THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

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

Duke Energy Carolinas, LLC .... Appellant,

v.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in applying the doctrine of laches to allow encroachments to remain on property owned by Caleb and Christina Walker in violation of a written, recorded public purpose easement that gives Duke Energy Carolinas, LLC "the right to keep said right of way clear of all trees, structures, and other objects"?

STATEMENT OF THE CASE

Duke Energy Carolinas, LLC ("Duke Energy") filed this action on October 21, 2014, seeking to enforce its rights under an express, recorded easement over a portion of real property owned by Caleb and Christina Walker (the "Walkers"). (R. at 14-22). Duke Energy sought the removal of a fence, retaining wall, and patio (the "Encroachments") from its easement (the "Easement" or "Right-of-way"). The Walkers filed an answer on January 15, 2015 in which they admitted ownership of the property and the existence of the Easement over their property. (R. at 23, ¶1). However, the Walkers asserted affirmative defenses of waiver, estoppel, and laches. (R. at 24, ¶¶ 15-16).

By consent of the parties, the case was tried without a jury on May 31 and June 1, 2016. (R. at 4-10). Both parties sought a directed verdict at the close of the evidence. (R. at 172-73). The trial court issued an order on August 2, 2016, finding that Duke Energy owns an easement over the property that is to be kept "clear of all trees, structures, and other objects except those placed thereon by the Grantee [Duke Energy]" and that the Encroachments are located within and in violation of the Easement. (R. at 6-7). The trial court further noted that the Easement language "does not include any exceptions or safety requirements." (*Id.*). However, the trial court went on to find that the doctrine of laches applied and that the Encroachments may remain, subject to a requirement that the Encroachments must be removed if "Duke Energy needs access to the easement from the location of the Encroachments." (R. at 8-9).

Duke Energy filed a motion to alter or amend pursuant to Rules 52 and 59, SCRCP on August 11, 2016. (R. at 26-44). In that motion, Duke Energy clarified the timeline of events leading up to the filing of this action, reiterated the undisputed testimony relating to safety, and set forth reasons why the trial court's application of the doctrine of laches to undermine the

express language of the Easement was both an error of law and was unsupported by the evidence. (*Id.*). Duke Energy supplemented the motion with portions of the trial transcript by letter dated August 17, 2016. (R. at 59). The motion was denied in a Form 4 order dated August 31, 2016. (Order, R. at 11-13). This appeal followed.

FACTS

There are very few facts in controversy. The Walkers own the property in dispute. (R. at 370-71, 244). Duke Energy, through its predecessor in interest, Duke Power Company, has a recorded easement or right-of-way over the property dated November 4, 1939. (R. at 321-22. 87-88, 245). The Easement is sixty-eight feet in width and provides that the Right-of-way remain "clear of all trees, structures, and other objects except those placed thereon by the Grantee [Duke Energy]." (R. at 321-22).

For many years, Duke Energy has owned, controlled, and operated a high voltage electric transmission line that is located in the Easement. The transmission line is rated at 100,000 volts (100kV). (R. at 96).

The Walkers admit they purchased the property subject to the Easement. (R. at 245-47, 252). The Easement is as shown on a survey prepared by R. Daniel Proctor and in the plat referenced in the Walkers' deed. (R. at 5, 353-55, 372).

On March 7, 2013, the Walkers' contractor requested a permit for a pool, a retaining wall, patio, and metal fence to be built on the property. (R. at 323-28). Mr. Walker testified that he knew prior to construction of the Encroachments that they would encroach into the Easement, but he proceeded with construction of the Encroachments within the Easement without first contacting Duke Energy. (R. at 249-50).

