

**RECORD ON APPEAL**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas**

**The Honorable Jennifer B. McCoy, Circuit Court Judge**

**Appellate Case No. 2019-000574**

Elizabeth Lofton.....Appellant,

v.

Berkeley Electric Cooperative, Inc.  
and John Lucas Tree Expert Company.....Respondents,

**RECORD ON APPEAL**

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Certificate of Counsel

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The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

September 2, 2019

/s/ Michael A. Whitsitt

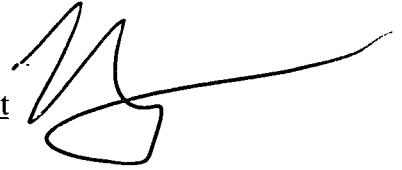
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(843)696-8904

Attorney for Appellant

A handwritten signature in black ink, appearing to be 'M. Whitsitt', with a long horizontal line extending to the right.

**Defendants.**

***(Jury Trial Demanded)***

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JULIE J. HARRIS  
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(Sealed)

1. Plaintiff, Elizabeth Lofton, is a citizen and resident of the County of Charleston, State of South Carolina and was at all material times herein.
2. Defendant, Berkeley County Electric Cooperative, Inc., is and has been at all material times a South Carolina Non-Profit corporation, with its principal place of business in the state, and is and was qualified and licensed to do business in the State of South Carolina, and was doing and/or transacting and conducting business as an electric utility in the County of Charleston, State of South Carolina.
3. At all times pertinent herein, in the acts and/or omissions alleged herein, the agents, servants, and/or employees of Defendant were acting within the course and scope of their employment and agency and with express or implied consent or permission of Defendant.

4. This Court has jurisdiction and venue of this action in that the property that is the subject of the action is located in Charleston County, SC, the acts and/or omissions giving rise to this action occurred in Charleston County, SC, and Plaintiff's damages are in excess of \$7,500.00.
5. Plaintiff is the owner of a piece, parcel or tract of land located in Charleston County, South Carolina, more fully described by the property description included and attached as Exhibit A.
6. As part of Plaintiff's business, Plaintiff cultivates various plants and trees grown on her property for later re-sale, including pine, live oak, pecan, magnolia, wax myrtle, elm and gum trees.
7. Upon information and belief, approximately three times prior to July 17, 2013, Defendant, through its agent/employee, appeared uninvited at the property of Plaintiff with the intent of obtaining a Right of Way easement over the land of Plaintiff.
8. On or about July 17, 2013, an agent/employee of Defendant appeared once more at Plaintiff's property, where, by his acts and/or omissions, he was able to coerce Plaintiff into signing a Right of Way easement. During this discussion, the agent/employee of Defendant fraudulently and or wrongfully led Plaintiff to believe that the easement on her property would be limited to an encroachment not to exceed 10 feet inward from the centerline of Aiden's Way.
9. Defendant, through its agent/employee, also assured Plaintiff that no poles would be erected on her property by pinpointing the location of each pole on a map. These points showed each pole located on adjoining property once owned by Mary Carroll, who granted a "perpetual non-exclusive easement" over her land "to allow vehicular, pedestrian and utility access from Old Georgetown Road" across her land to Plaintiff's land by deed dated December 27, 2006,

and recorded in the RMC Office for Charleston County on May 22, 2013, at Book 0332, Page 617.

10. Defendant also indicated, through its agent/employee, that no trees would be cut, removed, and/or destroyed from Plaintiff's land.

11. At this time, Defendant, through its agent/employee, fraudulently and/or wrongfully coerced Plaintiff into signing an incomplete document granting Defendant an easement over the land of Plaintiff.

12. Upon information and belief, handwritten information, including, but not limited to the property description and notary signature, were added to this document outside of Plaintiff's presence and after Defendant fraudulently and/or wrongfully obtained Plaintiff's signature.

13. Upon information and belief, Defendant was to return a copy of this document to Plaintiff. Plaintiff never received this document, nor the consideration included on said document. Furthermore, the easement granted to Defendant on or about July 17, 2013, was notarized by the same agent of Defendant who, upon information and belief, coerced Plaintiff into signing said document.

14. Several weeks later, Plaintiff received notification from a neighbor that Defendant was unlawfully cutting, destroying and removing trees and other personal property from her land.

15. Plaintiff immediately approached Defendant, or their agents/employees on her property, and demanded they stop work, which they did for several weeks.

16. Defendant ultimately returned to Plaintiff's property without permission and continued to cut, destroy and remove trees and other personal property from Plaintiff's land.

17. As a result, Plaintiff, upon information and belief, is informed and believes she is entitled to actual, compensatory, and punitive damages in an amount to be determined by the Court and for attorney's fees. Further, Plaintiff requests such other and further relief as may be appropriate

**FOR A FIRST CAUSE OF ACTION**  
**(Trespass)**

18. Further complaining of Defendant, Plaintiff repeats and realleges verbatim its foregoing allegations in this Complaint as if fully incorporated herein and, to the extent they are not inconsistent, are made a part of this cause of action.

19. As aforementioned, Plaintiff is the owner of a lot of land located in Charleston County, South Carolina.

20. That the actions of Defendant described hereinabove constitute trespass to real property of Plaintiff.

21. That Defendant entered onto the property of Plaintiff with the intention of doing harm to the property and did in fact substantially harm the property.

22. That Defendant was without lawful authority to enter and destroy the property of Plaintiff.

23. That Defendant did interfere with Plaintiff's property through intentional acts and without the permission of Plaintiff.

24. Plaintiff demands judgment against Defendant for actual, compensatory, and punitive damages in an amount to be determined by the Court and for attorney's fees. Further, Plaintiff requests such other and further relief as may be appropriate, including an injunction against the above-listed activities.

**FOR A SECOND CAUSE OF ACTION**  
**(Conversion)**

25. Plaintiff incorporates into this cause of action the allegations contained in the foregoing paragraphs above as if fully repeated verbatim herein, to the extent the same is consistent herewith.

26. The title to the land in question is in Plaintiff's name.

27. Defendant entered upon Plaintiff's land for the purpose of wrongfully and/or fraudulently obtaining a Right of Way easement, which Defendant then used to destroy and remove a tract of trees belonging to Plaintiff.

28. Furthermore, in the event said Right of Way easement is ruled to be obtained in a non-fraudulent manner, Defendant entered upon and exercised control over a tract of land outside the scope of said Right of Way easement.

29. As a direct and proximate, cause, result and consequence of the conversion of Defendant, Plaintiff has suffered a large monetary loss including, but not limited to the destruction of trees and property used in Plaintiff's landscaping business and the costs of repair and replanting the trees destroyed by Defendant. Plaintiff would also seek punitive damages in an amount to be determined by the trier of fact.

**FOR A THIRD CAUSE OF ACTION**  
**(Negligence/Gross Negligence)**

30. Plaintiff incorporates into this cause of action the allegations contained in the foregoing paragraphs above as if fully repeated verbatim herein, to the extent that the same is consistent herewith.

