkeley Electric's contention that the power line across TMS 283-00-00-498 had not been moved for the last thirty years. The court found that the system maps do not conflict with its employees testimony concerning the location of its power lines because Simmons did not provide any testimony as to how these maps should be interpreted. Simmons contends that the court erred by weighing evidence instead of recognizing that it created a dispute of fact. Simmons contends that Berkeley Electric produced conflicting system maps regarding the location of the power line that allegedly crossed TMS 283-00-00-498. The System Map prepared by Southern Engineering dated 4/12/95 shows a power line across Kitford Road but does not indicate whether it encroaches on TMS 283-00-00-498. R 135. The current Berkeley Electric System Map shows the same power line in a substantially different location. R 136. Berkeley Electric did not produce any system map showing the location of its power line across TMS 283-00-00-498 prior to 1995 and after 1980 although plaintiff requested it to produce this in discovery.

Simmons contends that he and the court were entitled to rely upon them as "maps" since Berkeley Electric was requested to produce all "maps showing the location of the disputed power line from 1980 to the present" in discovery. These documents were provided in response. Maps are by definition intended to be accurate. They are shown on a drawing with a scale indicated thereon. The Court has only to refer

to them to see that they cannot be consistent since they show different locations for the subject power line across TMS 498 in 1995 and the present.

It is reasonable to conclude from the inconsistent system maps that the power line was moved between 1995 and the present; otherwise the two system maps would be identical. Therefore, the documentary evidence supports the conclusion that there was no power line crossing TMS 283-00-00-488 at the end of 1983; and that the location of the power line changed from 1995 to the present based upon system maps prepared at different times. The evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004) Under the summary judgment standard, the court gives every benefit of the doubt to the non-moving party. Watters v. Terminix Service, Inc. 376 S.C.632, 635, 658 S.E. 2d 110,111 (Ct. App. 2008).If the court determined that the maps required further explanation to determine if they established an issue of fact it should have denied summary judgment instead of rejecting them. Summary judgment is appropriate only if the moving party can establish that inquiry into the facts is not desirable to clarify the application of the law. Standard Fire v. Marine Contracting, 301 SC 418, 421, 392 S.E.460 (1990).

3. Berkeley Electric submitted no evidence of prescriptive easements across
TMS 282- 00-00-135

Berkeley Electric failed to establish it is entitled to a prescriptive easement across TMS 282-00-00-135 because the only evidence it has provided in its Amended Motion for Summary Judgment relates only to the installation of its utility poles for a line across TMS 283-00-00-498. Simmons asserts that there were no facts other than what it

introduced as to TMS 282-00-00-135 and that they do not establish that Berkeley electric is entitled to a prescriptive easement as matter of law. Berkeley Electric's counsel attempted to rebut those at the hearing but arguments of counsel are no basis for granting summary judgment. Arguments of counsel are not the basis for summary judgment. Trivelas v. S.C. Dept. of Transp. 348 SC 125,141, 558 S.E. 2d 271,279 (Ct. App. 2001)

F. The Court improperly weighed the evidence and ignored the existence of numerous material disputed facts

Simmons contends that the court did not properly apply the standard for summary judgment in deciding to grant summary judgment to Berkeley Electric on a prescriptive easement. The Court's role is to examine the record to determine whether there are material issues of disputed fact and if there are none, to decide whether the moving party is entitled to judgment as matter of law. The Court's role is not to balance and interpret the evidence to determine which side should prevail. Here the record contains numerous instances of facts in dispute which should have caused the Court to deny its motion . The Court's Order however, contains findings which weigh the evidence and which the Court should not perform at this stage of the proceedings.

Simmons submitted two plats which do not contain any Berkeley electric power poles at a time when it contends they were in place. The court rejected this because the plats were not of Simmons property. Simmons Berkeley electric system maps which were not consistent as to the location of a line across TMS 283-00-00-498. The court said it couldn't interpret these and disregarded them . Simmons submitted an affidavit in which he asserted that Berkeley Electric used a different route in the past along his driveway across TMS 135 for its power lines and cable lines to service

customers on Kitford Road and not across TMS 283-00-00-498. The court ignored this completely.

The motion record does not support the granting of summary judgment because Simmons assertions create a disputed issue of fact as to continuous use for twenty years. Simmons assertion that power to customers along Kitford Road was provided in the past by a line from the main distribution line crossing TMS 282-00-00-135 under the 1956 easement down to Kitford Road is consistent with other evidence. The power pole on the south side of Kitford Road birth marked "1986" could just as well have been used at this location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. Similarly, the pole on TMS 283-00-00-118 to the north of TMS 283-00-00-498 and birth marked "1984" could have been placed in its location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. The date of the birthmarks on the poles may signify when the pole was installed but without other corroborating evidence which BEC never provided, they are not conclusive as when the power line across TMS 283-00-00-498 was installed between those poles.

The Court must view the evidence and all inferences which can be reasonably drawn there from in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Surveys done in 1981 and 1983 do not show the existence of a power line across TMS 498 which Berkeley Electric alleges was there in 1980. Two Berkeley Electric system power surveys show the power line in different locations. Birthmarks on power poles are

not conclusive evidence that a power line ran between them. Berkeley Electric's own documents contradict the sworn testimony of its employees, Seeny and Frank upon which its allegation of continuous use rests. The Court should not have accepted the employee testimony as conclusive proof of continuous use when it was contradicted by the documentary evidence and Simmons testimony.

In summary, the record contained disputed issues of fact which preclude the granting of summary judgment. The Court attempted to weigh and interpret the evidence instead of simply deciding whether there was a dispute of fact. The Findings and Conclusions of Law are subjective evaluations of the evidence which the Court should not have undertaken at this stage of the proceedings. They are not supported by the motion record and exceed the scope of the Court's duty to determine this motion.

G. Berkeley Electric failed to establish any prescriptive easements by clear and convincing evidence

In order to establish a prescriptive easement, a party must show (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years ; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right." Horry County v. Laychur, 315 SC 364, 367 (1993). The claimant must show by "clear and convincing" evidence he has met the requirements for adverse possession. Davis v. Monteith, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986).

Simmons contends that the court erred in granting summary judgment because Berkeley Electric failed to satisfy its burden its burden of proof on the issue of a prescriptive easement.

Simmons contends Berkeley Electric did not provide any evidence of an express easement to cross TMS 135 beyond the terms of the 1956 transmission line easement which it indisputably exceeded. Thus, there is no evidence to support a prescriptive easement based upon some claim of right. As far any outright adverse use for 20 years, Berkeley Electric did not submit any evidence of when it first installed the power line to the Andersen property from the transmission line crossing TMS 282-00-00- 135 or the other line which is to the west. Therefore, Berkeley electric has failed to establish any right to a prescriptive easement across TMS 282-00-00-135 and summary judgment as to that issue should have been denied.

Simmons also contends that Berkeley Electric failed to meet its burden of proof of clear and convincing evidence as to a prescriptive easement as to TMS283-00-00-498. Simmons contended that Berkeley Electric's employees testimony that the line was installed before 1980 was contradicted by its owns business records. Even if the court disagreed with Simmons contention as to the significance of the facts, disagreement as to the conclusion to be drawn from the facts requires that it should have denied summary judgment. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997); Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990).

Further, plaintiff contends that the age of the "birthmarks" on the poles to which the power lines are attached (1984 & 1986) does not confirm when the power line was installed. Simmons contends that power to customers along Kitford Road was provided in the past by a line from the main distribution line crossing TMS 282-00-00-135 over his driveway down to Kitford Road. See Simmons Supplemental Affidavit. The pole on the

south side of Kitford Road birth marked “1986” could have been placed in its location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. Similarly, the pole on TMS 283-00-00-118 to the north of TMS 283-00-00-498 and birth marked “1984” could have been placed in its location to service customers in the immediate area and not necessarily to provide a route to cross TMS 283-00-00-498 as alleged by Berkeley Electric employees. The date of the birthmarks on the poles may signify when the pole was installed but without other corroborating evidence, they are not conclusive as when the power line across TMS 283-00-00-498 was installed between those poles.

Simmons contends that Berkeley Electric has used a different route down his driveway for its power lines and cable lines in the past to service customers on Kitford Road and not the line across TMS 283-00-00-498.

II. THE COURT ERRED BY GRANTING SUMMARY JUDGMENT TO ST JOHN’S

Simmons contends that the December 22nd Order granting summary judgment to St John’s is not supported by the motion record ; that the court granted legal claims which were not asserted in St. John’s summary judgment motion; and that an express easement to install water lines along Kitford Road “which included a portion of the road extending north from the main portion of Kitford Road to residences along said roadway” was based on no evidence. Simmons contends that the county encroachment permit granted to St John’s does not rise to the level of a claim of right and there was no evidence in the record to support the court’s decision to create a prescriptive easement founded upon it. The court’s finding that St John’s water lines were open and notorious

for the statutory period is not supported in the record of its customer use on Kitford since St John's records established that service to the closest customers to Simmons was installed in 1986 and 1987 that Simmons demanded that St John's remove its water line in 2005. Alleged evidence of earlier use in the form of customer affidavits was not in the record. Finally the court did not find the existence of a prescriptive easement by clear and convincing evidence and there were disputed issues of fact.

A. The court improperly granted summary judgment on an express easement

St. John's motion for summary judgment was limited to the imposition of a prescriptive easement. R. p. 61. St. John's motion for a prescriptive easement was based on an encroachment permit it received in 1977 from Charleston County to extend its water line from Main Road down Kitford Road. R 63. St Johns asserted that the encroachment permit represented a "claim of right". Id. During oral argument, counsel for St. Johns claimed that a dirt drive over Simmons property was part of Kitford Road and thus included in the encroachment permit. R. p. 214, line 21- p. 215, line 3; R. p. 217, line 13-21. However the encroachment permit states on its face that it applies only to construction on a "right of way of county road or street". R. p. 67. The encroachment permit refers to a drawing (designated as U-25) which St. John's did not include as not part of the motion record. R. p. 69. There was not even any evidence in the motion record where this express easement was located. There was no evidence in the motion record that this dirt drive across Simmons property was ever a county road or street or that it was ever maintained by Charleston County. Thus the court only had the assertions of counsel that St Johns had the right to traverse Simmons property across an unspecified dirt road allegedly maintained by the county. Because St. Johns motion failed to request summary

judgment on an express easement, Simmons was denied the right to rebut the unsubstantiated allegations of an express easement and demonstrate the existence of disputed issues of fact. (In fact the Lacey plat submitted in opposition to Berkeley Electric's motion for summary judgment shows that the public portion of Kitford Road ends at the Seaboard Coastline Railroad right of way and thereafter becomes a private road. R. p. 130. R 56, SCRCF (as well as the court's scheduling order) precluded St. John's from asserting a new basis for summary judgment, i.e. an express easement as the basis for its motion. Thus the court erred in granting summary judgment on an express easement as a matter of law.

B. St. Johns failed to establish a claim of right under the encroachment permit

The court's order further states that to the extent that the express easement is silent as to the specific location across Simmons property, St. Johns holds a prescriptive easement. R. p. 11. In order to establish a prescriptive easement, a party must show (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years ; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right." Horry County v. Laychur, 315 SC 364, 367, 434 S.E.259 (1993). Simmons contends that the county encroachment permit could not establish a claim of right to support a prescriptive easement and that the use was not open and notorious for the statutory period. See Section C below. The county encroachment permit on its face allows St John's to install its water mains on county roads or streets. It does not create a claim of right to encroach on private property. St. Johns obtained an encroachment permit for the purpose of installing water lines along Kitford Road. St. John's did not present evidence to establish that it could have reasonably relied on the

encroachment permit for such a purpose as installing water lines on private property. The ownership of the property and the lot descriptions are a matter of public record in the Charleston Recorder of Mesne Conveyance and the tax assessor. St. John's could have easily determined whether the property it was about to enter was public or private. St. John's motion for summary judgment did not include the map referred to in the encroachment permit or any other map on which it could have allegedly relied. Thus the court had no basis to find that the encroachment permit created a claim of right. Therefore, the court should not have granted summary judgment on a prescriptive easement because St. John failed to establish any claim of right to cross either TMS 283-00-00-498 or TMS 282-00-00-135.