After the construction of the Encroachments, Mr. Walker called Duke Energy in January 2014 to discuss additional landscaping he was considering. (R. at 92, 227, 234, 258-59). On January 27, 2014, Steven Pryor of Duke Energy's Asset Protection Department visited the site and told the Walkers the Encroachments were within the Easement and must be removed. (R. at 329, 259-60). Duke Energy sent a follow-up letter demanding that the Encroachments be removed on February 3, 2014. (R. at 364). In June 2014, Pryor again visited the site and marked the Easement at the Walkers' request. (R. at 356). Duke Energy filed its Complaint in October 2014. Given the timing of the Walkers' contact with Duke Energy, which occurred only after the Encroachments were completed, there is no evidence that the Walkers took any action in reliance on or changed any position based on any action or inaction by Duke Energy.

From the application for a construction permit (prior to the beginning of any construction of the Encroachments) until the filing of the Complaint, less than two years elapsed. Duke Energy was consistent in demanding that the Encroachments be removed from the time it first observed them on January 27, 2014 until the day it filed this action in October 2014.

STANDARD OF REVIEW

Duke Energy agrees with the trial court's findings relating to the location of the Easement and its language. Instead, this appeal challenges the trial court's application of the doctrine of laches to diminish the rights conveyed to Duke Energy by the express language of the Easement.

Laches is an equitable defense. *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004). As such, it receives equity review. *See Wright v. Craft*, 372 S.C. 1, 19, 640 S.E.2d 486, 496 (Ct. App. 2006) (citing *Brown v. Chandler*, 50 S.C. 385, 27 S.E. 868, 871 (1897)). Review of the trial court's factual determinations is as follows:

> the question of laches is largely a factual one, and its determination . . . will not be disturbed on appeal unless such findings are without evidentiary support or against the clear preponderance of the evidence.

Maxwell v. Smith, 228 S.C. 182, 191, 89 S.E.2d 280, 284 (1955). In addition, this Court may always correct errors of law. S.C. Code Ann. §§ 14-8-200, 14-3-320, 14-3-330; S.C. Const. art. V., 5; Jean H. Toal *et al., Appellate Practice in South Carolina* 222-23 (3d ed. 2016).

ARGUMENT

As set forth in the first paragraph of the trial court's Conclusions of Law,

> The Easement unequivocally gives Duke Energy "the right to keep said right of way clear of all trees, structures, and other objects except those placed thereon by the Grantee [Duke Energy]." Based upon the Proctor Survey, the Encroachments are located at least partially within Plaintiff's Easement. This clause does not include any exceptions or safety requirements. "'The language of an easement determines its extent.' Thus, this court must construe unambiguous language in the grant of an easement according to the terms the parties have used." *Plott v. Justin Enterprises*, 374 S.C. 504, 513-14, 649 S.E.2d 92, 96 (Ct. App. 2007) (quoting *Binkley v. Rabon Creek Watershed Conserv'n Dist.*, 348 S.C. 58, 67, 558 S.E.2d 902, 906-07 (Ct.App.2001)); *S. Carolina Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981) ("Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in plain, ordinary, and popular sense."). To the extent the language and terms of an easement are specific, they cannot be constricted to any degree. *Xanadu Horizontal Prop. Regime v. Ocean Walk Horizontal Prop. Regime*, 306 S.C. 170, 172, 410 S.E.2d 580, 581-82 (Ct. App. 1991). Based on the foregoing, this court concludes that the Encroachments are in violation of Plaintiff's Easement.

(R. at 6-7).

This analysis should have ended the trial court's inquiry. Given these rulings as to the location and scope of the Easement, it was error for the trial court to constrict Duke Energy's rights under its purchased Easement "to any degree." *Xanadu Horizontal Prop. Regime*, 306 S.C. at 172, 410 S.E.2d at 581-82. This includes the right to keep the Easement clear. Although Duke Energy believes it proved at trial that the Encroachments interfere with its use and enjoyment of the Easement and also present a safety hazard, Duke Energy need not prove either

of these things, nor make any showing of necessity of removal, to require the removal of the Encroachments from the Easement. Therefore, it was error for the trial court to allow the Encroachments to remain.