31. Plaintiff is informed and believes that Defendant was grossly negligent, willful, wanton, reckless, careless, and/or negligent in the breach of the following duties in one or more of the following particulars:

- a. In failing to properly follow and/or employ procedures pertaining to the process(es) used to obtain Right of Way easements from property owners, who are not experts in the field of real estate. Defendant had a duty to properly follow procedures set forth by adopted codes, municipal ordinances, State law and Federal law.
- b. In failing to properly notify Plaintiff of the extent and/or consequences of work to be completed on her property. Defendant had a duty to notify Plaintiff as to the full extent of work to be performed on her property.
- c. In wrongfully converting Plaintiff's property for the use of Defendant. Defendant had a duty not to convert property that belonged to another.
- d. In allowing its agent/employee to provide confusing, inconsistent, incorrect and false information to Plaintiff. Defendant had a duty to provide correct, consistent, clear and non-misleading information to Plaintiff regarding the extent and scope of work to be completed on her property, as well as, the extent and scope of the easement sought to be obtained for Right of Way access to her property.
- e. In allowing its representative to notarize the Right of Way easement, which upon information and belief, he wrongfully and/or fraudulently obtained from Plaintiff. Under South Carolina Code Ann., § 26-1-120(B), a notary certifies that "the person whose signature was notarized did not appear to be incompetent, lacking understanding of the transaction requiring the notarial act, or acting involuntary, under duress, or undue influence." Defendant owes a duty to Plaintiff to ensure that an uninterested third party be required to notarize any documents granting it a pecuniary interest.
- f. In improperly destroying the property of Plaintiff. Defendant had a duty not to improperly destroy the property of Plaintiff.
- g. In destroying Plaintiff's property beyond the "extent necessary" to keep trees and shrubbery clear of said electric line or system.
- h. In failing to check the relevant deeds to said properties over which an easement was sought. Upon examination, Defendant would have been aware that a "perpetual non-exclusive easement" had already been granted "to allow vehicular, pedestrian and utility access from Old Georgetown road across Lot 1 to Lot 2." This easement reflected the true intent of the landholders and was recorded in the RMC Office for Charleston County on May 22, 2013, at Book 0332, Page 617.

32. Defendant's acts and/or omissions cited in Paragraph 31 constitute a breach of duty and were either intentional, performed without the slightest care, or were performed with an absence of care that is necessary under the circumstances.

33. That as a direct and proximate cause of one or more of the aforementioned acts of negligence, gross negligence, recklessness, willfulness, wantonness, and/or carelessness on the part of Defendant, Plaintiff has sustained and suffered great harm to her property, including but not limited to loss of value, loss of enjoyment and the costs of repairing the land to the condition it was before Defendant's acts and/or omissions. Furthermore, Plaintiff suffered trauma anxiety and emotional distress, all to her general detriment, in a sum to be determined by the trier of fact.

**FOR A FOURTH CAUSE OF ACTION**  
**(Fraud/Negligent Misrepresentation)**

34. Plaintiff incorporates into this cause of action the allegations contained in the foregoing paragraphs above as if fully repeated verbatim herein, to the extent that the same is consistent herewith.

35. Defendant owed a duty to Plaintiff not to make false representations to Plaintiff about any aspect of the easement and/or scope of work to be completed on land owned by Plaintiff.

36. Defendant, through its agent/employee, made false representations to Plaintiff by intentionally understating and/or concealing the scope and/or extent of work to be completed on Plaintiff's property.

37. Upon information and belief, Defendant deliberately and continually failed to disclose the information as to the extent and/or scope of work on Plaintiff's land in order to coerce Plaintiff into signing the easement dated July 17, 2013.

38. The representations were material to Plaintiff in that they played a role in Defendant's receipt of a Right of Way easement over a limited area of Plaintiff's property.

39. Defendant knew or should have known their representations were false or had a reckless disregard for the veracity of their statements and/or omissions.

40. Defendant's intent was that Plaintiff act upon the false representations for the pecuniary interest of having Plaintiff grant Defendant a Right of Way easement over her property.

41. Plaintiff, through her dealings with Defendant was ignorant of the falsity of Defendant's representations, and as a customer, or potential customer of Defendant, had a right to rely upon the representations of Defendant and did rely thereon.

42. As a direct and proximate consequence of the fraudulent acts and/or omissions of Defendant, Plaintiff has damages in the amount equal to but not less than the cost of repairs and replacement of the destroyed trees on her property, loss of use of the property, further destruction of property to be used in Plaintiff's landscaping business, and an award of punitive damages in an amount to be determined by the trier of fact.

**FOR A FIFTH CAUSE OF ACTION**

**(South Carolina Unfair Trade Practices Act, SC Code Ann., § 39-5-10 et seq.)**

43. Plaintiff incorporates into this cause of action the allegations contained in the foregoing paragraphs above as if fully repeated verbatim herein, to the extent that the same is consistent herewith.

44. Plaintiff and Defendant are "persons" within the meaning of South Carolina Code Ann., § 39-5-10(a).

45. That Defendant's actions entering Plaintiff's land for the purpose of fraudulently and/or wrongfully obtaining an easement to cut timber from Plaintiff's land directly or indirectly affects the people of this state, and are expressly included within the meaning of "trade or commerce" in South Carolina Code Ann., § 39-6-10(b).

46. As a direct and proximate result of the trespass and conversion of Plaintiff's land, coupled with the false and misleading representations of Defendant in obtaining the Right of Way easement from Plaintiff, Plaintiff has suffered clear and ascertainable loss of money, and such other pecuniary losses as set forth in the body of this Complaint, those to be discovered through this litigation, as well as, those losses that will continue into the future.

47. The conduct, actions, and inactions of Defendant, as set forth throughout this Complaint, as well as, those to be discovered through this litigation, constitute unfair, deceptive, immoral, unethical and offensive trade acts and practices as prohibited in South Carolina Code Ann., § 39-5-10 et seq.

48. The unfair and deceptive practices set forth above, as well as, those to be discovered through this litigation, have both a propensity for repetition and an adverse impact on the public, public's interest, and public's safety in general, in as much, as other landowners in South Carolina may be coerced into and not totally informed as to their dealings with Defendant.

49. Defendant knew or should have known as set forth herein was in violation of South Carolina Code Ann., § 39-5-10 et seq.

50. Pursuant to South Carolina Code Ann., § 39-5-140, as a result of the conduct, actions and inactions of Defendant, as set forth throughout this Complaint, as well as, those to be discovered through this litigation, and the resultant financial losses suffered by Plaintiff, Plaintiff is entitled to recover its actual damages and treble damages with interest thereon, plus attorney's fees, plus all costs of this proceeding, as their trier of fact may deem appropriate, and such other relief as the Court deems just and proper.

**FOR A SEVENTH CAUSE OF ACTION**  
**(Violation of South Carolina Timber Statute, S.C. Code Ann, § 16-11-580)**

51. Plaintiff incorporates into this cause of action the allegations contained in the foregoing paragraphs as if full repeated verbatim herein, to the extent that the same is consistent herewith.

52. Defendant knowingly and willfully entered upon the land of Plaintiff without obtaining proper legal consent from Plaintiff to cut, destroy and/or remove forest products located on the land of Plaintiff.

53. Upon information and belief, any consent for entry upon Plaintiff's land that was obtained by Defendants to cut, destroy or remove said forest products was obtained or acquired from Plaintiff under false pretenses or with fraudulent intent.

54. Upon information and belief, Defendant also transported, or caused to be transported, forest products with knowledge that said forest products were cut, removed, obtained, or acquired from the property of Plaintiff in violation of the provisions of this subsection.

55. Pursuant to South Carolina Code Ann., § 16-11-615 as a result of the conduct, actions and inactions of Defendant, as set forth throughout this Complaint, as well as, those to be discovered through this litigation, and the resultant financial losses suffered by Plaintiff, Plaintiff is entitled to recover its actual damages and treble damages with interest thereon, plus attorney's fees and all costs of this proceeding, as the trier of fact may deem appropriate, including such other relief as the Court deems just and proper.

**WHEREFORE**, Plaintiff, demanding a trial by jury, demands judgment against Defendant on the various causes of action, praying specifically for actual, compensatory, consequential, incidental, treble and/or punitive damages in an amount to be determined by the trier of fact and interest thereon, and for fees, costs and a reasonable attorney's fee. Further, Plaintiff requests such other and further relief as this Court may deem just and proper.