C. There was a dispute of fact that the use was open and notorious

The court found that there had been continuous water service without the use of any wells. R. p. 11. Simmons contends that the motion record does not support the court's finding that there was a prescriptive easement based on an open and notorious use. The motion record is limited. It contains the affidavit of Hugh Miley, the project engineer who stated that "the first construction project began in 1977 and included the installation of a water line in and along Kitford Road." R. p. 59 . Mr. Miley does not identify the location of the water line as crossing either Simmons parcel or refer to any maps or drawings which indicate its exact location. Hugh Miley's affidavit is vague and inconclusive.

The motion record also contains St. John's customer list for Kitford Road with the dates of service and addresses. St John's contended that this was evidence of twenty years of open and notorious use. R. pp. 63, 65. All but two of these customers received

their service after 1986. R. p. 65. The list shows that one of the pre 1896 customers received service on Kitford Road in 1975, before St John's had even constructed the water line on Kitford Road according to Mr. Miley's affidavit. Therefore, St John's customer list establishes only that St John's had a single customer on Kitford Road as of 1979.

All of the other customers on St John's list received service after 1986. For example, water service was connected to the Andersen property (across TMS 282-00-00-135) in August 1987 and to Frazier and Gordon, property owners to the rear of TMS 283-00-00-498 in July 1986 and August 1987 respectively. Therefore, the earliest that Simmons could have had constructive notice of the existence of water service across his property would be July 1986. He objected to St John's water lines in 2005 and tolled the statutory period.

Simmons does not concede that this was sufficient to constitute constructive notice. St. Johns must show "a distinct and positive assertion of a right hostile to the owner, and brought home to him for the statutory twenty year period". Williamson v. Abbott, 107 S.C. 397, 93 S.E. 15 (1917). Instead, the facts on the motion record presented a question of fact that prevented the court from granting summary judgment. Simmons stated: "I have well water and so do many other homes in this area. I had no reason to know that St John's was providing water service to property owners using my land for access." R. p. 76, para. 6. Thus, the issue of whether the use was open and notorious was a question of fact that prevented the court from granting summary judgment on a prescriptive easement.

D. Customer affidavits of earlier use were not in the record

The order refers to affidavits of St. John's customers attesting to twenty years of uninterrupted use. However, there were no affidavits submitted with St John's motion and accordingly the motion record does not support this finding.

E. The motion record does not support a finding of prescriptive easement by clear and convincing evidence.

Simmons contends that the court should not have granted summary judgment on a prescriptive easement because of the lack of clear and convincing evidence. Each element of a prescriptive easement must be demonstrated by clear and convincing evidence. Davis v. Monteith, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986). Graniteville Co. v. Williams, 209 S.C. 112, 120-21 (1946); Williamson v. Abbott, 107 SC 397, 93 S.E. 15 (1917). There was no evidence of an express easement. The existence of a prescriptive easement was not established by clear and convincing evidence. The claim of right could not be established on the face of the encroachment permit or by reference to any drawing in the record. The first use was not established by Hugh Miley's affidavit because it was not specific as to Simmons property. The customer list is not evidence of a first use pre 1985 since the two customers were not served by a water line on the property that Simmons or his predecessor in title owned. The post 1985 customers on the list do not establish twenty years of adverse use since Simmons complained about St. John's possible encroachment in 2005. Thus, all of the material facts necessary for St. Johns to establish a prescriptive easement were disputed by competent evidence including St John's own business records.

The undisputed facts also support Simmons position. The water lines were underground beneath both properties. St John's never marked the lines or told Simmons of their existence before he complained in 2005. Simmons did not receive any notice and had no reason to know that water service was being provided to owners in the rear of his property since well water was available in the area.

Therefore, Simmons contends that the court should not have granted summary judgment on a prescriptive easement due to the lack of clear and convincing evidence that its use was open and notorious for twenty years.

CONCLUSION

For the reasons expressed above, Simmons respectfully requests that this court reverse the January 18th Order granting summary to Berkeley Electric and remand the matter to the Master in Equity for further proceedings. Simmons further requests that the Court reverse the December 22nd order granting summary judgment to St. Johns and remand for a trial before the Circuit Court as to damages.

Respectfully submitted,

Edward A. Bertele
Attorney for Appellant

April 17, 2012
Charleston, SC

Roosevelt Simmons, Appellant,

v.

Berkeley Electric
Cooperative, Inc. and
St. Johns Water Co., Respondents.

Brief of Respondent
St. Johns Water Company, Inc.

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I. STATEMENT OF ISSUES ON APPEAL

1. Did the Master-in-Equity err in granting summary judgment to St. John's Water Company on an express easement based on no evidence and when not requested by St. John's in its motion?
2. Did the Master-in-Equity err in granting summary judgment to St. John's Water Company on a prescriptive easement on the basis that claim of right could be based upon an encroachment permit?
3. Did the Master-in-Equity err in granting summary judgment to St. John's Water Company on a prescriptive easement on the basis that buried water lines were open and notorious use for the statutory period?
4. Did the Master-in-Equity err in granting summary judgment to St. John's Water Company on a prescriptive easement based upon customer affidavits not in the record?
5. Did the Master-in-Equity err in granting summary judgment to St. John's Water Company on a prescriptive easement because there was a lack of clear and convincing evidence and a dispute of material fact?

II. STATEMENT OF THE CASE

Roosevelt Simmons, the Appellant herein, acquired a parcel of property (hereinafter "subject property") along Kitford Road in Johns Island SC, with TMS# 283-00-00-498, in 1992 as trustee. Full legal title vested in Appellant in 2003 as the result of an inter-family transaction. According to Appellant, he subsequently discovered a water meter located on the subject property, and upon further inspection, determined that it belonged to St. John's Water Company, Inc, one of the Respondents herein (hereinafter St. Johns).

Over twenty years prior to Appellant acquiring the subject property, the Respondent obtained the right to install water lines along Kitford Road via an Encroachment Permit. The

permit was obtained from the County of Charleston, and granted St. Johns the right to install water lines along Kitford Road, including the section of road now crossing over the subject property. The Respondent began installing the water lines along Kitford Road in 1977, and construction was completed in early 1978.

In the thirty years between the end of that construction and the filing of this action, St. Johns has maintained and used the original main water line installed along Kitford Road and under the subject property with no interruption of use whatsoever. The line along Kitford Road was installed and became operational in 1978. Since 1979, St. Johns has used the water main to provide service to customers on Kitford Road. Since 1984, St. Johns has provided continuous water service to at least one residence located north of the subject property, and at least two additional residences to the north of the subject property are currently serviced by that line. There is only one way for that water to get to those customers: the line that was installed in 1978, a portion of which currently runs under the subject property.

There is an additional parcel of property, TMS# 282-00-00-135, which is not affected whatsoever by any water lines owned or maintained by St. Johns. Respondent asserts that it does not have any lines under TMS# 282-00-00-135, and Appellant has introduced no evidence proving that any of St. Johns' water lines cross this parcel.

In 2008, Appellant filed an action for trespass and conversion. After all pleadings were filed and discovery was completed, Respondents filed a motion for summary judgment. The motion hearing was held on November 22, 2010, at which time the motion for summary judgment was granted. Appellant filed a timely motion to reconsider, which was heard on April 11, 2011. The Master-in-Equity denied the motion to reconsider. This appeal followed.

III. STATEMENT OF FACTS

St. Johns originally acquired a series of Encroachment Permits to install water lines in and around John's Island in the later part of the 1970s (R. pp. 66-69). These permits were granted by the County of Charleston, and covered areas all over the rural island. Until the time that St. Johns began installing these lines, the only way for residents to receive water was through the use of wells and pumps. One of the permits granted St. Johns the right to install water lines "[a]long Kitford Road as shown on sheet U25" (R. p. 69). The corresponding map U25 (dated 1977) shows a then-unpaved Kitford Road and the planned locations of the water lines to be placed around that road (R. p. 245). At the end of Kitford Road, the map indicates that a spur of the main water line is to turn roughly northeast and extend under what is now the subject property.

According to the affidavit of Hugh Miley, an engineer who oversaw the original construction project, the line was completed in 1978, at which time the water line under the subject property was functioning and operational (R. p. 59). Since that time, St. Johns has never stopped using that line (R. p. 60) and has supplied water to the residences located along Kitford Road and to the northeast of the subject property via the same water line that was installed as a result of the construction project commenced in 1977. No other lines have been installed by St. Johns along Kitford Road, and there is no other way for the residences on Kitford Road to receive municipal water except via that water line.

Further, Appellant is no longer the owner of the subject property (R. p. 80). He lost title to the property at the beginning of 2011 as a result of a Sheriff's Sale for a failure to pay use taxes (R. p. 122-125). As such, Simmons does not even have standing to pursue the matter at this time.

IV. ARGUMENT

A. The Master did not err in granting St. Johns's Motion for Summary Judgment.

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002). St. Johns contends that the Master-in-Equity did not err by granting its motion for summary judgment. As is fully discussed herein, there was ample evidence before the Court to allow the Master to determine that St. Johns has a prescriptive easement under the subject property.

1. The Master had sufficient evidence before him to find that St. Johns held an express easement.

“The character of an express easement is determined by the nature of the right and the intention of the parties creating it.” Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (S.C. 1997).

The Master's Order states that “St. Johns Water Company has an express easement, obtained in 1977, to install and maintain water lines under the subject property” (R. p. 12). This finding was based on the evidence presented at the motion hearing by counsel for St. Johns, namely the encroachment permit granted by Charleston County in 1977, which incorporated a drawing labeled U25. This was presented to and viewed by the Master at the summary judgment hearing. The language contained in the permit makes it clear that St. Johns obtained an express easement to install and maintain its water lines along Kitford Road (R. p. 66-69). The corresponding map, marked U25, was also presented to the Master at trial. This map shows the location of the water lines, and indicates that the line under the subject property was part of the original plan (R. p. 245). The nature of the right created by

the encroachment permit and the intention of that parties are clear: to allow St. Johns to install and maintain water lines along Kitford Road and under the subject property.

Based on this evidence, the Master had sufficient proof before him to make a finding that St. Johns held an express easement to install and maintain its water lines along Kitford Road. That easement included the portion of the line that is under the subject property.

2. St. Johns established a valid claim of right to use the subject property.

St. Johns established that based on the encroachment permit issued by the County of Charleston in 1977, it held a substantial belief that it had a valid claim of right to enter the subject property to install and maintain its water main. This issue is fully addressed below, in Section 5.

3. Any dispute of fact regarding open and notorious use was not determinative to the granting of summary judgment as to St. Johns's prescriptive easement.

The dispute as to open and notorious use was whether or not a buried water line could be considered open and notorious. While St. Johns contends that its water line under the subject property does constitute an open and notorious use, this question did not even have to be reached for the court to find summary judgment appropriate. St. Johns demonstrated a valid claim of right, which negated the need to show open and notorious use. This issue is fully addressed below, in Section 5.