I. Laches does not apply in this case.

After finding that the Encroachments violate Duke Energy's rights under the Easement, the trial court stripped Duke Energy of those rights, citing the equitable doctrine of laches.[1] This was in error for the reasons set forth below.

A. Equity follows the law, and this case was brought within any potentially applicable limitations period. Therefore, the doctrine of laches does not apply.

Duke Energy brought this action within less than two years from the time the Walkers installed the Encroachments and within less than one year of when Duke Energy became aware of the Encroachments. That is well within any possible statutory limitation period for an action to remove the Encroachments from the Easement. *See* S.C. Code Ann. §§ 15-3-530 (providing three year statute for trespass or damage to real property); 15-3-340 (providing ten year statute for recovery of real property).[2]

"It is well known that equity follows the law." *Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007). Given this maxim, South Carolina courts place a heavy (and heightened) burden on a party "asserting the defense of laches in a lawsuit filed within the applicable limitations period," as follows:

> In order to constitute laches, there must be shown, not merely neglect for a time to enforce a legal or equitable right, where such neglect is for a period short of that which is a bar under the statute of limitations, but *it must further be made to*

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[1] Although laches appears in the Walkers' answer, it was neither argued nor mentioned at trial by the Walkers or their counsel.

[2] For reasons not at issue here, Duke Energy does not concede that either of these, or any, statute of limitations applies to actions for the removal of encroachments from utility rights of way.

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

Brown v. Butler, 347 S.C. 259, 267, 554 S.E.2d 431, 435 (Ct. App. 2001) (emphasis added, quoting *Edwards v. Johnson,* 90 S.C. 90, 103-04, 72 S.E. 638, 644 (1911)). Here, there was no evidence that Duke Energy failed to perform any legal duty or that it misled the Walkers in any way, and the trial court's order does not make any finding on either of these required elements. The evidence was undisputed that Duke Energy was clear and consistent in its insistence that the Encroachments be removed. Thus, the Walkers failed to meet their high burden.

The trial court's order does not cite the applicable standard for applying laches in a case filed within the limitations period, nor does it (or could it) determine that Duke Energy failed to perform a legal duty or that it misled the Walkers. Therefore, the trial court's order contains an error of law to the extent it finds that laches provided the Walkers a defense in this case.

B. The Walkers have not shown that Duke Energy unreasonably delayed bringing this action to the prejudice of the Walkers because the Encroachments were fully constructed by the time Duke Energy had any knowledge of them.

"In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant." *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007); *see Hallums v. Hallums*, 296 S.C. 195, 198–99, 371 S.E.2d 525, 527–28 (1988) (requiring a party asserting a defense of laches to show "(1) delay, (2) unreasonable delay, (3) prejudice"). Thus, the burden fell to the Walkers to establish this defense.

The trial court's order provides a cursory discussion of laches generally followed by a conclusory statement that Duke Energy's delay of less than a year in filing this action was

unreasonable and prejudicial. (R. at 6-7). The trial court did not specify any way in which any alleged delay by Duke Energy was unreasonable or caused any material prejudice to the Walkers. Therefore, these unsupported conclusions constitute error as a matter of law and are not supported by the evidence.

"[D]elay alone in assertion of a right does not constitute laches." *Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002); *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994) ("The lached party must have had actual knowledge or inquiry notice of the facts forming the basis of its claim, and its failure to assert its right is irrelevant until there is a reason or situation that demands assertion.").

> Under the doctrine of laches, if a party who knows his rights does not timely assert them, and by his delay, causes another party to incur expenses or otherwise detrimentally change his position, then equity steps in and refuses to enforce those rights. The party asserting laches has the burden of showing negligence, the opportunity to act sooner, and material prejudice.

