THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

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SC Court of Appeals

The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2014-CP-23-5816

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

v.

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

FINAL BRIEF OF RESPONDENTS CALEB E. WALKER AND CHRISTINA T. WALKER

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STATEMENT OF ISSUE ON APPEAL

I. Is the trial court's laches judgment supported by the clear preponderance of the evidence?

STATEMENT OF THE CASE

Appellant Duke Energy Carolinas, LLC ("Duke Energy") filed this case on October 21, 2014. (R. at 14-22.) Duke Energy alleged that Respondents Caleb and Christina Walker (collectively, "Walkers" or "Respondents") encroached on an easement that Duke Energy holds on a portion of the Walkers' property. (R. at 14-22.) The Walkers filed an Answer on January 15, 2015 and raised laches as an affirmative defense. (R. at 23-25.) The trial court tried the case without a jury on May 31 and June 1, 2016. The trial court issued an order on August 2, 2016 ("Order"). (R. at 4-9.) In this Order, the trial court held that the Walkers established a defense of laches, as Duke Energy "did not act promptly to avail itself of its rights under the Easement." (R. at 7.) On August 11, 2016 Duke Energy filed a motion to alter or amend. (R. at 26-44.) On August 17, 2016 Duke Energy supplemented this motion with portions of the trial transcript. (R. at 59.) The trial court denied the motion on August 31, 2016. (R. at 11-13.) This appeal followed.

STATEMENT OF FACTS

The Walkers own property at 239 N. Rutherford Road, Greer, SC 29615 ("Property"). (R. at 244.) Duke Energy owns an easement, dated November 4, 1939, that runs over part of the Property ("Easement"). (R. at 87-88.) Around February 2013, the Walkers erected a fence on the Property and built a swimming pool, retaining wall, and patio (collectively, "Additions"). (R. at 323-28.) In January 2014 the Walkers wanted to install landscaping around the Additions, so Caleb Walker contacted Duke Energy to make sure that the proposed landscaping was agreeable to Duke Energy. (R. at 92, 227, 234, 258-59.) On January 27, 2014 Steven Pryor, an employee in Duke Energy's Asset Protection Department, visited the Property. (R. at 259-60.) Duke Energy sent a follow-up letter on Feburary 3, 2014 and demanded that the Walkers remove the Additions. (R. at 364.) Duke Energy filed its Complaint on October 21, 2014. (R. at 14-22.)

STANDARD OF REVIEW

The only issue before this Court is whether the trial court properly applied the doctrine of laches. This Court's standard of review for laches 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); *see also Archambault v. Sprouse*, 218 S.C. 500, 63 S.E.2d 449 (1951); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 297, 519 S.E.2d 583, 599 (Ct. App. 1999) ("[W]hether laches applies in a particular situation is highly fact-specific, so each case must be judged on its own merits.").

ARGUMENT

Appellants make much to do about their qualms with the trial court judge's Order. However, the simple matter is that the trial court, as the educated fact finder, heard two days of testimony, evaluated the credibility of the witnesses and other evidence, and applied the law to the facts. Case law dictates that this Court's standard of review is narrow, and it should not disturb the trial court's findings unless they are "without evidentiary support or against the clear preponderance of the evidence." *Maxwell*, 228 S.C. at 191, 89 S.E.2d at 284. The trial court's Order is grounded in evidentiary support and the clear preponderance of the evidence. This Court should AFFIRM the trial court's order and dismiss this appeal.

I. The Trial Court's Order is Grounded in Evidentiary Support and the Clear Preponderance of the Evidence.

Although Appellant launches a salvo of reasons why it disagrees with the trial court's ruling, only one issue is properly before this Court: whether the trial court properly held that laches acts as a defense to Appellant's claims. Nothing more. Accordingly, this Court should first inquire as to the proper standard of review for laches.

This Court should not disturb the trial court's findings regarding laches unless the findings are "without evidentiary support or against the clear preponderance of the evidence." *Maxwell*, 228 S.C. at 191, 89 S.E.2d at 284. The Walkers repeat this standard numerous times in this brief as it is the lynchpin to this Court's determination.

a. The Defense of Laches Was Properly Before the Trial Court.