4. Customer affidavits referred to in the Order are not necessary to prove twenty years continuous use.

The Master's Order references customer affidavits that attest to twenty years of continuous use of the water line under the subject property. At the time of drafting the Order, counsel for St. Johns believed that two affidavits from Respondent's customers attesting to twenty years of continuous use had been submitted to the Court in response to Plaintiff's Interrogatories. Upon a review of the file in preparation for this appeal, it was discovered

that the affidavits had never been submitted to the Court. Those affidavits are admittedly not part of the motion record, but they are not necessary to establish use for the statutory period, as there was other evidence presented to the Court to prove that the requisite period of time had passed. This issue is fully addressed below, in Section 5.

5. St. Johns presented clear and convincing evidence that conclusively proved a prescriptive easement.

St. Johns was entitled to judgment as a matter of law that it holds a prescriptive easement. Even when the facts are viewed in the light most favorable to Appellant, it is clear that Respondent holds an easement by prescription to run and maintain water lines under the subject property. To establish an easement by prescription, St. Johns must show (1) the continued and uninterrupted use or enjoyment of the right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right. Jones v. Daley, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct. App. 2005).

a. St. Johns has maintained its water lines under the subject property continuously and without interruption for over 20 years.

The first requirement for a prescriptive easement is that the use in question has been both continued and uninterrupted for a period in excess of twenty years. Id.

As indicated in the affidavit of Hugh Miley, the head engineer of the original construction project, the water line in question was installed well over twenty years ago. The construction project which installed the water line under the subject property began in 1977 and was completed in 1978. (R. p. 59) It has been used continuously ever since that time, and there has been no interruption of service whatsoever. (R. p. 60)

Appellant argues that "Mr. Miley does not identify the location of the water line as crossing either Simmons parcel or refer to any maps or drawings which indicate its exact location" (Appellant's Br. 40). However, when Mr. Miley's affidavit is considered in

conjunction with the original encroachment permit and map, it is clear that the affidavit supports the contention that the line he is describing is the same one that runs under the subject property. Mr. Miley's affidavit identifies Kitford Road by name, and the map identifies the exact location of the water line.

Further, Appellant's own evidence establishes the location of the water line. The map marked "Exhibit B," attached to the affidavit of Roosevelt Simmons and filed August 5, 2010, shows precisely where that water main is located (R. p. 78). The map clearly shows the water line running along an existing dirt road that crosses the subject property. When considered with Mr. Miley's statement that "the said water line is currently in the same place and location as originally installed during this period of time," (R. p. 60) it is clear that the original construction project resulted in the installation of the very same line which is now under the subject property. Appellant has introduced no evidence to contradict this.

Appellant suggests that the first use did not commence until 1986 (Appellant's Br. 40). This contention is based on the customer records of St. Johns , which indicate the dates on which service was established at individual residences. However, Appellant does admit that St. John's had at least a single customer on Kitford Road as early as 1979 (Appellant's Br. 40). There was only one main water line constructed on Kitford Road, and no other main lines have been installed since its construction in 1977-78. That main line includes the line that runs under the subject property now. The only way for any customer on Kitford Road to receive municipal water is through that single water main. By Appellant's own admission, St. Johns had a customer on Kitford Road in 1979, thus establishing that the water main was used to provide service to customers at least as early as 1979. There has been no interruption of water service since that time, and there was no evidence before the court to suggest that service has ever been interrupted.

Additionally, the customer records are not the only way to determine the date of first use, nor are they even the most accurate. St. Johns presented evidence that the line in question was installed and functioning as of 1978. (R. p. 59-60). At that time, construction was completed and the line was operational. It stands to reason that a water company must first install a large-gauge main water line before it can service customers. Once an individual customer applies for service, smaller gauge lines are tapped into the main line and installed under the customer's property. The line under the subject property is the same large-gauge main line that was installed along Kitford Road in 1978 (R. p. 59-60). The Master-in-Equity understood this at the summary judgment hearing, as evidenced by the following:

Prior to that, prior to 1977, prior -- I forgot the dates, the 1950's, I guess, these people had no power, no water. Just because they put power, water lines in didn't mean that people tapped into them. They tapped into electricity but not water. Water they tapped into once they [St. Johns] got a grant [to supply water to individual customers], which I assume happened in the late 80's. That's not in the record. That's just me knowing what happens out there in the country. So there were water lines put there. You've got to have water lines installed for people to have water lines [to their houses]. You determine there is water there by turning the spigot and having no well.

(R. p. 221, lines 11-22.) The affidavit of Mr. Miley establishes that St. Johns first installed the main water line on Kitford Road in 1978. This affidavit is sufficient to definitively prove that the correct date for first use is 1978, some twenty-seven years before Appellant's first complaint. Based on the evidence presented at trial, the Master did not err in his determination that St. Johns had used the water line under the subject property for a period in excess of twenty years with no interruption of service.

b. The right enjoyed by St. Johns is the right to the continued use and maintenance of the lines located below the subject property.

After first proving that the use has been continuous and uninterrupted, a party

seeking a prescriptive easement must show the identity of the thing enjoyed. Jones, 363 S.C. at 316, 609 S.E.2d at 600.

The rights enjoyed by St. Johns are the rights it has enjoyed since the installation of the water line in 1978: (1) to use the line for the delivery of water services to its customers; and (2) to enter the property in order to conduct necessary inspections, repairs, or improvements to the water lines. The Appellant submitted no evidence to contradict this.

c. St. Johns's use of Appellant's property is under a valid claim of right.

Regarding the final element, “[t]o establish an easement by prescription, one need only establish either a justifiable claim of right *or* adverse and hostile use.” Id. (emphasis in original). The Court in Loftis v. South Carolina Electric and Gas Company stated, “[o]ur courts have held that a party may earn a prescriptive easement under a claim of right if ‘he demonstrate[s] a substantial belief that he had the right to use’ the property in a manner consistent with the alleged easement.” Loftis v. South Carolina Electric and Gas Company, 361 S.C. 434, 604 S.E.2d 714, 717 (2004) (quoting Hartley v. John Wesley United Methodist Church of Johns Island, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct. App. 2003)). St. Johns presented evidence to establish a valid claim of right at the summary judgment hearing.

St. Johns applied for and received an Encroachment Permit from the County of Charleston in 1977 (R. p. 66-69). At that time, Johns Island was a mostly rural community, and St. Johns was installing the first municipal water lines to service the island's residents. The encroachment permit expressly granted St. Johns the right to install and maintain water lines along several roads in and around Johns Island, including the water line in question along Kitford Road. This permit was accompanied by various maps showing the specific locations where the water lines were to be installed. The original map referenced in the permit for Kitford Road showed where the water line was to be placed (R. p. 245). The water

line starts at the beginning of Kitford Road, and continues along its length until it terminates near the end of Kitford Road. Along the main line there are two spurs which continue roughly north off of the main line. The second spur is at the end of Kitford Road; it runs roughly northeast under the subject property and now provides service to the residences to the north of Appellant's tract. All of this is indicated on the map that accompanied the original encroachment permit in 1977. On the authority of that permit, St. Johns believed that it had the right to enter onto the subject property to install and maintain its water lines.

Appellant contends that "[t]he county encroachment permit on its face allows St John's to install its water mains on county roads and streets. It does not create a claim of right to encroach on private property" (Appellant's Br. 39). This is similar to the Appellant's argument in Loftis, where the Court stated,

Appellants incorrectly assert that a prescriptive easement cannot be established in this case because "[o]bviously, use is not adverse where the [d]efendant had a mistaken belief it had the right to be on the property." Appellants ignore that a prescriptive easement can also be established under a "claim of right," or, in other words, under the very mistaken belief Appellants admit drove SCE&G's actions.

Loftis, 361 S.C. at 434, 604 S.E.2d at 717. Appellant's suggestion that the original encroachment permit lacked the authority to grant access to the subject property misses the point. What is relevant is St. Johns's substantial belief that the encroachment permit did, in fact, grant it the authority to install its water lines under the subject property in 1977. It is this belief that supports the Respondent's claim of right, not the authority that is or is not contained in the permit itself.

Appellant's Initial Brief further states that "St. Johns must show 'a distinct and positive assertion of a right hostile to the owner, and brought home to him for the statutory twenty year period'. Williamson v. Abbott, 107 SC 397 (1917)" (Appellant's Br. 40). In

Williamson, the question was whether a use that was *permissive* at its outset could ever ripen into a prescriptive easement. The entire quote from Williamson is as follows:

It is the well-settled rule that use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription, since user as of right, as distinguished from permissive user, is lacking, if permissive in its inception, such permissive character will continue of the same nature, and no adverse user can arise, until there is a distinct and positive assertion of a right hostile to the owner, and brought home to him.

Williamson v. Abbott, 107 SC 397, 93 S.E. 15, 16 (1917). In Williamson, the Court was differentiating between an adverse use and a permissive one, not reciting a test for whether or not a prescriptive easement existed. Further, the “hostile” requirement (as well as the “open and notorious” requirements suggested by Appellant) is necessary when the use is being defined as adverse. Case law decided subsequent to Williamson makes it clear that the third prong of the test for an easement by prescription may be satisfied by showing a “claim of right.” See Jones, 363 S.C. at 316, 609 S.E.2d at 600; Loftis, 361 S.C. at 434, 604 S.E.2d at 717; Hartley, 355 S.C. at 151, 584 S.E.2d at 389.

Even if it is assumed that the initial encroachment permit did not grant St. Johns the right to install its lines under the subject property - and Respondent would argue that the encroachment permit did, in fact, give it that absolute right - St. Johns held a justifiable and substantial belief that it had the right to install its water lines precisely where they are presently located on Kitford Road. Charleston County granted St. Johns the right to install water lines all over Johns Island, and the maps that St. Johns's employees worked off of, including the map of Kitford Road, had been approved by the County. Nothing indicated that St. Johns was doing anything other than installing those lines where it had been granted the right to do so.

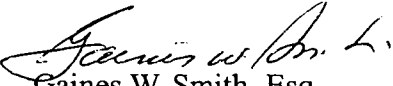
Acting under the authority of the encroachment permit, St. Johns held the belief that it had the right to install its water lines under the subject property. St. Johns presented this evidence at the hearing to establish that it had a substantial belief that its use of the subject property was under a claim of right. As a result, the Master had sufficient evidence in front of him to support his finding of a prescriptive easement in favor of St. Johns.

V. CONCLUSION

St. Johns presented ample evidence to the Master to support summary judgment, as all of the requirements necessary to prove an easement by prescription were shown by the Respondents. There is no genuine issue of material fact, even when the facts are viewed in a light most favorable to Appellant. The affidavit of Hugh Miley is evidence that the line began operation in 1978, twenty-seven years before Appellant's first complaint. The admission of the Appellant himself establishes that the line was used to service a customer on Kitford Road 1979, twenty-six years prior to Appellant's first complaint. There has been no interruption in service whatsoever, and Appellant presented no evidence to suggest that there ever has been. St. Johns identified the identity of the thing enjoyed through the affidavit of Hugh Miley and the assertions of counsel at trial, namely the right to maintain the lines and provide municipal water to customers along Kitford Road. Finally, the original encroachment permit and accompanying map support the contention that St. Johns had a valid claim of right to enter the property and install and maintain its water lines in their current position. The map attached to Appellant's affidavit further establishes the line's location, and when considered with the Miley affidavit attesting to the fact that the line has not been moved, it becomes clear that the line has been under the subject property since its installation in 1978. All three prongs of the test for a prescriptive easement were satisfied. As an additional ground, Appellant is not even the current owner of the subject property, and

thus lacks standing. For these reasons, St. John's Water Company respectfully requests that the Order of the Master-in-Equity be affirmed.