Respectfully Submitted,

**HARRELL LAW FIRM, P.A.**

By: Shawn M. Bevens  
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Charleston, South Carolina 29407  
Phone: (843) 766-4700  
Fax: (843) 766-4784

**Attorney for Plaintiff**

Charleston, South Carolina  
Date: June 29, 2015

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**PLAINTIFF'S NOTICE OF MOTIOIN  
AND MOTION FOR LEAVE  
TO AMEND COMPLAINT**

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Plaintiff, Elizabeth

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Elizabeth

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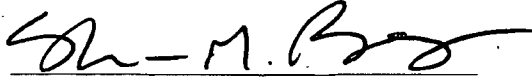
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Respectfully Submitted,

**HARRELL LAW FIRM, P.A.**



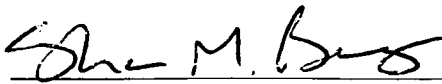
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shawn@hlfpa.com

**Attorneys for Plaintiff**

Charleston, South Carolina  
Date: December 29, 2015



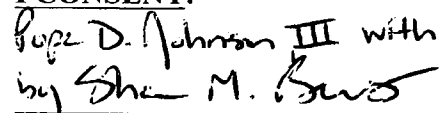
**I SO MOVE:**



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Phone: (843) 766-4700  
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shawn@hlfp.com

**Attorney for Plaintiff**

**I CONSENT:**

 with permission  
by Shawn M. Bevens

Pope D. Johnson, III  
Attorney at Law  
1230 Richland Street  
Columbia, South Carolina 29201  
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pope@popejohnsonlaw.com

**Attorney for Defendant**

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Lucas”), alleging and saying as follows:

1. Plaintiff, Elizabeth Lofton, is a citizen and resident of the County of Charleston, State of South Carolina and was at all material times herein.

2. Defendant, Berkeley Electric, is and has been at all material times a South Carolina Non-Profit corporation, with its principal place of business in the state, and is and was qualified and licensed to do business in the State of South Carolina, and was doing and/or transacting and conducting business as an electric utility in the County of Charleston, State of South Carolina.

3. Defendant, John Lucas Tree Expert, Co., is and has been at all material times, a Maine corporation registered and licensed to do business in the State of South Carolina, and was doing and/or transacting and conducting business as a tree removal service in the County of Charleston, State of South Carolina.

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CLERK OF COURT

4. At all times pertinent in the acts and/or omissions alleged herein, the agents, servants, and/or employees of both Defendant Berkeley Electric and Defendant John Lucas were acting within the course and scope of their employment and agency and with express or implied consent or permission of the respective Defendants.

5. This Court has jurisdiction and venue of this action in that the property that is the subject of the action is located in Charleston County, South Carolina, the acts and/or omissions giving rise to this action occurred in Charleston County, South Carolina, and Plaintiff's damages are in excess of \$7,500.00.

6. Plaintiff is the owner of a piece, parcel or tract of land located in Charleston County, South Carolina, more fully described by the property description included and attached as Exhibit A.

7. As part of Plaintiff's business, Plaintiff cultivates various plants and trees grown on her property for later re-sale, including pine, live oak, pecan, magnolia, wax myrtle, elm and gum trees.

8. Upon information and belief, approximately three times prior to July 17, 2013, Defendant Berkeley Electric, through its agent(s) and/or employee(s) appeared uninvited at the property of Plaintiff with the intent of obtaining a Right of Way easement over the land of Plaintiff.

9. On or about July 17, 2013, Defendant Berkeley Electric, through its agent and/or employee, Mr. Henry "Bud" Easler, appeared once more at Plaintiff's property, where, by his acts and/or omissions, he coerced Plaintiff into signing a Right of Way easement. During this discussion, Defendant Berkeley Electric, by and through Mr. Easler, fraudulently and/or wrongfully led Plaintiff to believe the easement on her property would be limited to an

encroachment not to exceed 10 feet inward from the centerline of Aiden's Way, which was understood by the parties to be the boundary of Plaintiff's property.

10. Defendant Berkeley Electric, through its agent Mr. Easler, also assured Plaintiff that no telephone poles would be erected on her property. He did this by pinpointing the location of each pole on a map of the property. These points showed each pole would be located on adjoining property once owned by Mary Carroll.

11. Mary Carroll granted a "perpetual non-exclusive easement" over her land on the said plat "to allow vehicular, pedestrian and utility access from Old Georgetown Road" to Plaintiff's land by deed dated December 27, 2006, and recorded in the RMC Office for Charleston County on May 22, 2013, at Book 0332, Page 617.

12. Defendant Berkeley Electric, through its agent and/or employee, further indicated to Plaintiff that no trees would be cut, removed, and/or destroyed from Plaintiff's land.

13. Defendant Berkeley Electric, through its agent, fraudulently and/or wrongfully coerced Plaintiff into signing an incomplete document on legal size paper. This document granted Defendant Berkeley Electric an easement over the land of Plaintiff. Handwritten information, such as the property description and notary signature, were added to this document outside of Plaintiff's presence and after her signature was obtained.

14. Upon information and belief, an agent for Defendant Berkeley Electric was to return to Plaintiff's property the following day with a fully executed document including proper notarization and land description. Plaintiff never received this document, nor the consideration included on said document. Furthermore, the easement granted to Defendant on or about July 17, 2013, was notarized by the same agent of Defendant who, upon information and belief, coerced Plaintiff into signing said document.

15. Several weeks later, Plaintiff received notification from a neighbor that agents and/or employees from Defendant Berkeley Electric and/or Defendant John Lucas were cutting, destroying and/or removing trees and other personal property from her land. Said personal property includes, but is not limited to, a number of potting bins used by Plaintiff for her business.

16. Plaintiff immediately approached Defendants, through their agents/employees on the property, and demanded they stop work.

17. Despite being told by Plaintiff to stop work, agents and/or employees of Defendant Berkeley Electric and/or Defendant John Lucas returned to Plaintiff's property without permission and continued to cut, destroy and/or remove trees and other personal property from Plaintiff's land.

18. As a result, Plaintiff, upon information and belief, is informed and believes she is entitled to actual, compensatory, and punitive damages in an amount to be determined by the Court plus attorney's fees. Further, Plaintiff requests such other and further relief as this Court may deem appropriate.

**FOR A FIRST CAUSE OF ACTION**  
**(Trespass)**

19. Further complaining of Defendants, Plaintiff repeats and realleges verbatim its foregoing allegations in this Complaint as if fully incorporated herein and, to the extent they are not inconsistent, are made a part of this cause of action.

20. As aforementioned, Plaintiff is the owner of a lot of land located in Charleston County, South Carolina.

21. That the actions of Defendants described hereinabove constitute trespass to real property of Plaintiff.

22. That Defendants entered onto the property of Plaintiff with the intention of doing harm to the property, and did in fact cause substantial harm to the property of Plaintiff.

23. That Defendants were without lawful authority to enter and destroy the property of Plaintiff.

24. That Defendants did interfere with Plaintiff's property through intentional acts and without the permission of Plaintiff.

25. Plaintiff demands judgment against Defendants for actual, compensatory, and punitive damages in an amount to be determined by the Court plus attorney's fees. Further, Plaintiff requests such other and further relief as may this Court may deem appropriate.

**FOR A SECOND CAUSE OF ACTION**  
**(Conversion)**

26. Plaintiff incorporates into this cause of action the allegations contained in the foregoing paragraphs above as if fully repeated verbatim herein, to the extent the same is consistent herewith.

27. The title to the land in question is in Plaintiff's name.

28. Upon information and belief, Defendants gained control and possession over a tract of Plaintiff's property by virtue of a fraudulently and/or wrongfully obtained Right of Way easement, which was obtained without regard for Plaintiff's rights to the land.

29. Defendant Berkeley Electric entered upon Plaintiff's land for the purpose of fraudulently and/or wrongfully obtaining a Right of Way easement, which Defendant Berkeley Electric and/or Defendant John Lucas then used to destroy and remove a tract of trees and other personal property from the land of Plaintiff.

30. Furthermore, in the event said Right of Way easement is ruled to be obtained in a non-fraudulent manner, Defendants entered upon and exercised control over a tract of land outside the scope of said Right of Way easement.

31. As a direct and proximate, cause, result and consequence of the conversion of Defendants, Plaintiff has suffered a large monetary loss including, but not limited to the destruction of trees and personal property plus the costs of repair and replanting the trees destroyed by Defendants. Plaintiff would also seek punitive damages in an amount to be determined by the trier of fact.