Richey v. Dickinson, 359 S.C. 609, 612, 598 S.E.2d 307, 309 (Ct. App. 2004) (citations omitted); *see Chambers of S.C., Inc. v. Cty. Council for Lee Cty.*, 315 S.C. 418, 421, 434 S.E.2d 279, 280–81 (1993) ("Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." (citing *Rabon v. Mali,* 289 S.C. 37, 344 S.E.2d 608 (1986); *Mack v. Edens,* 306 S.C. 433, 412 S.E.2d 431 (Ct. App.1991)).

This is not a case where the Walkers approached Duke Energy prior to building the in the Easement and gained some type of approval that then caused them to construct the Encroachments. Mr. Walker specifically testified the Walkers never sought any such permission from Duke Energy. (R. at 247-48). Instead, the Walkers built the Encroachments knowing that

they encroached into the Easement and then approached Duke Energy months later. In other words, the Walkers designed and built the Encroachments before any evidence suggests Duke Energy had any actual or constructive knowledge of them and Duke Energy promptly told the Walkers to remove the Encroachments as soon as it knew its rights had been violated. Therefore, nothing Duke Energy did or failed to do caused the Walkers to change their position because the Encroachments were already constructed.

By way of illustration, this case is very different from *Jones v. Leagan*, 384 S.C. 1, 19–20, 681 S.E.2d 6, 16 (Ct. App. 2009), a case in which this Court affirmed the application of laches. There, a landowner (Jones) failed to visit his property for seventeen years. In the meantime, another couple invested time and money in the property under the good faith belief that they owned it and without any knowledge of Jones's claim of ownership. Here, on the other hand, (1) Duke Energy asserted its rights as soon as it learned of the Encroachments (and just a few months after they were completed), and (2) the Walkers admitted that they knew the Encroachments fell within the Easement, yet did not contact Duke Energy prior to initiating construction. The Walkers were in the best position to protect their rights, and they easily could have done so by consulting with Duke Energy prior to construction. Unlike in *Jones*, where seventeen years had passed and the encroaching defendants had no knowledge of any claim to the property, the Walkers knew about the Easement, built the Encroachments without permission, and Duke Energy immediately sought the removal of the Encroachments as soon as it was aware of them.

Although the trial court's order mentions prejudice, it does not provide a factual basis for its finding. (R. at 8). Nor does a review of the record reveal any evidence that delay on Duke Energy's part in asserting its rights caused the Walkers "to incur expenses or enter into

obligations or otherwise detrimentally change [their] position." *See Chambers*, 315 S.C. at 421, 434 S.E.2d at 280–81. The Walkers admit that they proceeded at their own risk without consulting Duke Energy first, apparently believing it was better to seek forgiveness than permission. Thus, there is no basis for applying laches, or any equitable doctrine for the Walkers' benefit.

Moreover, courts have long recited "[h]e who seeks equity must do equity." *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994). Therefore, in considering whether to invoke equity, the trial court should have balanced the equities between the parties to determine what relief, if any, was appropriate. *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005). As discussed above, the Walkers knew about the Easement and built the Encroachments with full knowledge that they encroached.

The trial court's order deprives Duke Energy of its rights under the Easement to keep the Easement clear. As also noted by the trial court, a clear and unambiguous easement cannot be constricted to any degree. In essence, however, the trial court did exactly that by permitting willful and knowing Encroachments to remain. It is irrelevant whether every inch of the Easement is needed. Duke Energy's predecessor bought and paid for those rights, the Walkers admittedly took their property subject to them, and a court cannot reduce those rights based on its own determination that Duke Energy has never "needed to exercise its easement rights," particularly when the trial court's order specifically recognizes that Duke Energy may need to do so in the future.

To allow relief under the facts of this case undermines the public policies underlying statutes of limitations and favoring the provision of electric power to South Carolinians as

discussed further below. In addition, it provides incentive for willful encroachment into utility rights of way because it allows such encroachments if the utility does not notice it and file suit immediately.