Respectfully submitted,
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Bar # 5167

Dated: April 16, 2012
Charleston, SC

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 SCRC

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 pursuing 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* SCRCF 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.

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 SCRPC. 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 where 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. SCRCR 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." SCRCR 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) SCRPC. 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 437 at 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 SCRPC. 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.

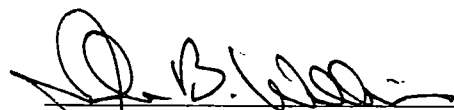
In opposing BEC's motion for summary judgment, Simmons argued that BEC's use of his property exceeded the scope of the express easements. Simmons bears the burden of proof on this issue and the Master properly found that he failed to produce any evidence that BEC exceeded the scope of its express easements.

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

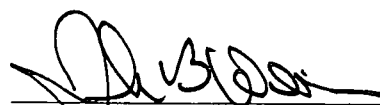
Roosevelt Simmons.....Appellant

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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April 20th, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

APPELLANT'S REPLY BRIEF

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**I. REPLY TO BRIEF OF RESPONDENT
BERKELEY ELECTRIC COOPERATIVE, INC.**

REPLY TO STATEMENT OF FACTS

Respondent Berkeley Electric Cooperative, Inc. (Berkeley Electric) asserts that “ Under [the 1972] 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 Andersen. . . just north of parcel 135.”

Respondent’s Brief at pages 5-6. Berkeley Electric cites the affidavits of its employees Seeney and Frank which it submitted in support of its 2009 summary judgment motion as evidence of this assertion in the record. Id. at page 6. However neither the Seeney or Frank affidavits say what Berkeley Electric claims they do. First these affidavits say only that there is a power line “in front of 3705 Kitford Road” but do not identify the directions in which this line runs. Second neither of these affidavits mentions that the line “in front of 3705 Kitford Road” runs to the Andersen property. Third, neither of these affidavits mentions any recorded document including the 1956 or 1972 easements as the basis for the affiant’s belief that Berkeley Electric had a right to install the line.

Berkeley Electric further asserts that “The Kitford Road line extends through the railroad easement over property owned by the Estate of Andersen (TMS 282-00-00-135) to a pole located within BEC’s 75 foot wide easement.” Resp. Brief at page 8. TMS

135 is and has been owned by Simmons. R.p.118, para.3, R. p. 126. There is nothing in the record to support the contention that estate of Andersen owns TMS 135. The Bradley affidavit which is cited by Berkeley Electric to support its contention does not support this statement. Bradley stated: “Our easement encroaches on property owned by the Andersen’s, shown as TMS 282-00-00-**136**. . . . Our line extends from a pole located within the 75’ wide easement onto the property of estate of W. M. Andersen”. R. p. 154, para. 3& 4. Bradley is clearly referring only to the power line running from the transmission line east to service Andersen which Simmons contends runs across his property. The supplemental plat, R. p. 130, which Simmons obtained and was part of the motion record, identifies another line running from the transmission line to the west and encroaching on TMS 135.

Berkeley Electric claims that in his opposition to its 2009 summary judgment motion, Simmons said that his lawsuit was only about Berkeley Electric’s power line crossing TMS 498. Resp. Brief at page 7. However, that statement is not based upon anything contained in Simmons affidavit. R. pp. 49-50, p. 52. Moreover, Simmons was pro se at the time that he submitted this affidavit as Berkeley Electric well knew when it filed its motion. See R. p. 1-2, Order filed May 6, 2009 relieving counsel. The Second Amended Complaint also makes clear that Simmons claims for trespass against Berkeley Electric encompass both TMS 498 and 135. R. pp. 32-33. Simmons acknowledges that as result of Berkeley Electric’s disclosure of the 1972 easement in discovery which came after he submitted his 2009 affidavit, Berkeley Electric could locate a power line across TMS 498; but he has never conceded that the particular location of this line was authorized under the 1972 easement as is clear in his affidavit.

Berkeley Electric fails to mention that when it filed an amended Notice of motion in November 2010, it did not amend either of these affidavits. Since 3705 Kitford Road is across from TMS 498, the original Simmons affidavit was directed at that location in response to their affidavits. If as Berkeley Electric contends, Simmons was limiting his claims to TMS 498, Berkeley Electric failed to point that out in its amended motion. The Second Amended Complaint asserted trespass as to both TMS 498 and 135 and Berkeley Electric was obligated to establish the lack of material facts as to each. Therefore, there is nothing in the record to support Berkeley Electric's contention that its line was in any other location than what Simmons had referred to in his 2009 affidavit, i.e. across the westerly portion of TMS 498.

Berkeley Electric further asserts that if the line crosses TMS 135, it was operated under a claim of right for 20 years based upon the Seeney and Frank affidavits. Resp. Brief at page 9. As demonstrated above, neither affidavit indicates where the line they are talking about is located and cannot support the contention that it crossed TMS 135.

In summary, most of the facts asserted by Berkeley Electric are not supported in the motion record. The Seeney and Frank affidavits cannot be used to support a claim of right to cross any particular location since none is specified.

REPLY ARGUMENT

Berkeley Electric begins its argument by cautioning that progress on Johns Island came at a price: that some parcels would have power lines on them and some would not; and then criticizes Simmons for complaining about the lines on his property. Resp. Brief at page 9. However, as the record below indicates, Simmons appeal is not based upon

“sour grapes”, but because Berkeley Electric failed to establish that it was entitled to summary judgment.

The record below is clear that the parties agreed to submit the issue of the scope of the easements to the Master instead of proceeding to a jury trial. This is not an “unpled cause of action” as Berkeley Electric contends, Respondent’s Brief at page 11, but one to which Berkeley Electric consented. Simmons claim of an abuse of the two easements is documented by various plats as well as Berkeley Electric’s own records. Berkeley Electric contends that, “there is no need to balance the equities” because its use of Simmons property was authorized by contract or operation of law. Id at page 11. However, this case is about the details and implementation of those two easements given to Berkeley Electric by Simmons predecessors in title, who were not equipped to understand the consequences or to protect themselves from such abuse.

A. Appellant raised the issue of the Order of Reference below

Berkeley Electric contends that Simmons did not raise the issue of the scope of the easements as being within the Order of Reference previously and that Simmons cannot raise it on appeal. Resp. Brief at pages 12-13. Berkeley Electric again misstates the facts. Simmons originally filed a trespass action which was scheduled to be heard by a jury in 2009 when Simmons was pro se. After Simmons current counsel entered an appearance in July 2009, the trial was carried to enable further discovery. As result of disclosure of the 1972 easement during discovery, Simmons’ counsel requested and the parties consented to having the Master in Equity decide whether Berkeley Electric exceeded the scope of its easements. Simmons counsel documented these events in a letter to Master in Equity Mikell Scarborough dated November 17, 2009 to Judge

Scarborough, after the Order of Reference was entered. In this letter he stated: “Counsel agreed that the scope of the 1972 easement was an issue which should be referred to your Honor before any damages could be assessed.” Berkeley Electric’s counsel never sent a letter disputing this statement or denied that this was the proper scope of the Order of Reference. Therefore, Berkeley Electric is estopped from denying that this issue was raised and part of the proceedings below. Furthermore, Simmons raised it in his Brief in opposition to summary judgment, R. p. 115, and in his R 59 (e) motion for reconsideration. R. p.185. Thus the issue of whether the court’s decision was contrary to the order of the reference is preserved on appeal.

Because the extent of an easement is a question to be resolved by an action in equity, Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997), it was necessary for this issue to be referred to the Master. Appellant contends that in dismissing the complaint against Berkeley Electric based upon an express easement, the Master disregarded the intent of the parties incorporated into the Order of Reference. The Master’s role as defined in the Order of Reference was to “ make appropriate findings of fact and conclusions of law regarding the issue of easements both prescriptive and /or express across the lands of plaintiff.” Simmons does not contend that the Master could not make findings about the express easements but that this issue was not properly before the court for summary judgment. Simmons was not trying to limit the evidence submitted to the Master, as Berkeley Electric contends, Respondent’s Brief at page 14, but to bring to the court’s attention the issue that the parties had agreed to submit to it. Berkeley Electric’s summary judgment motion was not intended nor did it address this issue.

Finally, in a footnote, Berkeley Electric claims that “Simmons now longer disputes that the 1956 easement . . . and the 1972 easement . . . authorize BEC to run its power lines across his property.” Resp. Brief at page 14, fn. 2. This is intended to suggest that Simmons has waived any claim that Berkeley Electric exceeded the scope of its easements but as demonstrated above, See Reply to Statement of Facts, this is factually incorrect. Simmons opposed summary judgment on the basis that the 1956 easement did not allow Berkeley Electric to cross TMS 135 outside of the 75 foot transmission line and that Berkeley Electric exceeded the scope of the 1972 easement by crossing TMS 498 after it has used another route along Kitford Road.

B. Reply as to the finding regarding express easements

Berkeley Electric claims that Simmons did not object to the Master’s ruling regarding express easements at the hearing and it is not preserved for appeal. Resp. Brief at page 15- 16. Berkeley Electric is arguing that that counsel had to note an “exception” to the court’s ruling, but this is no longer required to preserve an issue. Appellant raised the issue as to the scope of the express easements in his opposition to summary judgment, see above, and in his motion to alter and amend the judgment

Berkeley Electric does not even attempt to explain why it did not file a motion for summary judgment for an express easement across Simmons property and give Simmons the opportunity to respond. Berkeley Electric only requested a prescriptive easement on TMS 498 based upon the existence of the 1956 easement across TMS 135 and 498. Berkeley Electric’s argument that Simmons cannot complain because he introduced the 1972 easement does not address the lack of notice. Simmons would have prepared a different response because different legal standards are involved. The issue is

not whether there are express easements, but whether the express easements allow Berkeley Electric to construct the lines in question across Simmons property. As to that issue, the facts are in dispute as set forth herein.

C. Reply to the scope of the easement issue.

Berkeley electric contends that Simmons didn't object to summary judgment as to the scope of the easements, Respondent's Brief at page 17. Again Berkeley Electric misstates the record below. Appellant opposed Berkeley Electric's motion for a prescriptive easement on the merits, i.e. that they were not there for the requisite period and also that there were facts in dispute as to whether Berkeley Electric exceeded the scope of these easements. These arguments were raised in Simmons Memorandum in opposition and at the hearing and in his motion for reconsideration. R. pp. 110-119, 162-166; p. 199, line 24 – p. 209, line 25; p. 229, line 12 - 234, line 5. Consequently, Berkeley Electric's contention that it was not raised below, Resp. Brief at page 17, is erroneous.

Berkeley Electric contends that "Simmons bears the burden of proof on the scope of the easement issue. Resp. Brief at page 18. That is not the correct legal standard since Berkeley Electric had moved for summary judgment as to a prescriptive easement. Simmons' burden was to show a dispute of material fact as to that issue not to prove anything as to the scope of the easements. Simmons introduced evidence that Berkeley Electric's line across TMS 498 was not shown on two surveys including one from Berkeley Electric prepared at a time when Seeney and Frank said it was there. The additional evidence submitted by Simmons related to his claim that the proper procedure was to address the scope of the easements; this included evidence that Berkeley Electric lines crossed his property twice and caused a loss of harvestable trees. See R. p. 119,

para. 4 & 5, p. 130. Simmons asserted and Berkeley did not refute that Berkeley could have used another route to avoid these effects. Therefore, Berkeley Electric cannot claim that Simmons did not meet his burden of proof on an issue which was not brought before the court by Berkeley Electric in its summary judgment motion.