Laches is an affirmative defense that must be raised in the pleadings. *Mack v. Edens*, 306 S.C. 433, 433, 412 S.E.2d 431, 436 (Ct. App. 1991); *see also* Rule 8(c), SCRCP. The Walkers raised laches in their Answer. (R. at 24, ¶ 15.) A trial court judge may enter judgment on any ground on which the case was pleaded or tried. *See, e.g.*, *Parker Peanut Co. v. Felder*, 207 S.C. 63, 34 S.E.2d 488, 490 (1945) ("A judgment or decree, whether in law or equity, must conform to both the pleadings and the proofs[.]"). Duke Energy makes no argument that the trial court judge raised the laches defense *sua sponte*.[1] Because the trial court *could* consider the laches defense, we proceed to the next analytical step: whether it *properly did* consider the laches defense.

b. The Trial Court's Ruling on Laches is Grounded in Evidentiary Support and the Clear Preponderance of Evidence.

This Court must give the trial court's ruling the appropriate standard of review.

> 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 evidence.*

Maxwell, 228 S.C. at 191, 89 S.E.2d at 284 (emphasis added).

[1] Duke Energy states that "[a]lthough laches appears in the Walkers' answer, it was neither argued nor mentioned at trial by the Walkers or their counsel." There are several issues here. First, this statement is misleading. The Walkers' counsel did address laches at trial, albeit not by name. The Walkers' counsel does not recall expressly mentioning "laches," but he questioned Duke Energy's witnesses about Duke Energy's notice of the Additions. Second, whether the Walkers or their counsel argued laches at trial is irrelevant to this Court's determination of this appeal, as the trial court may base its ruling on any issue properly before it. *See Parker*, 207 S.C. at 63, 34 S.E.2d at 488. Issues raised in the pleadings are properly raised. *Id.*

Thus, this Court should not disturb the trial court's determination of laches unless it finds that the trial court ruled either (1) without evidentiary support or (2) against the clear preponderance of the evidence. Neither occurred. The trial court made its ruling based on significant evidentiary support and with the clear preponderance of evidence. This Court should find that the trial court properly applied laches and affirm its ruling.

1. Elements of Laches.

The trial court defined laches as:

> neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.

(R. at 7 (*quoting Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007); *State v. Policao*, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013)) (internal quotation marks omitted).)

The general rule is that for laches to apply, Duke Energy must have had actual knowledge of the Additions. *Arceneaux v. Arrington*, 284 S.C. 500, 504, 327 S.E.2d 357, 359 (Ct. App. 1984). There is a relevant exception. If the "circumstances are such as to have put [Duke Energy] on enquiry [of the Additions] and the means of ascertaining the truth were readily available had enquiry been made, the neglect of [Duke Energy] to make enquiry will charge [Duke Energy] with laches the same as if [it] had known about the encroachments." *Id.* In other words, Duke could have discovered the Additions, but neglected to do so.

This is exactly the scenario. Here, Duke Energy admitted at trial that it "performed at least two fly-over observations per year." (R. at 7.) The purpose of a fly-over is to see if any encroachments are present on Duke Energy's property. This is self-evident. Duke Energy cannot claim that they did not receive notice. Eighteen months elapsed from construction of the Additions to filing suit. Conservatively, we can assume that eighteen months translates to at least three fly-

overs. These fly-over observations put Duke Energy on constructive inquiry notice, such that it had the "means of ascertaining the truth" and neglected to do so. If a large, sophisticated corporation such as Duke Energy has the resources to conduct multiple yearly flyovers to observe its properties, surely equity requires that it do so and alert Respondents of any problems. To do otherwise flies in the face of logic. Appellant attempts to conflate the issues by stating that "it was error for the trial court to constrict Duke Energy's rights under its purchased Easement 'to any degree.'" (App.'s Initial Br. at 5 (citation omitted).) This misstates the issue. The trial court did not *constrict* Duke Energy's rights under the Easement. Duke Energy still has its full bundle of rights. Duke Energy *neglected to exercise* its rights under circumstances where it should have done so.