**FOR A THIRD CAUSE OF ACTION**  
**(Negligence/Gross Negligence)**

32. Plaintiff incorporates into this cause of action the allegations contained in the foregoing paragraphs above as if fully repeated verbatim herein, to the extent that the same is consistent herewith.

33. Plaintiff is informed and believes that Defendant Berkeley Electric was grossly negligent, willful, wanton, reckless, careless, and/or negligent in the breach of the following duties in one or more of the following particulars:

- a. In failing to properly follow and/or employ laws and/or procedures pertaining to the processes used to obtain Right of Way easements from property owners. Defendant Berkeley Electric had a duty to properly follow procedures set forth by adopted codes, municipal ordinances, State law and Federal law.
- b. In wrongfully converting Plaintiff's property. Defendant Berkeley Electric had a duty not to convert property that belonged to another.
- c. In failing to properly notify Plaintiff of the extent and/or consequences of work to be completed on her property. Defendant Berkeley Electric had a duty to notify Plaintiff as to the full scope of work to be performed on her property.
- d. In allowing its agent/employee to provide confusing, inconsistent, incorrect and false information to Plaintiff. Defendant Berkeley Electric had a duty to provide correct, consistent, clear and non-misleading information to Plaintiff regarding the extent and scope of work to be completed on her property.
- e. In allowing its agent/employee to notarize the Right of Way easement, which upon information and belief, he wrongfully and/or fraudulently obtained from Plaintiff.

Defendant Berkeley Electric owes a duty to Plaintiff to ensure that she is not incompetent, acting involuntary or under duress or undue influence.

- f. In improperly destroying the property of Plaintiff. Defendant Berkeley Electric had a duty not to improperly destroy the property of Plaintiff.
- g. In destroying Plaintiff's property beyond the "extent necessary" to keep trees and shrubbery clear of said electric line or system.
- h. In failing to check the relevant deeds to said properties over which an easement was sought. Upon examination, Defendant Berkeley Electric would have been aware that a "perpetual non-exclusive easement" had already been granted "to allow vehicular, pedestrian and utility access from Old Georgetown road across Lot 1 to Lot 2." This easement reflected the true intent of the landholders and was recorded in the RMC Office for Charleston County on May 22, 2013, at Book 0332, Page 617.

34. The acts and/or omissions of Defendant Berkeley Electric cited in Paragraph 33 constitute a breach of duty and were either intentional, performed without the slightest care, or were performed with an absence of care that is necessary under the circumstances.

35. Plaintiff is informed and believes that Defendant John Lucas was grossly negligent, willful, wanton, reckless, careless, and/or negligent in the breach of the following duties in one or more of the following particulars:

- a. In wrongfully converting Plaintiff's property. Defendant John Lucas had a duty not to convert property that belonged to another.
- b. In improperly destroying the property of Plaintiff. Defendant John Lucas had a duty not to improperly destroy the property of Plaintiff.
- c. In destroying Plaintiff's property beyond the "extent necessary" to keep trees and shrubbery clear of said electric line or system.
- d. In failing to check the relevant deeds to said properties over which an easement was sought. Upon examination, Defendant John Lucas would have been aware that a "perpetual non-exclusive easement" had already been granted "to allow vehicular, pedestrian and utility access from Old Georgetown road across Lot 1 to Lot 2." This easement reflected the true intent of the landholders and was recorded in the RMC Office for Charleston County on May 22, 2013, at Book 0332, Page 617.

36. The acts and/or omissions of Defendant John Lucas cited in Paragraph 35 constitute a breach of duty and were either intentional, performed without the slightest care, or were performed with an absence of care that is necessary under the circumstances.

37. That as a direct and proximate cause of one or more of the aforementioned acts of negligence, gross negligence, recklessness, willfulness, wantonness, and/or carelessness on the part of Defendants, Plaintiff has sustained and suffered great harm to her property, including but not limited to loss of value, loss of enjoyment and the costs of repairing the land to the condition it was before Defendants' acts and/or omissions. Plaintiff also suffered trauma, anxiety and emotional distress, all to her general detriment, in a sum to be determined by the trier of fact.

**FOR A FOURTH CAUSE OF ACTION**  
**(Violation of South Carolina Timber Statute, S.C. Code Ann. § 16-11-580)**

38. Plaintiff incorporates into this cause of action the allegations contained in the foregoing paragraphs as if full repeated verbatim herein, to the extent that the same is consistent herewith.

39. Defendant Berkeley Electric and/or Defendant John Lucas knowingly and willfully entered upon the land of Plaintiff without obtaining proper legal consent from Plaintiff to cut, destroy and/or remove forest products located on the land of Plaintiff.

40. Upon information and belief, any consent for entry upon Plaintiff's land that was obtained by Defendants to cut, destroy or remove said forest products was obtained and/or acquired from Plaintiff under false pretenses or with fraudulent intent.

41. Upon information and belief, Defendants also transported, or caused to be transported, forest products with knowledge that said forest products were cut, removed, obtained, or acquired from the property of Plaintiff in violation of the provisions of this subsection.

42. Pursuant to South Carolina Code Ann., § 16-11-615 as a result of the conduct, actions and inactions of Defendants, as set forth throughout this Complaint, as well as, those to be discovered through this litigation, and the resultant financial losses suffered by Plaintiff, Plaintiff is entitled to recover its actual damages and treble damages with interest thereon, plus attorney's

fees and all costs of this proceeding, as the trier of fact may deem appropriate, including such other relief as the Court deems just and proper.

**FOR A FIFTH CAUSE OF ACTION**  
**(Defendant Berkeley Electric - Fraud/Negligent Misrepresentation)**

43. Plaintiff incorporates into this cause of action the allegations contained in the foregoing paragraphs above as if fully repeated verbatim herein, to the extent that the same is consistent herewith.
44. Defendant Berkeley Electric owed a duty to Plaintiff not to make false representations to Plaintiff about any aspect of the easement and/or scope of work to be completed on land owned by Plaintiff.
45. Defendant Berkeley Electric, through its agent/employee made false representations to Plaintiff by intentionally understating and/or concealing the scope and/or extent of work to be completed on Plaintiff's property.
46. Upon information and belief, Defendant Berkeley Electric deliberately and continually failed to disclose information as to the extent and/or scope of work on Plaintiff's land in order to coerce Plaintiff into signing the Right of Way easement dated July 17, 2013.
47. The representations were material to Plaintiff in that they played a role in Defendant Berkeley Electric's receipt of a Right of Way easement over a portion of Plaintiff's property.
48. Defendant Berkeley Electric either knew or should have known its representations, or those of its agent/employee, were false or were made with a reckless disregard for the veracity of the statements, acts and/or omissions.
49. Defendant Berkeley Electric's intent was that Plaintiff act upon the false representations for the pecuniary interest of having Plaintiff grant it a Right of Way easement over her property.

50. Plaintiff, through her dealings with Defendant Berkeley Electric was ignorant of the falsity of its representations, and as a customer, or potential customer of it, had a right to rely upon the representations of Defendant Berkeley Electric and did rely thereon.

51. As a direct and proximate consequence of the fraudulent acts and/or omissions of Defendant Berkeley Electric, Plaintiff has damages in the amount equal to but not less than the cost of repairs and replacement of the destroyed trees on her property, loss of use of the property, further destruction of property to be used in Plaintiff's landscaping business, and an award of punitive damages in an amount to be determined by the trier of fact.

**FOR A SIXTH CAUSE OF ACTION**

**(Defendant Berkeley Electric - South Carolina Unfair Trade Practices Act, SC Code Ann., § 39-5-10 et seq.)**

52. Plaintiff incorporates into this cause of action the allegations contained in the foregoing paragraphs above as if fully repeated verbatim herein, to the extent that the same is consistent herewith.