Berkeley Electric claims that Simmons counsel conceded at the November 22 motion hearing that Simmons did not challenge the 1972 easement but then insisted that the scope of the easement was in dispute. Respondent's Brief at page 18. Unfortunately, Berkeley Electric has again misstated the record. The citation of the transcript to which Berkeley Electric refers concerns the 75 foot wide 1956 easement not the 1972 easement. R. p.198, lines 10 - 25. Therefore the record indicates that Simmons agreed that the 1956 grant provided for a 75 foot wide easement- nothing more. The record also indicates that Simmons contested the scope of the 1972 easement. See below. Since Berkeley Electric repeatedly asserts that Simmons does not dispute that the lines are permitted under the easements, Respondent's Brief at page 19, appellant is again compelled to rebut it by reference to the record.

Berkeley Electric attempts to justify the court's ruling that its power line did not exceed the scope of the 1972 easement by asserting that the line across TMS 498 under the 1972 easement only crosses once. Respondent's Brief at page 19. This is discussed in detail below. See Section E.

Berkeley Electric contends that it could still assert the right to use the property as it did under a claim of right. Resp. Brief at page 20. However, the legal standards applicable to a prescriptive easement are different and Simmons contended that there

were disputed issues of fact concerning Berkeley Electric's claim of a prescriptive easement. See below.

D. Reply as to the 1956 easement

Appellant contended that the Master erred by finding that Berkeley Electric exceeded the scope of the 1956 easement by the placement of its power lines to the east and west of the 75 foot wide transmission line easement; and that Berkeley Electric presented no evidence of a claim to any type of easement for those lines. In response, Berkeley Electric contends that Simmons conceded that the use of his property under the 1956 easement was not at issue. Resp. Brief at page 21. However, the transcript citation that Berkeley Electric gives is misleading because it ignores the preceding sentences and is thus taken out of context. Appellant's objections regarding the 1956 easement were identified in the preceding sentences of the transcript, in which the court states that "the one [line] you have a problem with is the one with the yellow line on it", to which counsel responds: "Yes. Also a line which goes west from the 75 foot easement down Kitford Road, which does cross 135." R. p.198, lines 16-21. The "yellow line" to which the court referred was a highlighted portion of the supplemented Lacey plat submitted by Simmons to show the location of the Berkeley Electric line from the transmission line to the Andersen property across TMS 135. R. p. 130. Therefore, Berkeley Electric's contention that Simmons conceded that the 1956 easement did not exceed its scope is erroneous.

The question of the extent of a grant of an easement is an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997); Lighthouse Tennis Club Village Horizontal Property Regime LXVI v. South Island Pub. Serv. Dist., 355 S.C.

529,586 S.E.2d 146 (Ct.App.2003); Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct.App.1998). "Thus, this Court may take its own view of the evidence." Tupper, 326 S.C. at 323, 487 S.E.2d at 190.

As stated in Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 558 S.E.2d 902, 906-907 (Ct. App. 2001): "The language of an easement determines its extent. Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense."(quotation omitted). The 1956 easement is clear. It gives Berkeley Electric the right to install an electric transmission line within a 75 foot wide strip on the lands of the grantor. Simmons acknowledged only that this 75 foot strip on which Berkeley Electric installed a transmission line across TMS 135 and TMS 498 was permitted but contended before the Master that the two lines running from that transmission line were not included under the 1956 easement. R. p.198, lines 16-21.

Berkeley Electric's claim, Resp. Brief at page 22, that Simmons did not produce evidence of this violation of the 1956 easement is baseless. Simmons introduced the Lacey plat showing the location of both power lines running from the transmission line. Simmons contended that these power lines ran across TMS 135 based upon his own knowledge of the location of his property lines. Berkeley Electric has never produced any document to rebut Simmons claim that the power line running to the west from the 75 foot transmission line is not on TMS 135 so that fact is not in dispute. Berkeley Electric produced the Bradley affidavit containing his opinion that the Berkeley Electric line running to the east from the 75 foot transmission line was on Andersen's property not

Simmons. Simmons objected to this opinion. see below. If this court finds that the Bradley affidavit was improperly allowed, Simmons assertion is uncontested. If the Bradley affidavit is allowed, there is a disputed issue of material fact.

Berkeley Electric claims that Simmons initial affidavit filed in 2009 when he was pro se contradicts his later affidavit, Resp. Brief at page 22, but that is also untrue. Simmons' initial affidavit dealt only with the Berkeley Electric claim as set forth in the Seeney and Frank affidavits (the only evidence initially submitted in support of summary judgment) that the line across TMS 498 in 2009 existed since 1978. The 2005 Lacey plat indicated the location of that power line. Simmons did not need to address TMS 135 at that time since Berkeley Electric had not raised any issue about it in its motion. However, after Simmons retained counsel, and in opposition to Berkeley Electric's amended summary judgment motion, Simmons in his supplemental affidavit explained that he asked Lacey to supplement the survey when he realized it didn't locate the power lines on TMS 135. R. p.119, para. 4.

Berkeley Electric's claims that the court should ignore the Lacey plat because it is unrecorded and not documented, Resp. Brief at page 23, is baseless. The plat bears the name and seal of a licensed South Carolina land surveyor. Simmons verified that it contains what he asked Lacey to do. R 901(b) (2), SCRE, allows for authentication by a person having knowledge of what the documents purports to be. Therefore, the Lacey plat supports Simmons contention that there are power lines crossing TMS 135.

In contrast, Berkeley Electric submitted an affidavit by an employee, Bradley claiming that in his opinion, the power line servicing the Andersen property does not cross TMS 135. R. p. 154, para. 3. The drawing on which Bradley relies, R. p.157, is a

hand drawn sketch of a power line easement , the preparer is not identified , it is not authenticated by Bradley, and the sketch does not locate either of the power lines shown on the Lacey plat. Therefore, Exhibit B does not satisfy the admissibility criteria of R. 901(b) (2), SCRE. In summary, the record contains evidence that there were two Berkeley Electric power lines running from the 1956 transmission line: as to one of them, Berkeley Electric did not present any evidence to rebut Simmons testimony that it was on TMS 135; and as to the other, there was, at least a dispute of material fact as to whether it is on TMS 135, if the Bradley affidavit is considered.

Finally, Berkeley Electric mistakenly asserts that at the motion hearing Simmons counsel admitted that it could “run its lines across TMS 135”, citing the same transcript reference upon which it previously relied. Respondent’s Brief at page 23. Appellant response is the same, that the record does not support this contention for the reasons expressed above.

E. Reply to the scope of the 1972 easement

Berkeley Electric contends that Simmons failed to establish that it exceeded the scope of the 1972 easement. Respondent’s Brief at page 25. However, as noted above, this motion was brought by Berkeley Electric for summary judgment on a prescriptive easement, not by Simmons. Thus Simmons had only to show that there was a dispute of fact to defeat Berkeley Electric’s the motion.

Simmons' counsel contended at the motion hearing, R. p. 204, line 2 - p. 206, line 25, that the language was vague and required extrinsic evidence to interpret. Id. The easement was given in conjunction with Brown’s 1972 subdivision of his property and the extension of Kitford Road to the abandoned railroad right of way. R. p, 203, lines 2-

11. “[G]rants of easement must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense.” Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 558 S.E.2d 902, 906-907 (S.C.App. 2001). The 1972 easement grants Berkeley Electric to enter upon the described 4.7 acres of Edward Brown to “ place, construct , repair, maintain, relocate and replace . . . an electric transmission or distribution line.” R. p. 132. There is no size or location for the power line in the easement. Id. This easement is to be compared with Berkeley Electric’s 1956 easement which authorizes a specific area for installation of a transmission line. The Master said about the easement” It doesn’t give me any specifics.” R. p.204, line 15.

Berkeley Electric contended that “Mr. Brown . . . had no problem with the scope of the easement”, Resp. Brief at page 25, but its statement is not based upon evidence but is conjecture. Berkeley Electric also asserted that the property owner did not want to incur the expense for surveys, but that is also conjecture. Another viable explanation that the property owners were unsophisticated , didn’t understand their rights and that Berkeley Electric took advantage of them by obtaining a vague easement to avoid having to spend money on its own surveys. In either event, the doubts about the meaning of the easement should have been resolved by the Master at a hearing to determine the intent of the parties.

Simmons contends that Berkeley Electric exceed the reasonable scope of this easement by erecting its power line across TMS 498 to Kitford Road then back across Kitford Road to service the Chris Brown property next to TMS 498. The Chris Brown lot and TMS 498 were part of the subdivision created in 1972. Simmons contends that it

would have been unreasonable for Edward Brown to agree to allow Berkeley Electric to destroy the value of one of the lots by crossing it again (the transmission line was already there) in order to serve another of his lots. The easement should be reasonably construed. One reasonable interpretation is that the easement allowed Berkeley Electric to run its line down Kitford which Brown was extending so that power could be brought from the 75 foot transmission line to Kitford Road. Simmons contends that Berkeley Electric exceeded the reasonable scope of the 1972 easement to cross TMS 498 when it had already used the easement to run its power line down Kitford Road back to the transmission line. Therefore, the issue is when Berkeley Electric implemented the line across TMS 498. If it installed this line in the late 1970s as it contends, why did it need to cross TMS 135 to return to the transmission line. If its line was already down Kitford Road to access the transmission line, why did it need to cross TMS 498 to get to the transmission line to the north. In either event, Berkeley Electric cannot reasonably interpret the 1972 easement to allow it to run a power line from the transmission line across TMS 498 , then across Kitford Road, back across Kitford Road to service Chris Brown, then down Kitford Road back to the transmission line on the other side of the abandoned railroad right of way. Berkeley Electric has not offered any explanation of this “loop” in its power line which affects only Simmons property. 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 v. Carolina Power & Light Co., et al., 204 S.C. 83, 28 S.E. 2d 545 (1942). Simmons contends that Berkeley Electric exceeded the scope of its easement

by crossing TMS 498 when it was just as convenient to serve the property owners from its power line along Kitford Road.

Berkeley Electric's contention that Simmons did not offer any evidence that it exceeded the scope of the easement is erroneous. Simmons offered the supplemented Lacy plat showing the loop of Berkeley Electric's power lines coming from the transmission line to the north of TMS 498 across TMS 498 down to Kitford Road and down Kitford Road back to the transmission line. R. p 130. Simmons also asserted that the line down Kitford Road had been used to service customers from the transmission line in the past. R. p. 119, para. 4. Since Berkeley Electric never asserted that the 1972 easement created an express easement across TMS 498 in its motion, Simmons did not have the burden of proof to show that Berkeley Electric exceeded it, only that there was a question of fact as to the issue of a prescriptive right.

F. Reply to the issue of the Bradley affidavit.

Berkeley Electric has no valid response to Simmons contention that the Bradley affidavit should have been submitted as part of its motion for summary judgment either when it filed it in 2009 or amended it in 2010. Simmons' complaint alleged trespass by Berkeley Electric on TMS 135 and 498. Berkeley Electric claims that Simmons did not mention any encroachment in his initial affidavit submitted in opposition to its initial motion in 2009. Resp. Brief at page 27-28. However, Berkeley Electric had the burden in its initial summary judgment motion to show the lack of any encroachment of its power lines on TMS 135 and the Seeney and Frank affidavits did not mention any parcel. Simmons interpreted their statements as applying to TMS 498 because of the age of the poles to which they referred. Berkeley Electric was in control of its own motion and can't

claim it was misled based upon what Simmons did. Simmons was denied fair notice of Berkeley Electric's newly found defense and the opportunity to respond.