A hypothetical scenario helps explain the distinction. After the trial court's ruling, Duke Energy still owns the Easement in full. It still owns all rights under the Easement. Nothing has been added or subtracted. If the Walkers built another structure that encroached into the Easement, Duke Energy has the ability to bring action to exercise its rights to keep the Easement clear. Its rights are fully intact. If, however, Duke Energy again fails to exercise its rights in a timely fashion, it runs the risk of neglecting to exercise these rights for that scenario and waiving any right of enforcement. The Walkers should be not be punished for Duke Energy's delay, which the trial court held was "unreasonable under the circumstances and prejudicial to [the Walkers.]" (R. at 8.)

Arceneaux, which the trial court relies on in its Order, is instructive to this Court's analysis. In *Arceneaux*, a landowner took title to property governed by restrictive covenants preventing commercial use. *Arceneaux*, 284 S.C. at 501-02, 327 S.E.2d at 358. The landowner used the land for commercial use. *Id.* at 502, 327 S.E.2d at 358. Plaintiffs owned land in the same subdivision and brought suit to enforce the restrictive covenants and prevent the commercial usage of the property. *Id.* The landowner raised laches as an affirmative defense. The trial court found the

plaintiffs guilty of laches and this Court affirmed the trial court. *Id.* In doing so, this Court noted that the plaintiffs had prior knowledge of the commercial use of the property. *Id.* at 502, 327 S.E.2d at 359. *Arceneaux* is different from the instant case in this regard, as Duke Energy did not have advance knowledge that the Walkers were going to build the Additions. However, *Arceneaux* is similar to this case on a key point—constructive notice. The *Arceneaux* plaintiffs said that they delayed in bringing the case because the landowner did not disclose the restrictive covenants, and therefore they could not know about the violation. *Id.* at 503, 327 S.E.2d at 359. Plaintiffs contended that "there was no visible change which would have put them on notice that [the property] had been sold to [defendant] subject to the restrictive covenants." *Id.* Plaintiffs argued that "because they did not know of their rights . . . the delay in commencing suit was not unreasonable." *Id.* This Court rejected this argument. *Id.*

This Court stated that "the general rule" regarding laches is that "to charge a party with laches in the assertion of an alleged right, he must have knowledge of the facts upon which he bases his claim." *Id.* at 503-04, 327 S.E.2d at 359. The Court then explained the exception:

> [where] the circumstances . . . have put [plaintiffs] on enquiry and the means of ascertaining the truth were readily available had enquiry been made, the neglect of [plaintiffs] to make enquiry **will charge [the neglectful party] with laches the same as if he had known the facts.**

Id. The *Arceneaux* court reasoned that because the restrictive covenants were referenced in the defendant's recorded deed, the plaintiffs had inquiry notice of the covenants, and their failure to further inquire barred them through laches. *Arceneaux* is similar to this case.

Like *Arceneaux*, Duke Energy claims that it did not know about the Additions, and it took immediate action to remove them once it learned about them. However, like *Arceneaux*, Duke Energy was on inquiry notice once the Additions were constructed, *not* when it discovered them.

Like *Arceneaux*, Duke Energy did not contact the Walkers about the Additions for over a year after construction, and did not file this lawsuit for over twenty months after construction.

Indeed, here Duke Energy was put on even greater constructive notice than in *Arceneaux*, as here Duke Energy could see physical signs of the construction: trucks, excavation, grading, and the final structures. The *Arceneaux* court found constructive notice against the plaintiffs even where there was "no visible change" to the physical property. *Id.* at 503, 327 S.E.2d at 359.

Respondents anticipate that Duke Energy will argue that:

(1) Duke Energy cannot be expected to constantly monitor all of its property for such relatively small encroachments;

(2) Affirming the trial court would remove the proverbial finger from the dike and allow other encroachments to run rampant; and

(3) Public policy is served by constant and judicious enforcement of public utilities easements.

The Walkers address each in turn.