How is a utility to operate if it can lose its rights under its easements for failing to notice and file suit over every single encroachment in all of its rights of way, even when the encroachment has only been there a few months—far less than the time allotted under any potentially applicable statute of limitations? It simply cannot. No electric utility can constantly monitor its thousands of miles of electric transmission line, such as the 13,000+ miles of transmission line maintained by Duke Energy Carolinas. Yet, that is exactly what the trial court's reasoning would require. Further, what effect does such an order have on pre-suit settlement discussions if objecting face-to-face and sending a confirming letter—all within just a few months of learning about a possible encroachment within an easement and well within any potentially applicable statute of limitations—is not enough? It necessarily means that utilities must immediately file suit and clog the State's courts with matters that otherwise might have been resolved amicably. For all the reasons set forth above, the law and equity require that the Walkers be ordered to remove the Encroachments immediately.

C. The Walkers did not establish that Duke Energy knowingly abandoned its right to keep the Easement clear.

South Carolina appellate courts have stressed that laches is akin to waiver and requires a knowing abandonment of a right. *Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470-71 (2007) ("The equitable doctrine of laches is equivalent to the legal doctrine of waiver, which is the voluntary and intentional relinquishment or abandonment of a known right. Both laches and waiver require a party to have *known* of a right, and *known* that the party was abandoning that right." (emphasis added, citation omitted)); *see Byars v. Cherokee County*, 237 S.C. 548,

560, 118 S.E.2d 324, 330 (1961) ("the circumstances must have been such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts."). "Importantly, delay alone in assertion of a right does not, in and of itself, constitute laches. *Rather, so long as there is no knowledge of the wrong committed and no refusal to embrace an opportunity to ascertain facts, there can be no laches.*" *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct. App. 2004) (emphasis added, quoting *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 297, 519 S.E.2d 583, 599 (Ct.App.1999)).

No evidence presented at trial showed that Duke Energy knowingly abandoned or surrendered its claim to any portion of the Easement at any time. Instead, the trial court improperly imputed knowledge to Duke Energy, based upon two alleged helicopter flyovers, in between the time the Encroachments were constructed and when the Walkers contacted Duke Energy. (R. at 7). However, there was no definitive testimony about whether or not a flyover covering the Walkers' property occurred between the completion of the construction of the Encroachments and Duke Energy's advising the Walkers that the Encroachments would need to be removed in January 2014. (*See* R. at 121-22, 132, 135-36). There was no evidence that any alleged helicopter flyover by Duke Energy led to any actual or constructive knowledge of the Encroachments. (*See id.*). Further, there was no testimony or other evidence that could lead to the implication that Duke Energy intended to relinquish its rights to enforce the Easement as drafted. Thus, there is no evidence in the record reflecting a knowing and intentional relinquishment of the Easement, or any portion thereof, on the part of Duke Energy. Therefore, it was error for the trial court to apply the doctrine of laches in this case.

D. The Easement's savings clause prohibits application of laches.

The Easement contains a "savings clause" that provides: "It is understood and agreed that the failure of neglect of the grantee, its successors or assigns, at any time to exercise any of the rights herein granted shall not be construed as a waiver or abandonment of the right at any time thereafter to exercise any or all of such rights and privileges." (R. at 321-22).

Thus, even assuming that Duke Energy failed or neglected to enforce its rights between the time the Encroachments were constructed in the spring of 2013 and when it objected to them in January 2014 (filing suit later in 2014), it had a contractual right to do so under the Easement without waiving or abandoning its rights in the Easement in any way. The Walkers took their property with that provision and are bound by it just as they are by the rest of the Easement's terms. To allow the Encroachments to remain despite the savings clause modifies the Easement, which violates both the plain language of the Easement and the law cited above.

II. South Carolina law does not allow a public purpose easement to be modified or abandoned under the facts presented here.