Simmons contended that R56(c), SCRCP, only permits initial affidavits and opposing affidavits prior to the hearing. Berkeley Electric claims that R 56 (c), SCRCP permits it to supplement its affidavits by further affidavits, Resp. Brief at page 28 but the rule does not state that. Berkeley Electric cites R 6(d), SCRCP as allowing the moving party to file affidavits any time before the hearing. Simmons contends that R 56 which applies to summary judgment motions controls the procedure not R 6, SCRCP which deals with all other motions. Generally, when a general statute and a specific statute conflict, the specific statute prevails. Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995). In James v. South Carolina Dept. of Transp., 393 S.C. 440, 711 S.E.2d 919 (Ct. App. 2011), this court ruled that Rule 26, SCRCP which specifically governs expert witness fees should have been applied instead of Rule 30, SCRCP which concerns all other witness fees. 711 S.E. 2d. at 924. Therefore, the Bradley affidavit which Berkeley Electric admits was a response to Simmons affidavit should not have been permitted ; or Simmons should have been given an opportunity to respond.

R 56(e), SCRCP which discusses supplementation, does not allow Berkeley Electric to submit an affidavit the way it did without obtaining the court's permission and without allowing Simmons the opportunity to respond. Berkeley Electric assumed it had the right of last reply but the applicable rule, R56(c), SCRCP does not permit that.

Berkeley Electric attempts to avoid another bar to the Bradley affidavit, that it did not name him as an expert witness in its answers to interrogatories , by claiming that

he did not testify at trial and didn't need to be named. Resp. Brief at page 29. That distinction is without substance. The purpose of the interrogatory question is for the party to identify an expert on whose opinion that party will rely. See R 26(b) (4)(A), SCRCP. The reference to "trial" in the interrogatory is to contrast the expert on whom the party will rely from the expert with whom the party consulted but will not rely, whose opinions are not discoverable without showing exceptional circumstances. See R 26(b) (4) (B), SCRCP Berkeley Electric then claims that Bradley's statements are based upon personal observations and "He does not offer an opinion". Resp. Brief at page 29. That statement is simply wrong. Bradley states: "In viewing the drawings, plats and tax maps, it is my opinion. . . ." R 154, para. 3. Therefore, the Bradley affidavit contains an opinion and was not disclosed in discovery. Therefore, Bradley's opinion that Berkeley Electric's power lines do not cross TMS 135 should not have been permitted. The Master was wrong in allowing it and relying upon it to grant summary judgment that the 1956 easement does not exceed its scope.

Lastly, the argument that Simmons opposition was untimely and should not have been allowed, Resp. Brief at page 29-30, was not raised below. It is not preserved for appeal.

G. Reply to the prescriptive easement issue

Berkeley Electric contends that Simmons abandoned his appeal as to the prescriptive easement issue by conceding that it could cross TMS 498 and 135. Resp. Brief at page 31. Although an express easement can be the basis for a claim or right upon which to assert the existence of a prescriptive easement, the claimant must still establish the existence of a substantial belief and the existence of the use for the statutory period.

Loftis v South Carolina Elec. & Gas Co., 361 S.C. 434, 604 S.E.2d 714,717 (Ct. App. 2004). Simmons has not waived his appeal from the court's ruling on the issue of a prescriptive easement but only acknowledged that the 1956 easement allows Berkeley Electric to cross TMS 498 and 135 but not to run additional power lines from that line across TMS 135. As to those additional lines, Berkeley Electric must prove the two elements of a prescriptive easement, substantial belief and the use for the statutory period. However, there is no evidence in the record of either. Neither Seeney, Frank or Bradley stated the basis upon which they believed that there was an easement to cross TMS 135 or that their lines had been there for the requisite period. Therefore, the court's decision to grant summary judgment as to a prescriptive easement across TMS 135 has no basis in fact.

With respect to the 1972 easement, Simmons contended that it does not allow Berkeley Electric to cross TMS 498 in connection with its line running down Kitford Road. See Section E above. By exceeding the scope of the 1972 easement, Berkeley Electric must establish that its line across TMS 498 was entitled to a prescriptive easement by proving the same two elements- substantial belief and use for the statutory period. As set forth below, Section G, Simmons introduced evidence that the line across TMS 498 was not there in 1980 when Seeney and Frank said it was creating a disputed issue of fact which precluded summary judgment as to a prescriptive easement. Therefore, Simmons has not abandoned his challenge to the Master's finding that there was a prescriptive easement as to TMS 498.

H. Reply to objections to use of Schuler and Galliard plat

Appellant asserted that the Master's decision granting a prescriptive easement as to TMS 498 was based upon an improper weighing of the evidence, including the Galliard and Schuler plats. Appellant's Brief at page 29. Berkeley Electric claims that Simmons did not preserve the issue of the Master improperly weighing the evidence at the hearing when the court announced its decision. Resp. Brief at page 32. Berkeley Electric cites Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (S.C.App. 1995), C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993) and Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct.App.1990). However, Berkeley Electric misstates the holding of those cases. These cases stand for the proposition that "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., Hicks v. Hicks, 2011-UP-124 (SCCA). None of these cases hold that the party must make a contemporaneous objection when the court is announcing its decision. Appellant properly raised the issue in his R 59(e) motion, R. pp. 182-185, and it is preserved on appeal.

Berkeley Electric claims that the Galliard and Schuler plats produced by Simmons did not create an issue of fact because there is no foundation for admissibility. Resp. Brief at page 33. However, Berkeley Electric does not cite to any place in the transcript of the motion hearing where its counsel objected to the Master considering them. Therefore, Berkeley Electric has waived any right to raise that issue on appeal.

R 901(b) (7), SCRE provides for authentication of public records by evidence that the document is what it purports to be. Simmons affidavit asserts that he has personal

knowledge that the Galliard plat is a true copy of the recorded plat. R. p. 49, para. 3.

Therefore there was a foundation for the Galliard plat and it is admissible.

The Schuler plat was prepared for Berkeley Electric and provided by it in discovery. R. p. 205, line 25 to p.206, line 5. Berkeley Electric's counsel did not make any objection to it being considered as such. At the hearing on the motion for reconsideration, Berkeley Electric's counsel did not object to its consideration but tried to explain it. " That [Schuler] plat was only to show the 75-foot right of way. It was not prepared to show any distribution lines coming off of it. "R. p. 234, lines 20-22. Berkeley Electric's counsel considered it to be "irrelevant". R. 235, line 9. Therefore, Berkeley Electric has waived any right to object to either plat being considered.

Berkeley Electric also claims that the Schuler plat was submitted "late" and should be disregarded by this court. Resp. Brief at page 35, n 1. However, Berkeley Electric never objected to this document or any other being "late" at the motion hearing. Berkeley Electric has waived its right to object on this appeal. Finally, this is Berkeley Electric's own document.

I. Reply to evidential value of Galliard and Schuler plats.

Berkeley Electric next claims that there is no authority to support Simmons claim that the absence of a feature on plat does mean that the feature was not there. Resp. Brief at page 34. However by examining the Galliard plat , the court can determine that this contention is without merit. The Galliard plat is dated October 7, 1981 for the purpose of creating a subdivision of property owned by the estate of James Frazier. The plat indicates the location of the 75 foot Berkeley Electric transmission line. It does not show that there was a power line that Berkeley Electric employees Seeney and Frank assert was

there in the late 1970's. Berkeley Electric contends there was no testimony as to the significance of the features shown or not shown. Resp. Brief at page 35. However, the fact that the surveyor indicated the location of one Berkeley Electric power line creates a reasonable inference that he would have indicated the presence of another line connecting to it at the same location. Therefore, the Master should not have disregarded the Galliard plat since Simmons was entitled to the benefit of all reasonable inferences from the evidence submitted that there was a dispute of fact.

Simmons contends that the same reasonable inferences arise from the Schuler plat. Berkeley Electric's counsel conceded at the motion hearing that the 1983 Schuler plat was prepared for it and did not deny that it was produced in discovery. The legend on the Schuler plat states, "Area under power line easement". R. p. 134. The plat does not reference any particular easement or indicate that it pertains to only one easement. Therefore, Berkeley Electric's contention that one power line is shown on the Schuler plat but not another is not consistent with the legend of the Schuler plat.

As shown on the original Lacey plat, not disputed by Berkeley Electric, the Berkeley Electric power line that crosses TMS 498 connects to a pole within the 75 foot transmission line easement on the property to the north, TMS 118. R. p. 52. The Schuler plat describes the "area under power line easement" on TMS 118. The Schuler shows the same pole on TMS 118 as the Lacey Plat. Berkeley Electric's contentions that its own surveyor Schuler did not include another power line requires it, not Simmons to come forward with evidence to explain the discrepancy.

Simmons contends that the combination of the Schuler and Galliard plats support the inference that there was no power line connected to the pole on TMS 118 in 1983.

Since the 75 foot transmission line is shown on both plats, the reasonable inference is that both surveyors intended to locate power lines. Berkeley Electric's argument that both surveyors ignored another power line is based upon an unreasonable inference.

In summary, Simmons submitted evidence, the Galliard and Schuler plats, to which Berkeley Electric never objected, from which a reasonable inference arises, that the power line across TMS 498 was not attached to Berkeley Electric's pole on TMS 118 as of the latest date, i.e. the Schuler plat. The Master disregarded this reasonable inference because he "weighed" the evidence. Therefore, his decision to grant summary judgment must be reversed.

J. Reply to rejection of system maps.

Appellant contended that the Berkeley Electric produced two system maps, R. pp. 135, 136, depicting the location of its power lines in 1995 and currently in response to his request for all maps showing the location of the disputed power line [across TMS 498] from 1980 to the present. Appellant's Brief at page 30. Berkeley Electric now claims that Simmons failed to present any evidence regarding the source to the Master. Reps. Brief at page 37. However, Berkeley Electric's counsel never made any objection at the summary judgment motion hearing or the R 59(e), SCRCPP motion hearing as to the source. Consequently Berkeley Electric has waived any right to assert an objection on appeal.

Simmons contended that the 1995 and current Berkeley Electric maps are contradictory and raise a reasonable inference that the line now crossing TMS 498 was moved there from another location in the past. Simmons contends that this rebutted the Seeney and Frank affidavits of more than 20 use continuous use of the same line across

TMS 498. The Master found that Simmons failed to provide evidence of “ what these maps depict, how accurate they are or how they are to be properly interpreted.” R. p. 20. Since that issue was not raised by Berkeley Electric at the motion hearing, Simmons addressed it in his R 59 (e), SCRCF motion. R. p.181; R. p. 230, line 19 – p. 231, line 4. The Order denying the motion did not address this issue.

Berkeley Electric did not dispute that these exhibits were intended as maps of the power line affecting TMS 498 in 1995 and currently but argues that Simmons must provide a factual basis for what the maps depict. Resp. Brief at page 37. However Berkeley Electric has already done that by supplying them in response to a particular discovery request. They are “maps showing the location of the disputed power line from 1980 to the present ”. Berkeley Electric now claims that its own system maps do not show any “significant difference” or change in the locations of the power line across TMS 498 from 1995 to the present. Reps. Brief at page 37. If Berkeley Electric is entitled to make an argument that its maps do not show a discrepancy, then Simmons is just as able to make the opposite argument- that they do.

Simmons contends that the Master erred by failing to consider the system maps at all because they were probative of the issue of the location of the power line across TMS 498 in the past. Simmons contends that the Master erred by disregarding the significance of the information appearing on the face of these maps, i.e. that the power line across TMS 498 was shown in two different locations at two different times. If the maps depict the power line in two different locations, this supports Simmons contention that the line had been moved.