53. Plaintiff and Defendant Berkeley Electric are "persons" within the meaning of South Carolina Code Ann., § 39-5-10(a).

54. That Defendant Berkeley Electric's actions entering Plaintiff's land for the purpose of fraudulently and/or wrongfully obtaining an easement to cut timber from Plaintiff's land directly or indirectly affects the people of this state, and are expressly included within the meaning of "trade or "commerce" in South Carolina Code Ann., § 39-6-10(b).

55. As a direct and proximate result of the trespass and conversion of Plaintiff's land, coupled with the false and misleading representations of Defendant Berkeley Electric in obtaining the Right of Way easement from Plaintiff, Plaintiff has suffered clear and ascertainable loss of money, and such other pecuniary losses as set forth in the body of this

Complaint, those to be discovered through this litigation, as well as, those losses that will continue into the future.

56. The conduct, actions, and inactions of Defendant Berkeley Electric, as set forth throughout this Complaint, as well as, those to be discovered through this litigation, constitute unfair, deceptive, immoral, unethical and offensive trade acts and practices as prohibited in South Carolina Code Ann., § 39-5-10 et seq.

57. The unfair and deceptive practices set forth above, as well as, those to be discovered through this litigation, have both a propensity for repetition and an adverse impact on the public, public's interest, and public's safety in general, in as much, as other landowners in South Carolina may be coerced into and not totally informed as to their dealings with Defendant Berkeley Electric.

58. Defendant Berkeley Electric knew or should have known as set forth herein that it was in violation of South Carolina Code Ann., § 39-5-10 et seq.

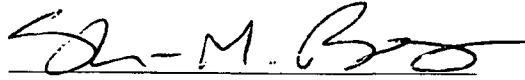
59. Pursuant to South Carolina Code Ann., § 39-5-140, as a result of the conduct, actions and inactions of Defendant Berkeley Electric, as set forth throughout this Complaint, as well as, those to be discovered through this litigation, and the resultant financial losses suffered by Plaintiff, Plaintiff is entitled to recover its actual damages and treble damages with interest thereon, plus attorney's fees, plus all costs of this proceeding, as their trier of fact may deem appropriate, and such other relief as the Court deems just and proper.

**WHEREFORE**, Plaintiff, *demanding a trial by jury*, demands judgment against Defendants on the various causes of action, praying specifically for actual, compensatory, consequential, incidental, treble and/or punitive damages in an amount to be determined by the

trier of fact and interest thereon, and for fees, costs and a reasonable attorney's fee. Further, Plaintiff requests such other and further relief as this Court may deem just and proper.

Respectfully Submitted,

**HARRELL LAW FIRM, P.A.**



Shawn M. Bevens, Esquire  
Harrell Square Building  
2000 Sam Rittenberg Blvd., Suite 2001  
Charleston, South Carolina 29407  
Phone: (843) 766-4700  
Fax: (843) 766- 4784  
shawn@hlfp.com

**Attorneys for Plaintiff**

Charleston, South Carolina  
Date: December 29<sup>th</sup>, 2015

STATE OF SOUTH CAROLINA )

COUNTY OF CHARLESTON )

ELIZABETH LOFTON, )

Plaintiff, )

vs. )

BERKELEY COUNTY ELECTRIC )  
COOPERATIVE, INC., )

Defendant. )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
CASE NO.: 2015-CP-10-3681

**CERTIFICATE OF SERVICE**

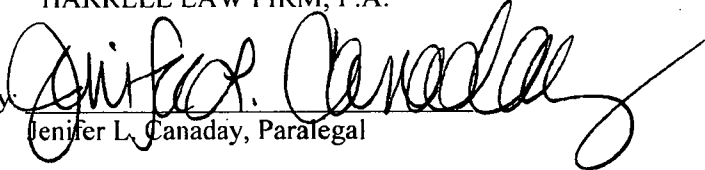
FILED  
2016 JAN 19 PM 2:32  
JULIE J. ARMSTRONG  
CLERK OF COURT

I, Jenifer L. Canaday, Paralegal for Shawn M. Bevans, Esquire, of the Harrell Law Firm, P.A., attorney for the Plaintiff, Elizabeth Lofton, do hereby certify that on the 29th day of December, 2015, I served copies of the within Motion and Consent Order to Amend Complaint, via first class mail and/or via electronic mail to the following parties:

**Pope D. Johnson, III, Esquire**  
1230 Richland Street  
Columbia, SC 29201  
Attorney for the Defendant

HARRELL LAW FIRM, P.A.

By

  
Jenifer L. Canaday, Paralegal

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Elizabeth Lofton,

Plaintiff,

vs.

Berkeley Electric Cooperative, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2015-CP-10-3681

**DEFENDANT'S ANSWER TO FIRST  
AMENDED COMPLAINT**

**FILED**  
2016 FEB -3 PM 2:15  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

Defendant Berkeley Electric Cooperative, Inc., answering the First Amended Complaint herein, alleges as follows:

1. That this defendant denies each and every allegation of the First Amended Complaint not hereinafter specifically admitted.
2. That the allegations of paragraphs 1, 2 and 3 are admitted upon information and belief.
3. That the allegations of paragraph 4 are denied.
4. That the allegations of paragraph 5 are admitted, with the exception of the allegation that plaintiff's damages are in excess of \$7,500.00 which allegations are denied.
5. That the allegations of paragraph 6 are denied.
6. That in response to the allegations of paragraphs 7, 8, 9, 10, 11, 12, 13 and 14, the defendant admits only that the plaintiff voluntarily gave the easement over her property, which was necessary for construction of the service line to provide the plaintiff power.
7. That the allegations of paragraphs 15, 16, 17 and 18 are denied.

*Handwritten initials*

8. That the allegations of paragraphs 1 through 7 hereof are realleged and incorporated herein by reference in response to the allegations of paragraph 19.
9. That the allegations of paragraph 20 are admitted upon information and belief.
10. That the allegations of paragraphs 21, 22, 23, 24 and 25 are denied.
11. That the allegations of paragraphs 1 through 10 hereof are realleged and incorporated herein by reference in response to the allegations of paragraph 26.
12. That the allegations of paragraph 27 are admitted upon information and belief.
13. That the allegations of paragraphs 28, 29, 30 and 31 are denied.
14. That the allegations of paragraphs 1 through 13 hereof are realleged and incorporated herein by reference in response to the allegations of paragraph 32.
15. That the allegations of paragraphs 33, 34, 35, 36 and 37 are denied.
16. That the allegations of paragraphs 1 through 15 hereof are realleged and incorporated herein by reference in response to the allegations of paragraph 38.
17. That the allegations of paragraphs 39, 40, 41 and 42 are denied.
18. That the allegations of paragraphs 1 through 17 hereof are realleged and incorporated herein by reference in response to the allegations of paragraph 43.
19. That the allegations of paragraphs 44, 45, 46, 47, 48, 49, 50 and 51 are denied.
20. That the allegations of paragraphs 1 through 19 hereof are realleged and incorporated herein by reference in response to the allegations of paragraph 52.

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W

21. That the allegations of paragraphs 53, 54, 55, 56, 57, 58, 59 and the remaining allegations of the Complaint are denied.

WHEREFORE, having answered, this defendant demands that the Complaint against it be dismissed and for such other and further relief as may be just and proper.



---

Pope D. Johnson, III  
Attorney at Law  
1230 Richland Street  
Columbia, SC 29201  
803-799-9791  
803-253-6084 (Fax)  
[pope@popejohnsonlaw.com](mailto:pope@popejohnsonlaw.com)  
**Attorney for Defendant Berkeley Electric  
Cooperative, Inc.**

Columbia, South Carolina  
February 1, 2016

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STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

Elizabeth Lofton,  
  
Plaintiff,  
  
vs.