In addition to the general discussion of easements and laches above, additional protections apply to easements acquired to serve a public purpose beyond the general case law referenced above. Namely, if a property right has been acquired to serve the public interest, that property right cannot be defeated or modified by prescription unless the property has been enclosed in such a way as to completely occupy the property in a manner inconsistent with the right of way *for the entire statutory period governing adverse possession. Blume v. S. Ry. Co., Carolina Div.*, 85 S.C. 440, 442, 67 S.E. 546, 547-48 (1910). In *Blume*, the court addressed whether a railroad easement could be destroyed by a claim of prescription as follows:

> [T]he public cannot acquire by prescription the right to use the right of way of a railroad company in a manner inconsistent with the company's use of it for corporate purposes... [T]he public has an interest in the construction and operation of railroads as highways, which are burdened with duties to the public.

> Therefore, a railroad company cannot dispose of or so use its right of way as to impair or destroy its ability to serve the public; and that, even under the condemnation statutes, another highway cannot be laid out over the right of way of a railroad, if the construction of such other highway operates as a hindrance to the use and enjoyment of the right of way for the purposes for which it was previously procured. *Prescription rests in the presumption of a grant or dedication, and, as the railroad company has no power either to grant or dedicate its right of way for any other than the purpose for which it was acquired, the presumption cannot arise; and, therefore,* ***neither private individuals nor the public can acquire by prescription any right to use the right of way of a railroad, which is incompatible with the purposes for which it was acquired, or which would hinder or impair the railroad company in discharging its duties to the public, imposed upon it by law.***
>
> . . . . [T]he facts of the case do not bring it within the principles laid down in *Railway v. Beaudrot*, 63 S. C. 266, 41 S. E. 299, and *Hill v. Railway*, 67 S. C. 548, 46 S. E. 486. In each of those cases, a part of the alleged right of way was enclosed by a substantial fence, and held in possession for the statutory period under claim of right, exclusive of any right or interest therein by the railroad company. It was held in those cases that such an assertion of right to the exclusive occupancy of the land in question was incompatible with the easement, and, if held for the statutory period, would defeat the easement. But in this case no such possession of any part of defendant's right of way was shown, and no use thereof was proved which is incompatible with the purpose for which it was acquired.

Id. (emphasis added).

Like railroads, power companies serve the public interest. It has been the law in South Carolina for decades that the manufacture, distribution, and sale of electric power serve an important public function and are for the public good. *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 181 S.E. 481, 486 (1935); *Park v. Greenwood County*, 174 S.C. 35, 176 S.E. 870, 873 (1934). Moreover, similar to railroads, property used in the generation or the transmission of power cannot be condemned. S.C. Code Ann. § 58-27-130. This reflects that the public purpose underlying the rule in *Blume* is also present for property used for the generation or the transmission of power. Given these similarities between railroads and power companies, the same rule should apply here as to the continued right to enforce the full rights conveyed in the Easement.

The burden of proof would be on the Walkers to establish any abandonment of the Easement by clear and convincing evidence. *Carolina Land Co. v. Bland*, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975). "[M]ere nonuse of an easement created by deed for a period however long will not amount to an abandonment, but there must be other acts by the owner of the dominant estate conclusively manifesting either the present intention to relinquish the easement or purpose inconsistent with its further existence." *Id.* Here, Duke Energy has continuously used the Right-of-way and was consistent in its communications with the Walkers that the Encroachments must be removed. Thus, there is no evidence, much less clear and convincing evidence, that Duke Energy abandoned any portion of the Easement. For these reasons, the trial court erred in failing to require the removal of the Encroachments.

III. The relief ordered by the trial court does not address Duke Energy's concerns.

The trial court attempted to "split the baby" in terms of the relief ordered by declaring that the Encroachments may remain except "if [Duke Energy] should ever need to access its power lines and it became necessary to remove the Encroachments, the [Walkers] must bear the cost of removal." (R. at 8-9). Specifically, the trial court ordered:

> 1. If a time arises when Duke Energy needs access to the Easement from the location of the Encroachments, the Encroachments must be removed and the Easement must be restored to accessible condition at full cost to the Defendants.
>
> 2. The duty to restore and responsibility for the costs associated with those repairs are to be filed with the register of deeds in Greenville County and are intended to be a covenant that runs with the land, so that any subsequent owners of the property own it subject to the same duty as the Defendants.
>
> 3. In the event that the Defendants must exercise their duty to remove the Encroachments and restore the Easement to an accessible condition, the Defendants must make all reasonable efforts to begin and complete the restoration within 10 days of when the need arises.