Berkeley Electric asserts that the maps are different in terms of “scale, level of detail and perspective. Resp. brief at page 37. However, the scale is irrelevant because geometry doesn’t change due to changes in scale. In other words, a map of South Carolina would show the same relative locations of the cities, towns and roads, regardless of whether the map was small or large based upon north – south orientation. The level of detail is irrelevant because Berkeley Electric provided these maps as showing the location of the disputed power line. Berkeley Electric therefore had reason to believe that the map shows a power line over TMS 498, otherwise they would not have produced it. Finally, there is no issue of perspective involved. A map is a map. It describes the location of different point in relation to one another based upon a standard reference point, i.e. North-south –east-west. All that matters is the relationship of the points to each other.

Simmons asserts that the maps plainly depict different locations of the same power line because the geometry of the power lines in relation to one is different on the 1995 map and the current map. This is not a function of a change in scale. Berkeley Electric is in reality asking this court to find that the Master couldn’t rely upon its own maps to show the location of its own power lines because these maps are inaccurate and are not what they purport to be.

K. Reply to lack of evidence regarding prescriptive easement across TMS 135.

Berkeley Electric claims that Simmons’ own statement that the line running down his driveway has been there for many years satisfies the requirement for a prescriptive easement. Resp. Brief at page 39 . However, that statement obviously does not satisfy the requirement of a continuous use for twenty years. Berkeley Electric also

claims that the Seeney and Frank affidavits support its claim of a prescriptive easement across TMS 135. Reps. Brief at page 39. However, as demonstrated above, the Seeney and Frank affidavits do not state that the particular line which they claim has been there for thirty years runs down Kitford , across the abandoned railroad right of way and connects to the 75 foot transmission line. Instead, they refer to power poles showing birthmarks dating to the 1980s and were addressing Simmons contention that the line across TMS 498 was not there for 20 years. Simmons responded with an affidavit directed at their contentions about the age of the line across TMS 498. These same affidavits were used by Berkeley Electric in its amended motion in 2010 in support of a prescriptive easement. Berkeley Electric's counsel knew that Simmons was responding to the line across TMS 498 but did not amend their affidavits to point out that Simmons had not addressed the line they were referring which also extended down Kitford Road. Therefore, Berkeley Electric's position that the Seeney and Frank affidavits support its claim of a prescriptive easement is rebutted both by their lack of specificity as well as by the failure to clarify them after Simmons responded. Berkeley Electric had over one year between the time it filed its initial summary judgment motion in June 2009 to amend its motion in November 2010.

Furthermore, if the Seeney and Frank affidavits supported Berkeley Electric's claim to a prescriptive easement on TMS 135, why did Berkeley Electric need to file the Bradley affidavit which contends that the power line is not even on TMS 135. As discussed above, why did Berkeley Electric not file the Bradley affidavit with its amended motion for summary judgment if it believed that the power line was not on

TMS 135. Therefore, the argument that the Seeney and Frank affidavits support a prescriptive easement claim across TMS 135 is specious.

Berkeley Electric does not deny that the “ birthmarks” referenced in the Seeney and Frank affidavits apply to the power poles that support the line which crosses TMS 498. Resp. Brief at pages 39-40. Therefore the reasonable interpretation of their statement is that the Kitford Road line to which they refer runs from 3705 Kitford Road which they identify as the location of one of the power poles across TMS 498 to TMS 118 to the north. Since Berkeley Electric has the burden of producing evidence showing a lack of disputed fact, it cannot rely upon non specific affidavits to support a generalized claim of a prescriptive easement across all of Simmons property. The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Baughman v. American Tel & Tel. Co., 306 S.C. 101,410 S.E. 2d 537 (1991).

In summary, Berkeley Electric failed to establish a prescriptive easement across TMS 135. The Seeney and Frank affidavits do not say what Berkeley Electric says they do and Berkeley failed to amend them when it filed an amended summary judgment motion. Its evidence consisted only of the last minute Bradley affidavit that there was no encroachment on TMS 135. Since Simmons testimony contradicts Bradley’s “opinion” that the line does encroach TMS 135, there is a disputed issue of fact. The Seeney and Frank affidavits do claim that the power line across TMS 498 was there since the late 1970 but Simmons contends that the survey and system maps contradict this. Therefore there was a dispute of fact as to the existence of a prescriptive easement across TMS 498 as well.

In summary Berkeley Electric failed to establish that it was entitled to summary judgment as to a prescriptive easement across either TMS 135 or 498. There was no credible evidence in the record to support a prescriptive easement as to TMS 135 since none of Berkeley Electric's employees addressed the issue in their affidavits. The facts as to the existence of a prescriptive easement across 498 were in dispute.

**II. REPLY TO BRIEF OF RESPONDENT
ST. JOHN'S WATER COMPANY, INC.**

REPLY TO STATEMENT OF CASE

Appellant objects to most of the Respondent St. John's Water Company, Inc. (St. John's) Statement of the Case, including the portions discussed below, because it contains contested matter, contrary to R 208(b) (2), SCACR. St. John's has asserted that Roosevelt Simmons discovered their water line on one of the parcels at issue, TMS 2832-00-00-498 but never presented any proof of a water line on the other parcel, TMS 282-00-00135. Respondent's Brief at pages 3,4. This is erroneous because the Record on Appeal contains the affidavit of Roosevelt Simmons in which he states: "I discovered a St. Johns water meter on TMS 282-00-00-135 in 2005 while I was planting trees. When I questioned Ava Robichaux, the St. Johns general manager on Johns Island about the water meter on this parcel and asked them to remove it, she sent me a letter saying that they would not relocate the water line because it had been there for 20 years. . . ." R. p.75, para.3. "At [my former attorney's] request, St. Johns marked the location of their water lines with blue flags that showed that they had crossed both TMS 282-00-00-135 and TMS 283-00-00-498. This was the first that I knew that there were water lines across both parcels." R. p.76, para. 4. Therefore, this portion of St. John's Statement of the Case

is both procedurally improper and factually incorrect as Simmons has presented evidence of encroachment across both parcels in opposition to St. John's motion for summary judgment. Other allegations in the Statement of the Case are properly included in the Statement of Facts.

REPLY TO STATEMENT OF FACTS

Appellant objects to the entire opening paragraph of St. Johns Statement of Facts as there are no citations to the Record on Appeal. Resp. Brief at page 5. In particular, St. Johns does not refer to the motion hearing transcript to establish that a map, U 25 was ever submitted to the Master at the motion hearing. Respondent's Brief at page 5. R 208(b)(2), SCACR requires such verification. Appellant has moved to strike this document from inclusion in the Record on Appeal. In its response to this motion, St John's asserted that during the motion hearing its counsel handed an unidentified document to the court that was U 25. R. p. 215, lines 24-25. Based upon this assertion, this Court denied appellant's motion to strike any reference to U25 Order dated November 29, 2011. Therefore appellant will rely upon this assertion (but not concede that) U25 is properly part of the motion record.

Appellant also objects to St John's assertion that it supplied water to customers to the northeast of TMS 498 as a result of the construction in 1977. Respondent's Brief at page 5. There are no citations to the record and such an assertion is unsupported by the affidavit of Hugh Miley or any other evidence.

St. Johns also asserts that Simmons has no standing to pursue any damage claims against St. Johns as to TMS 498 because he lost title to the property. Respondent's Brief at page 5. This assertion is not wholly supported by the record. Simmons addressed this

contention in response to the claim by St. Johns and Berkeley Electric that Simmons had no standing in their amended motions for summary judgment. R. pp. 107-108. The Master in Equity ruled on this point at the motion hearing and agreed with Simmons.

“ Mr. Simmons is no longer the owner of lot 498 and so he lacks standing. However, he would have standing to pursue damages for the time period he owned it. I’m finding there are no damages because there is no cause of action.” R. p. 222, lines 12-16.

Therefore, it is not subject to dispute that if Simmons prevails on this appeal and this court determines that his trespass claims as to TMS 498 should not have been dismissed, he would be entitled to past damages as to that parcel.

REPLY TO ARGUMENT

Appellant contended that summary judgment should not have been granted to St. John’s for several reasons including the lack of a factual basis in the motion record. St. John’s has not rebutted any of these contentions in its Respondent’s Brief. These issues are discussed in detail below.

A. Reply to Lack of basis to support express easement across TMS 498

Respondent does not explain why its summary judgment motion was based upon a prescriptive easement arising under a county encroachment permit and not an express easement based upon that permit. Respondent does explain how the map which allegedly is the basis for this express easement was never filed or served with its motion or identified at the motion hearing as such. In short, St. John’s has no explanation for the court granting it relief it did not seek, based upon a document it did not reveal to anyone else.

St. Johns asserts that a document identified as “a map, U 25” was shown to the Master and supports its claim that it had a express easement to install a water line across

TMS 498. Respondent's Brief at page 6-7. St. Johns admits that this map is necessary to establish the location of its easement under TMS 498. Id. at page 8-9.

In its argument that there was insufficient evidence in the record, appellant contended that St. Johns did not file or serve any map referenced in the encroachment permit as U 25 on appellant with its motion for summary judgment and did not ever identify it in the motion record or show it to appellant's counsel during the motion hearing. Appellant's Brief at pages 16-17, 37-38. St. Johns does not contend that it did do any of these in its Respondent's Brief or its response to appellant's motion to strike U 25. St. Johns has not even tried to offer an explanation for this deficiency since there is no justification for its failure to request summary judgment on an express easement based upon this map and to file and serve it. Consequently, appellant asserts that St. Johns has not rebutted his contention that he was denied notice and an opportunity to respond to the last minute introduction of an unfiled, unserved, unidentified document, now identified as U 25 at the motion hearing.

Since St. Johns admits that this map is necessary to establish the location of its easement under TMS 498, Respondent's Brief at 6-7, and this court has permitted it to be considered, appellant will address it. By referring to U 25, the court can easily determine that it cannot support the Master's findings that the encroachment permit authorized a water line to be located under TMS 498. The only identifications on U 25 are of Main Road and Kitford Road. There are no property or parcel (TMS) identification numbers. The location of the water line allegedly (see below) approved by the county is shown only by reference to the distance from the intersection of Main and Kitford Roads. Without having a surveyor or someone knowledgeable as to the distances attest that the

location of the water line corresponds to its location on TMS 498, there is no factual basis upon which to establish that U 25 supports St. John's contentions. In other words, even considering U 25, St. Johns failed to submit the requisite proof to support the granting of an express easement across TMS 498. Therefore appellant's contention about a lack of proof remains valid.

Furthermore, St. John's argument that the encroachment permit even considering U 25 can create an express easement for its water line across TMS 498, Resp. Brief at page 6, is utterly false. It is so basic as not to require citation to state that an encroachment permit irrespective of whatever is shown on a referenced map cannot create an express easement across private property as a matter of law. Any map which has been referenced in the encroachment permit cannot extend the authority that Charleston County has to allow encroachments on its roads and streets. There is no evidence in the motion record that Kitford Road ever crossed TMS 498. There is no evidence of a recorded plat dedicating a portion of TMS 498 to the public. In short TMS 498 consists entirely of private property. The court should reject St. John's claim to an express easement based upon the plain language of the encroachment permit, i.e. in and along Kitford Road.