Berkeley Electric Cooperative, Inc. and  
John Lucas Tree Expert Co.,  
  
Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2015-CP-10-3681

CERTIFICATE OF SERVICE

FILED  
FEB - 3 PM 2:15  
J. J. ARMSTRONG  
CLERK OF COURT

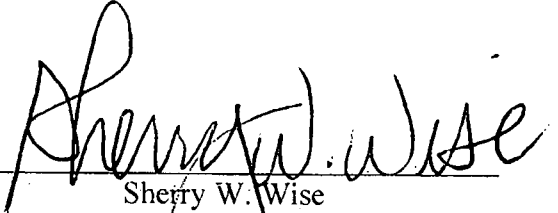
I, Sherry W. Wise, of Pope D. Johnson, III, Attorney at Law, hereby certify that I have served Shawn M. Bevens, attorney for the plaintiff, with the foregoing pleading(s) by mailing a copy of same, postage prepaid and return address clearly indicated, to him at the following address on the 1<sup>st</sup> day of February, 2016.

**COUNSEL SERVED:**

Shawn M. Bevens, Esquire  
Harrell Law Firm, P.A.  
2000 Sam Rittenberg Boulevard, Suite 2001  
Charleston, SC 29407

**PLEADINGS:**

Defendant's Answer to First Amended Complaint

  
Sherry W. Wise

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

ELIZABETH LOFTON,

Plaintiff,

vs.

BERKELEY ELECTRIC COOPERATIVE,  
INC. AND JOHN LUCAS TREE EXPERT,  
CO.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-10-3681

**ANSWER TO PLAINTIFF'S FIRST  
AMENDED COMPLAINT  
(Jury Trial Demanded)**

FILED  
2016 MAR 14 PM 3:17  
J. J. ARMSTRONG  
CLERK OF COURT

Defendant John Lucas Tree Expert, Co. ("Defendant") answers the Plaintiff's First Amended Complaint and respectfully asserts the following:

**FOR A FIRST DEFENSE**

1. Each and every allegation of the Amended Complaint not specifically admitted is denied and strict proof demanded.

**FOR A SECOND DEFENSE**

2. Each and/or every cause of action asserted against Defendant in Plaintiff's Amended Complaint fails to state facts sufficient to constitute a cause of action for which relief may be granted against Defendant and should therefore be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and other applicable law.

**FOR A THIRD DEFENSE**

3. Answering Paragraph 1 of the Amended Complaint, Defendant admits, upon information and belief, that Plaintiff held herself out to be a resident of Charleston County, South Carolina when she executed the Right of Way Easement related to this matter but Defendant

lacks sufficient knowledge or information regarding Plaintiff's current residence and demands strict proof.

4. Based on information and belief, Defendant admits the allegations of Paragraph 2 of the Amended Complaint.

5. Answering Paragraph 3 of the Amended Complaint, Defendant asserts it is in the business of utility line clearance but admits the remaining allegations of this paragraph.

6. Defendant objects to Paragraph 4 of the Amended Complaint on the grounds it calls for legal conclusions and does not require a response. To the extent this paragraph attempts to incorporate other allegations of the Amended Complaint without identifying those other allegations, Defendant objects and moves to strike or, in the alternative, for a more definite statement.

7. Defendant objects to all portions of Paragraph 5 of the Amended Complaint which call for legal conclusions and asserts no response is required. Defendant denies Plaintiff's allegations regarding damages. Defendant denies any liability for Plaintiff's alleged damages. Defendant does not currently challenge jurisdiction or venue, but reserves the right to do so at a later date, if appropriate.

8. Defendant objects to Paragraph 6 of the Amended Complaint on the grounds the document referenced as Exhibit A was not attached to the copy of the Amended Summons and Amended Complaint when it was served on Defendant. Therefore, Defendant can neither admit nor deny the specifics of Paragraph 6 of the Amended Complaint. Furthermore, assuming Plaintiff did own the property alleged, Defendant does not know whether she still is the owner of said property and demands strict proof.

9. Defendant lacks sufficient knowledge or information regarding the truth of the allegations of Paragraph 7 of the Amended Complaint and demands strict proof.

10. Defendant lacks sufficient knowledge or information regarding the truth of the allegations of Paragraph 8 of the Amended Complaint and demands strict proof.

11. Defendant lacks sufficient knowledge or information regarding the truth of the specifics of Paragraph 9 of the Amended Complaint and demands strict proof. Defendant is not aware of any information which would support an allegation that Co-Defendant Berkeley Electric or its employees coerced Plaintiff or engaged in any fraudulent or wrongful activity and demands strict proof. Defendant further references the Right of Way Easement voluntarily executed by Plaintiff.

12. Defendant lacks sufficient knowledge or information regarding the truth of the allegations of Paragraph 10 of the Amended Complaint and demands strict proof. Further answering this paragraph, Defendant references the Right Of Way Easement executed by Plaintiff which includes references to poles, wires, distribution lines and other electrical facilities.

13. Defendant lacks sufficient knowledge or information regarding the truth of the allegations of Paragraph 11 of the Amended Complaint and demands strict proof. Further answering this paragraph, Defendant references the document identified in this paragraph.

14. Based on information and belief, and upon Plaintiff's voluntary execution of the Right Of Way Easement, Defendant denies the allegations of Paragraph 12 of the Amended Complaint.

15. Defendant lacks sufficient knowledge or information regarding the truth of the allegations of Paragraph 13 of the Amended Complaint and demands strict proof. Further

answering this paragraph, Defendant denies it is aware of any fraudulent, wrongful or coercive act on the part of Co-Defendant and demands strict proof. Defendant does admit, upon information and belief, that Plaintiff voluntarily executed the referenced Right Of Way Easement.

16. Defendant lacks sufficient knowledge or information regarding the truth of the allegations of Paragraph 14 of the Amended Complaint and demands strict proof.

17. Defendant lacks sufficient knowledge or information regarding the truth of the allegations of Paragraph 15 of the Amended Complaint and demands strict proof. Further answering this paragraph, Defendant denies any wrongful acts or omissions alleged against Defendant and demands strict proof.

18. Defendant denies the allegations of Paragraph 16 of the Amended Complaint to the extent they make claims against Defendant. Defendant lacks sufficient knowledge or information regarding the truth of the allegations of this paragraph regarding the Co-Defendant and demands strict proof.

19. Defendant denies the allegations of Paragraph 17 of the Amended Complaint to the extent they make claims against Defendant. Defendant lacks sufficient knowledge or information regarding the truth of the allegations of this paragraph regarding the Co-Defendant and demands strict proof.

20. Defendant denies the allegations of Paragraph 18 of the Amended Complaint and demands strict proof.

21. Defendant asserts it is not required to respond to Paragraph 19 of the Amended Complaint but, to the extent it is, Defendant reasserts and realleges all the paragraphs of its pleadings as if repeated herein verbatim.

22. Defendant objects to Paragraph 20 of the Amended Complaint on the grounds it is vague and ambiguous as to what piece of property is being referenced and Defendant moves for a more definite statement. Subject to and without waiving this objection, Defendant lacks sufficient knowledge or information regarding the truth of Plaintiff's current ownership rights and property and demands strict proof.

23. Defendant denies the allegations of Paragraph 21 of the Amended Complaint and demands strict proof.

24. Defendant denies the allegations of Paragraph 22 of the Amended Complaint and demands strict proof. Defendant further asserts that any action it took on the subject property was pursuant to the Plaintiff's voluntary Right Of Way Easement and Defendant's contract with Co-Defendant.

25. Defendant denies the allegations of Paragraph 23 of the Amended Complaint and demands strict proof.

26. Defendant denies the allegations of Paragraph 24 of the Amended Complaint and demands strict proof.

27. Defendant denies the allegations of Paragraph 25 of the Amended Complaint and demands strict proof.

28. Defendant asserts it is not required to respond to Paragraph 26 of the Amended Complaint but, to the extent it is, Defendant reasserts and realleges all the paragraphs of its pleadings as if repeated herein verbatim.

29. Defendant objects to Paragraph 27 of the Amended Complaint on the grounds it is vague and ambiguous as to what piece of property is being referenced and Defendant moves for a more definite statement. Subject to and without waiving this objection, Defendant lacks

sufficient knowledge or information regarding the truth of Plaintiff's current ownership rights and property and demands strict proof.