4. If the Defendants fail to make all reasonable efforts to begin or complete the restoration within 10 days, the Court hereby authorizes Duke Energy to enter the property at any time without prior notice or further action of the Court to remove the Encroachments and restore the Easement to accessible condition. Any costs for such reparations would be at the expense of the Defendants.

5. In the event that any harm is done to the Defendant's property resulting from damage to the transmission lines or poles, Defendant shall hold Plaintiff harmless where such harm would have been prevented if Defendant had built outside of the Easement.

These terms, however, raise more questions than they answer. For example: How would it be determined "when Duke Energy needs access to the easement from the location of the Encroachments" for purposes of Paragraph 1? What is to be recorded with the register of deeds for purposes of Paragraph 2? What happens in the event of an emergency where time is of the essence? What happens if the Walkers cannot be reached or are out of town? The order contemplates that the Walkers will have ten days to remove the Encroachments in the case of need, but Duke Energy does not get ten days' notice of an emergency along its rights of way. The ten day period is arbitrary and does not present an acceptable time frame in the event of a transmission line outage. What about the customers served by Duke Energy's transmission line, including fragile populations? Are they to wait nearly two weeks to have their power restored while the Walkers remove the Encroachments? What about the potential penalties from the Federal Energy Regulatory Commission for a transmission line outage that might result from an inability to access the Encroachments and the resulting severe impediment to restoration? What is the mechanism for invoking the "hold harmless" language in Paragraph 5? In addition, Paragraph 2 on its face provides that Duke Energy's property rights have been changed by this order, which South Carolina law does not allow.

This relief stands in stark contrast to the plain statement of the parties' rights under the valid, recorded Easement that has been in place without incident from 1939 until the Walkers knowingly constructed the Encroachments in 2013. The appropriate relief in this case was and is the immediate removal of the Encroachments by the Walkers at their own expense.

CONCLUSION

While it is regrettable that the Walkers expended money to construct the Encroachments inside the Easement, they did so in admitted, knowing disregard of Duke Energy's rights. The trial court's order rewards the Walkers for their folly and punishes Duke Energy in the process, all the while allowing a significant and demonstrated safety risk to persist. For all of these reasons, the Court should reverse the trial court and grant Duke Energy the relief requested in its Complaint. There is no basis in fact, law, or equity for stripping Duke Energy of any of its rights under the clear and unambiguous language of the Easement.

Respectfully submitted,

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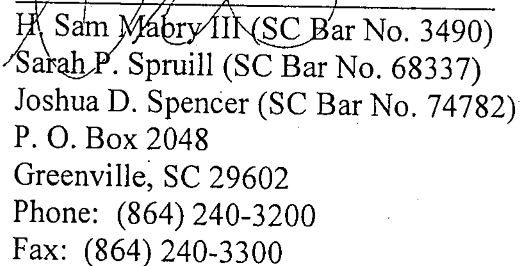

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March 14, 2017
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

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

Duke Energy Carolinas, LLC .... Appellant,

v.

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

CERTIFICATE OF COMPLIANCE

I certify that the final appellant's brief and reply brief in this matter comply with Rule 211(b), SCACR and the April 15, 2014 Order of the South Carolina Supreme Court relating to personal data identifiers.

[SIGNATURE ON NEXT PAGE.]

Respectfully submitted,

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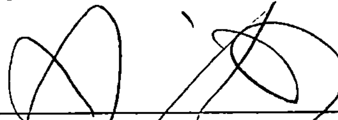

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