St. John's counsel's assertions at the motion hearing that the water line was permitted to the north of Kitford Road, or that the dirt road on TMS 498 was Kitford Road, is simply argument and not a basis for granting summary judgment. Factual statements by attorneys during oral argument may not be considered in determining whether a material issue of fact exists. Trivelas v. S.C. Dept of Trans., 348 SC 125,558 S.E.2nd 271,279 (Ct. App. 2001); Higgins v MUSC, 326 SC 592, 599, 486 S.E.2d 269,

272 (Ct. App. 1997). Had it been introduced and shown to counsel, appellant's counsel could have argued for a different interpretation. As appellant contended in his motion for reconsideration, R. pp. 168-169, and in his motion to strike, he was not given notice and the opportunity to respond because he believed that St. John's counsel was referring to the same plat used in the earlier Berkeley Electric motion. R. p. 217, lines 8-12. Because St. Johns has not rebutted or explained its failure to serve, file, introduce or identify and show to opposing counsel what he was actually referring to, appellant argues now that which he could have asserted before concerning U 25. As referenced above, U 25 lacks sufficient detail to enable the court to reasonably conclude where the water line was to be located. This court is not bound by the master's review and findings as to evidence.

Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). It should consider the lack of sufficient detail on U25 as fatal to St. Johns claims to an express easement.

In its Respondent's Brief, St. John's does not refer to any portion of the map, U25 which could support its allegations that TMS 498 is bisected by Kitford Road. In fact, the survey prepared for St. Johns to locate the water line across TMS 498, R. p. 78, shows Kitford Road continuing east and not north across TMS 498, as St. John's alleges is shown in U25. Therefore, even if U25 is properly part of the motion record (which appellant contends it should not be), it cannot provide the basis for an express easement either as a matter of law or because there were disputed issues of fact concerning what the map actually described.

B. Reply to lack of basis to dismiss trespass as to TMS 135

St. Johns did not refute appellant's position that there was no basis to grant an express easement on TMS 135. Instead, St. Johns contended that it only has a water line

under TMS 498 and none on TMS 135 and Simmons did not produce evidence to the contrary. Resp. Brief at page 4. The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Baughman v. American Tel & Tel. Co., 306 S.C. 101, 410 S.E. 2d 537 (1991). The Miley affidavit does not assert that there was no water line across TMS 135. The Miley affidavit does not even refer to the survey done for St. Johns in 2006. Furthermore, in opposition to the St. Johns motion, Simmons stated that he saw the blue flags indicating the location of water lines water lines which St. Johns had placed across TMS 498 and 135 after he complained in 2005. R. p.76, para. 4. The water line across TMS 135 was serving the Andersen property to the north of TMS 135. Id. St. Johns business records confirm that it provided water service to Andersen in 1987. R. p. 65. Based upon the evidence submitted, St. John's did not clearly establish that there was no water line across TMS 135 and Simmons' evidence indicated that there was service to Andersen crossing his property.

All of the same arguments that an encroachment permit cannot authorize trespass on private property apply to TMS 135. See Section 1 above. Therefore, appellant's contends that he has demonstrated that there was a failure of proof by St. Johns as to an express easement across TMS 135.

C. Reply to lack of facts to support a substantial belief to establish a claim of right

Appellant asserted that there was no factual support for a prescriptive easement under a claim of right in the motion record. Appellant's Brief at page 38. St. John's responds that the Miley affidavit in conjunction with the encroachment permit and U 25 supports the court's finding of a claim of right and a prescriptive easement. Resp. Brief

at page 8-9. St. John's is asking the court to find that if Charleston County did not allow it to locate a water line across TMS 498, it had a "substantial belief" that it had the right to use TMS 498 for that purpose. Resp. Brief at page 9. In other words, St. Johns wants the Court to find that St. Johns mistakenly located it under Simmons property because it believed it could locate a water line that was approved along Kitford Road across private property. The motion record consisting only of the Miley Affidavit, the encroachment permit and U 25 does not support this conclusion.

St. Johns relies upon Loftis v. South Carolina Elec. and Gas Co., 361 S.C. 434, 604 S.E.2d 714 (Ct. App. 2004) to support its assertion of a claim of right. Appellant contends that Loftis actually supports his contention that St. Johns failed to establish it had a substantial belief needed for a claim of right. As the Court of Appeals in Loftis noted: "Evidence supporting this belief, or claim of right, was presented to the master in the form of testimony regarding SCE&G's search for documents, believed to exist but missing, proving a filed right-of-way on the property. Furthermore, SCE&G presented as evidence several versions of their general service terms and conditions, which have stated the following since 1962:

'The Customer, in requesting or accepting service, thereby grants the Company without charge necessary rights-of-way and trimming and clearing privileges for its facilities along, across, and under property controlled by the Customer ... to the extent that such rights-of-way and trimmings are required or necessary to enable Company to supply service to the Customer ... [and] to serve other Customers.'

Since the prior owners of Appellants' property requested and received decades of electrical service, this evidence clearly supports the master's finding that SCE&G had a substantial belief it had a right to use the property in the manner it did based upon the

totality of the circumstances.” 604 S.E. 2nd at 717. Unlike Loftis, there was no history of water service on Kitford Road on which St. Johns could claim a “substantial belief.” The record establishes that water service was first brought to this area in 1978.

Similarly, in Jones v. Daley, 363 S.C. 310, 609 S.E.2d 597 (Ct. App. 2005) this court found a substantial belief to support a claim of right based upon “an abundance of testimony in the record reflecting Jones and her predecessor's claim of right to the easement.” 609 S.E. 2d at 600. The evidence consisted of testimony by several witnesses that they believed they had a right to use the access because their family had used it to get to and from the parcel for “as long as she can remember.” Id. St. Johns relies entirely upon the affidavit of the engineer Hugh Miley.

In summary, there was nothing in the motion record to establish a “substantial belief”. St. Johns did not produce evidence that it had an agreement with Simmons or his predecessor in title or any neighbors regarding water service as in Loftis. It is uncontroverted that TMS 498 is vacant and undeveloped and that Simmons had well water on his property to the rear of TMS 135. St. Johns did not introduce any affidavits to explain why it “mistakenly” located a water line under private property. The Miley affidavit does not state that the line was constructed across TMS 498. The encroachment permit does not support a mistaken belief since it authorizes encroachment only along Kitford Road.

St. Johns contends that the map U 25 shows a spur to the north of Kitford Road. Resp. Brief at page 12. Even by referring to U 25, St. Johns cannot establish how it had a “substantial belief” that it could cross TMS 498 with a water line. The map is not addressed in the Miley affidavit. St. Johns does not refer to any markings or identification

on U 25 to support its interpretation that it could have “mistakenly” believed that it had a claim of right to cross TMS 498. U 25 shows only the distances from Main Road to the location of the water line. It is inconceivable that St. Johns could not have properly located the line and therefore not a basis for a substantial belief that it was did so in error. Therefore, there is nothing in the motion record to support St. John’s counsel’s interpretation that St. Johns had a “substantial belief”⁹ that the spur to the north was thought to cross TMS 498.

A substantial belief must be more than a mere belief. In Morrow v. Dyches, 328 S.C. 522, 528 492 S.E.2d 420, 423-424 (Ct. App. 1997), this court held that testimony by a property owner that he assumed he had the right to use an adjacent abandoned railroad property for parking was insufficient to establish an easement by prescription.

St. Johns argues that it had a substantial belief based on the Miley affidavit and the encroachment permit and the fact that the permit did not grant such a right is not relevant. Resp. Brief at page 12. According to St. Johns definition of “substantial belief”, it could have used adjacent property such as TMS 498 just because it thought it had the right to install water lines under it. Morrow v Dyches, supra, holds that it can’t.

St. Johns is in the business of serving the public. It is in the business of using surveys and obtaining easements from property owners as in Loftis. This court should not allow St. John’s to assert a claim of right based upon nothing more than its belief. Therefore, the master’s decision granting St. Johns a prescriptive easement cannot be based upon a substantial belief of a claim of right since there are not sufficient facts in the record. The Master’s decision should be reversed.

St. Johns suggests that “plaintiff’s own evidence establishes the location of the water line”. Resp. Brief at page 9. This is a reference to a survey, R. p. 78, attached to Simmons affidavit in opposition to summary judgment. This survey was performed at the request of St. Johns in 2008 after Simmons complained to St. Johns about a water line he found on about TMS 135. Appellant’s Brief at pages 15-16. This survey merely documents that in 2008 the exact location of St. Johns water line under TMS 498 was established. The survey does not prove the necessary elements of St. Johns claims of a prescriptive easement, that the line was there for 20 years prior to Simmons discovery and complaint to St. Johns in 2005 or that there was a claim of right.

In summary, the Miley affidavit together with the encroachment permit and U 25 do not establish the “substantial belief” upon which a claim of right must be based.

D. Reply to lack of evidence of 20 years use

Appellant asserted that St. Johns did not establish the requisite 20 years of use, prior to 2005 when appellant first found the water line on TMS 135 and complained to St. Johns. Appellant’s Brief at page 39-40. St. Johns admits that the customer affidavits of 20 years of service which are mentioned in the court’s decision were not contained in the motion record. Resp. Brief at page 8. When appellant moved for reconsideration based upon among other things, the lack of these affidavits, See R. p. 172, St. Johns never advised the Master that the Order was drafted in error. Therefore, the Master could not have relied upon customer affidavits and the only record of use is the customer service records. Appellant contended that St. Johns own customer records indicate that the customers to the north were first served in 1986. Appellant’s Brief at page 39-40.

St. John's claims that the line constructed in 1978 is the same line under the Simmons property and this is evidence of first use. Resp. Brief at pages 9-10. St. Johns contends that the same large gauge main line installed under Kitford Road was installed under TMS 498. Resp. Brief at page 10. According to St. John's "once an individual customer applies for service, the smaller gauge water line is connected to the main line. Id. St. John's theorizes that the 2" line under Kitford Road was installed in 1978 since it is the same gauge as the main line. However, U 25 indicates that the main line is 2 1/2" and under St. John's theory the 2" line would have installed in 1984 when the customers to the north started service according to its own customer records. Accordingly, the court should find that St. Johns assertion that the smaller line came later as an admission of the later installation of the line under TMS 498 and a failure to establish the requisite 20 year period.

In summary, the uncontradicted evidence before the Master supports the conclusion only that St. Johns constructed a water line along Kitford Road in 1978 but does not establish that it crossed TMS 498 in 1978 to service future customers as St. Johns claims.

E. St. Johns does not assert adverse use as the basis for a prescriptive easement

Appellant has asserted that there was a dispute of fact that St. Johns use of TMS 498 for a water line was open and notorious, as a basis for a prescriptive easement. Appellant's Brief at page 39. In response, St. Johns asserts that it had a claim of right and need not establish an adverse use. Resp. Brief at page 7. Accordingly, St. Johns has waived any right to assert an adverse use as a basis for prescriptive easement. Appellant

relies upon the argument in its Initial Brief that St. Johns failed to establish that its use was open and notorious by clear and convincing evidence.

To summarize: the Miley affidavit, encroachment permit and U25 do not support the master's decision to grant St. Johns an express easement since they cannot allow encroachment on private property; the Miley affidavit, encroachment permit and U 25 do not support the Master's decision to grant a prescriptive easement because they do not establish a "substantial belief" that St. Johns could encroach TMS 498; there was no evidence to contradict Simmons contention that St. Johns "blue flagged" its water line on TMS 135 and St. Johns did not introduce any evidence of any type of easement, express or prescriptive to allow trespass; and St. Johns customer records do not establish a first use for more than 20 years. Therefore, the Master's decision granting summary judgment to St. Johns is not supported by the record.

CONCLUSION

For the reasons expressed above, Simmons respectfully requests that this court reverse the January 18th Order granting summary to Berkeley Electric and remand the matter to the Master in Equity for further proceedings. Simmons further requests that the Court reverse the December 22nd order granting summary judgment to St. Johns and remand for a trial before the Circuit Court as to damages.

Respectfully submitted,

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