30. Defendant denies the allegations of Paragraph 28 of the Amended Complaint and demands strict proof.

31. Defendant denies the allegations of Paragraph 29 of the Amended Complaint and demands strict proof.

32. Answering Paragraph 30 of the Amended Complaint, Defendant admits the Right Of Way Easement was legally obtained and voluntarily executed by Plaintiff but denies the remaining allegations of this paragraph and demands strict proof.

33. Defendant denies the allegations of Paragraph 31 of the Amended Complaint.

34. Defendant asserts it is not required to respond to Paragraph 32 of the Amended Complaint but, to the extent it is, Defendant reasserts and realleges all the paragraphs of its pleadings as if repeated herein verbatim.

35. Defendant asserts the allegations of Paragraph 33 of the Amended Complaint relate solely to the Co-Defendant and therefore do not require a response. To the extent a response is required, these allegations are denied and strict proof demanded.

36. Defendant asserts the allegations of Paragraph 34 of the Amended Complaint relate solely to the Co-Defendant and therefore do not require a response. To the extent a response is required, these allegations are denied and strict proof demanded.

37. Defendant denies the allegations of Paragraph 35 of the Amended Complaint.

38. Defendant denies the allegations of Paragraph 36 of the Amended Complaint.

39. Defendant denies the allegations of Paragraph 37 of the Amended Complaint.

40. Defendant asserts it is not required to respond to Paragraph 38 of the Amended Complaint but, to the extent it is, Defendant reasserts and realleges all the paragraphs of its pleadings as if repeated herein verbatim.

41. Defendant denies the allegations of Paragraph 39 of the Amended Complaint.

42. Defendant denies the allegations of Paragraph 40 of the Amended Complaint.

43. Defendant denies the allegations of Paragraph 41 of the Amended Complaint.

44. Defendant denies the allegations of Paragraph 42 of the Amended Complaint.

45. Defendant asserts it is not required to respond to Paragraph 43 of the Amended Complaint but, to the extent it is, Defendant reasserts and realleges all the paragraphs of its pleadings as if repeated herein verbatim.

46. Defendant asserts Paragraph 44 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. Defendant further objects to this paragraph on the grounds it calls for a legal conclusion and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

47. Defendant asserts Paragraph 45 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

48. Defendant asserts Paragraph 46 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

49. Defendant asserts Paragraph 47 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. Defendant further objects to this paragraph on

the grounds it calls for a legal conclusion and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

50. Defendant asserts Paragraph 48 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

51. Defendant asserts Paragraph 49 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

52. Defendant asserts Paragraph 50 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. Defendant further objects to this paragraph on the grounds it calls for a legal conclusion and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

53. Defendant denies the allegations of Paragraph 51 of the Amended Complaint.

54. Defendant asserts it is not required to respond to Paragraph 52 of the Amended Complaint but, to the extent it is, Defendant reasserts and realleges all the paragraphs of its pleadings as if repeated herein verbatim.

55. Defendant asserts Paragraph 53 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. Defendant further objects to this paragraph on the grounds it calls for a legal conclusion and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

56. Defendant asserts Paragraph 54 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

57. Defendant asserts Paragraph 55 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

58. Defendant asserts Paragraph 56 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

59. Defendant asserts Paragraph 57 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

60. Defendant asserts Paragraph 58 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

61. Defendant asserts Paragraph 59 of the Amended Complaint relates solely to the Co-Defendant and does not require a response. To the extent any response is required from Defendant, the allegations of this paragraph are denied and strict proof demanded.

62. Defendant denies Plaintiff is entitled to any relief from Defendant requested in the Prayer of the Complaint. Defendant acknowledges and agrees that this matter should be tried by a jury.

**FOR A FOURTH DEFENSE**

63. Defendant asserts all portions of the Amended Complaint, including, but not limited to, the Prayer of the Amended Complaint, which call for interest, fees, costs, and reasonable attorneys' fees fail to state facts sufficient to constitute a cause of action for which relief may be granted against Defendant and should therefore be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and other applicable law.

**FOR A FIFTH DEFENSE**

64. Pursuant to S.C. Code Ann. § 16-11-615 and to the extent Plaintiff is entitled to any relief from Defendant related to the cutting or destruction of timber, and the same is denied, Defendant asserts said damages are capped at no more than three times the fair market of the timber established by a registered forester.

**FOR A SIXTH DEFENSE**

65. Defendant asserts Plaintiff voluntarily executed a Right Of Way Easement which gave Defendants a right to perform a number of activities on the subject property including, but not limited to, cutting trees and shrubbery, trimming trees and shrubbery and doing other work necessary to clear the electrical line or system or communication system and giving Defendant the right to be on said property to perform all work applicable and allowed under the easement. Defendant pleads this Right Of Way Easement and Plaintiff's signature and acceptance of the same as a complete and absolute bar to Plaintiff's First Cause of Action for Trespass, Second Cause of Action for Conversion, Third Cause of Action for Negligence/Gross Negligence and/or Fourth Cause of Action for Violation of the South Carolina Timber Statute.

#### **FOR A SEVENTH DEFENSE**

66. Defendant alleges any injury and damage sustained by Plaintiff were due to and caused by the sole negligence and/or wilfulness of Plaintiff and, therefore, Defendant is not liable to Plaintiff for any sum whatsoever. Defendant has not yet been able to enter into discovery in this case and reserves the right to amend, supplement or withdraw this affirmative defense and/or add additional affirmative defenses. At the current time, Defendant asserts Plaintiff voluntarily executed a Right Of Way Easement and agreed to allow Defendants onto her property for the purposes which she now complains. To the extent there is any negligence in allowing this decision and/or allowing this work to be performed, Plaintiff's fault was the sole and/or contributing cause and acts as a bar to Plaintiff's recovery or, in the alternative, reduces Plaintiff's damages, if any. Defendant further asserts Plaintiff had a duty to read the contract and/or Right Of Way Easement documents she was signing and her failure to adequately satisfy that duty establishes her own negligence. Defendant asserts that Plaintiff's negligence is the sole cause of her alleged complaints or, in the alternative, is greater than fifty percent of the fault; in either event, Plaintiff's claims are barred based on her negligence described above and as will be determined through discovery.

#### **FOR AN EIGHTH DEFENSE**

67. Defendant pleads the law and doctrine of comparative negligence and alleges the negligence and recklessness of Plaintiff were greater than the negligence, if any, which might be established against Defendant and, therefore, Plaintiff is barred from any recovery in this action. Defendant further alleges any injury and damage sustained by Plaintiff was due to and caused by the negligence and/or wilfulness of Plaintiff combining, concurring, and contributing with the

negligence and/or wilfulness, if any, on the part of Defendant and, therefore, any amount of recovery awarded to Plaintiff for the injuries and damages alleged in the Complaint shall be reduced by the Court by the percentage of negligence and/or wilfulness attributed to Plaintiff. Defendant has not yet been able to enter into discovery in this case and reserves the right to supplement this affirmative defense and/or add additional affirmative defenses. At the current time, Defendant asserts Plaintiff voluntarily executed a Right Of Way Easement and agreed to allow Defendants onto her property for the purposes which she now complains. To the extent there is any negligence in allowing this decision and/or allowing this work to be performed, Plaintiff's fault was the sole and/or contributing cause and acts as a bar to Plaintiff's recovery or, in the alternative, reduces Plaintiff's damages, if any. Defendant further asserts Plaintiff had a duty to read the contract and/or Right Of Way Easement documents she was signing and her failure to adequately satisfy that duty establishes her own negligence. Defendant asserts that Plaintiff's negligence is the sole cause of her alleged complaints or, in the alternative, is greater than fifty percent of the fault; in either event, Plaintiff's claims are barred based on her negligence described above and as will be determined through discovery.