First, Duke Energy is a company with over $23 billion in revenue and twenty nine thousand employees. While it does have to monitor a large amount of property and resources, it possesses significant resources to do so. With great power comes great responsibility. With great revenue comes great responsibility.

Second, the Walkers understand that precedent is king in the corporate world. No company wants to be perceived as weak, ineffectual, or incapable of protecting its assets. However, the Walkers urge this Court to remember the small scale of the Additions. At the "greatest point of encroaching[,]" the Additions reach about "15 feet into a 68-foot easement." (R. at 5.) Allowing the Additions to remain will not lead to corporate ruin, nor will it set a bad precedent. Doing so would only lead to an equitable result.

Third, the Walkers agree that public utilities play a key part in societal infrastructure. That is not the issue at hand. The Walkers disagree with the conclusion that Duke Energy draws from operating a public utility. Duke Energy argues in its brief that the Walkers cannot modify Duke Energy's easement by prescription. (App.'s Initial Br. at 13-15.) This argument has logical flaws. The Walkers address these problems below.

II. The Trial Court's Ruling Does Not Provide for Prescription of Its Easement.

Duke Energy's second argument is that "South Carolina law does not allow a public purpose easement to be modified or abandoned under the facts presented here." (App.'s Initial Br. at 13.) This argument fails for several reasons.

First, Duke Energy misstates the applicable law. The trial court's application of laches does not "defeat or modify" Duke Energy's Easement by prescription, as Appellant claims. Duke Energy still owns all of the Easement as it has since its creation. Nothing has changed. Acquiring an easement by prescription would require a high burden—the Walkers must use Duke Energy's Easement "in substantially the same way for the full [statutory] period of 20 years and adversely to the rights of [Duke Energy]." *See Mills v. City Of Greenville*, 160 S.C. 10, 158 S.E. 113 (1931). This is obviously not the case. This argument is a red herring. Instead, Duke Energy still owns the entire bundle of rights associated with the Easement, but because it failed to timely bring suit to enforce its claim against the Walkers, the trial court held that laches barred them. This is a big difference.

Second, Duke Energy misstates the proper evidentiary burden. Duke Energy states that to obtain abandonment, the "burden of proof would be on the Walkers to establish [it] by clear and convincing evidence." (App.'s Initial Br. at 15.) The Walkers do not need to prove abandonment. The burden of proof was on Duke Energy to convince the trial court that the Walkers violated their

property rights. They failed to do so. The Walkers do not bear the burden of proof for proving abandonment. This argument fails.

III. The Only Issue Before This Court Is Whether the Trial Judge Properly Considered Laches, Not Whether Duke Energy's "Concerns" are Adequately Addressed.

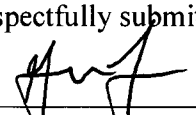
Duke Energy argues that the trial court's relief doesn't address Duke Energy's concerns. Duke Energy throws this section in to paint the trial judge as overreaching. This is not the issue before this court. The only issue before this Court is whether the trial court properly determined that laches bars Duke Energy from exercising its property right. The standard of review for laches is narrow, and Duke Energy has failed to prove that the trial judge's order is "without evidentiary support or against the clear preponderance of the evidence." *Maxwell*, 228 S.C. at 191, 89 S.E.2d at 284. This argument fails.

CONCLUSION

Duke Energy did not enforce its rights in a timely manner. The trial court considered the pre-trial briefings, trial testimony, and motions practice. After doing so, the court concluded that laches barred Duke Energy because it unreasonably delayed in asserting its rights. That was the trial judge's prerogative. Sixty year old South Carolina Supreme Court case law dictates that the trial court's order "will not be disturbed on appeal unless such findings are without evidentiary support or against the clear preponderance of the evidence." *Maxwell*, 228 S.C. at 191, 89 S.E.2d at 284. This is a narrow standard of review. Because the trial court's findings are grounded in evidentiary support and the clear preponderance of the evidence, this Court should AFFIRM the trial court's ruling and dismiss this appeal.

[*Signature block follows on the next page.*]

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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