#### **FOR A NINTH DEFENSE**

68. Defendant alleges all of the risks and dangers, if any, existing at the time and place of Plaintiff's alleged accident and injury were open, obvious, apparent, and were either known by the Plaintiff or should have been known by the Plaintiff. Furthermore, Plaintiff was perfectly competent to judge the appropriateness of the circumstances and conditions alleged to exist at the time and place of the allegations and, therefore, by her actions in voluntarily signing and/or failing to fully read the Right of Way Easement, Plaintiff freely and voluntarily exposed himself to the alleged danger, thereby assuming the risk of being injured in the manner alleged in

the Complaint. Therefore, Defendant is not liable to Plaintiff for any sum whatsoever, or, in the alternative, Defendant is entitled to reduce any award by Plaintiff's comparative negligence. Defendant has not yet been able to enter into discovery in this case and reserves the right to supplement this affirmative defense and/or add additional affirmative defenses. At the current time, Defendant asserts Plaintiff voluntarily executed a Right Of Way Easement and agreed to allow Defendants onto her property for the purposes which she now complains. To the extent there is any negligence in allowing this decision and/or allowing this work to be performed, Plaintiff's fault was the sole and/or contributing cause and acts as a bar to Plaintiff's recovery or, in the alternative, reduces Plaintiff's damages, if any. Defendant further asserts Plaintiff had a duty to read the contract and/or Right Of Way Easement documents she was signing and her failure to adequately satisfy that duty establishes her own negligence. Defendant asserts that Plaintiff's negligence is the sole cause of her alleged complaints or, in the alternative, is greater than fifty percent of the fault; in either event, Plaintiff's claims are barred based on her negligence described above and as will be determined through discovery.

#### **FOR A TENTH DEFENSE**

69. Defendant asserts Plaintiff has not specifically pled the property at issue in her Second Cause of Action for Conversion and, therefore, this matter should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure because a conversion claim must set forth facts sufficient to assert Plaintiff has an interest in the thing covered. In the alternative, Defendant pleads for a more definite statement.

#### **FOR AN ELEVENTH DEFENSE**

70. Defendant asserts Plaintiff's cause of action for conversion against Defendant should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure

and/or other applicable law because Plaintiff has failed to allege nor could Plaintiff show that Defendant converted any of her alleged property for Defendant's use.

**FOR A TWELFTH DEFENSE**

71. Defendant asserts it had permission pursuant to its agreement with Co-Defendant and Plaintiff's Right Of Way Easement and said permission acts as a complete bar to Plaintiff's claims of conversion, trespass, negligence and/or violation of the Timber Statute.

**FOR A THIRTEENTH DEFENSE**

72. In light of Plaintiff failing to allege and, furthermore, in light of the fact that there are no facts or evidence which supports such allegations, Defendant asserts Plaintiff's conversion cause of action should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and other applicable law to the extent it calls for punitive damages because Plaintiff has failed to plead nor can Plaintiff show Defendant acted recklessly or with conscious indifference to her rights.

**FOR A FOURTEENTH DEFENSE**

(Equitable Estoppel)

73. Defendant asserts Plaintiff is equitably estopped from asserting each and/or every cause of action asserted against Defendant because Plaintiff executed a Right Of Way Easement. Defendant asserts it was justified in relying on this easement and upon the representations of Co-Defendant and, therefore, Plaintiff is equitably estopped from each and/or every cause of action asserted against Defendant including but not limited to Plaintiff's causes of action for conversion, trespass, negligence/gross negligence and/or violation of the Timber Statute. Furthermore, Plaintiff does not make any allegations that she relied upon any statements of Defendant prior to (or even after) Plaintiff signed the Right of Way Easement.

**FOR A FIFTEENTH DEFENSE**

(Consent of Plaintiff)

74. Defendant asserts the consent given by Plaintiff, including but not limited to the Right Of Way Easement, acts as a complete bar to Plaintiff's causes of action for conversion, trespass, negligence/gross negligence and/or violation of the Timber Statute.

**FOR A SIXTEENTH DEFENSE**

(Authorization or Privilege)

75. Defendant asserts that Plaintiff's authorization and/or the Defendant's contract with the Co-Defendant gave Defendants the right and/or privilege to perform the work complained of in Plaintiff's Amended Complaint and this authorization and/or privilege acts as a complete bar to each and/or every cause of action asserted by Plaintiff including but not limited to Plaintiff's causes of action for conversion, trespass, negligence/gross negligence and/or violation of the Timber Statute.

**FOR A SEVENTEENTH DEFENSES**

(Permission)

76. Defendant asserts it had permission from Plaintiff and/or from the Co-Defendant to enter Plaintiff's land and perform the activities it performed and, therefore, Plaintiff's claim for trespass should be dismissed with prejudice.

**FOR AN EIGHTEENTH DEFENSE**

77. Defendant would show the claim of Plaintiff for punitive damages cannot be had because any award of punitive damages under South Carolina law without bifurcation of the trial so that any punitive damage issues are tried only after and if liability on the merits of this action has been found will violate Defendant's due process rights guaranteed by the United States

Constitution and the South Carolina Constitution, and would violate the common law and public policy of the State of South Carolina.

78. Defendant would show the claim of Plaintiff for punitive damages cannot be had because an award of punitive damages under South Carolina law without being subject to a predetermined limit on the amount of punitive damages that a jury might impose would violate Defendant's due process rights guaranteed by United States Constitution and the South Carolina Constitution, and would violate the common law of the State of South Carolina.

79. Defendant alleges the claim of Plaintiff for punitive damages cannot be had because an award of punitive damages under South Carolina law by a jury that is not:

- (a) Provided with sufficiently clear standards for determining the appropriateness of a punitive damage award or the size of such award;
- (b) Provided with adequate instructions as to the limits of punitive damage awards as determined by the principles underlying such an award;
- (c) Instructed that awarding punitive damages on individually discriminatory characteristics of Defendant is improper;
- (d) Instructed to consider punitive damages under a standard for determining the amount that is neither vague, arbitrary, nor capricious and that defines with reasonable clarity the actions of Defendant upon which an award of punitive damages may be based; and
- (e) Subjected to judicial review at both the trial and appellate court level under objective standards for determining appropriateness and reasonableness;

would violate Defendant's equal protection and due process rights as guaranteed by the United States Constitution and the South Carolina Constitution and would also violate the laws of the State of South Carolina.

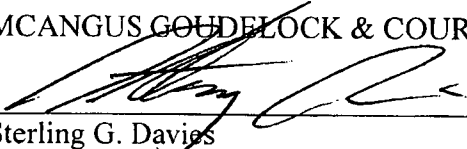
**RESERVATION AND NON-WAIVER**

80. Defendant reserves any additional and future defenses as may be revealed by additional information during the course of discovery and investigation and as is consistent with the South Carolina Rules of Civil Procedure.

81. Defendant incorporates by reference the defenses of all other Defendants as those defenses may be applicable to this Defendant.

WHEREFORE, having fully answered, Defendant prays that the Amended Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

MCANGUS GOUDELOCK & COURIE, L.L.C.



Sterling G. Davies

Bar No: 5840

Post Office Box 12519, Capitol Station  
Meridian, 1320 Main Street, 10<sup>th</sup> Floor (29201)  
Columbia, South Carolina 29211-2519  
(803) 779-2300

ATTORNEYS FOR DEFENDANT, JOHN LUCAS  
TREE EXPERT, CO.

March 12, 2016  
Columbia, South Carolina

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 11<sup>th</sup> day of March, 2016 served a copy of an Answer to Plaintiff's First Amended Complaint by mailing copies of same, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

Shawn M. Bevans, Esquire  
Harrell Law Firm, P.A.  
2000 Sam Rittenberg Boulevard, Suite 2001  
Charleston, South Carolina 29407  
*Attorney for Plaintiff Elizabeth Lofton*



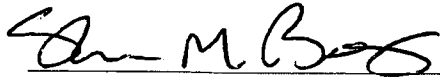
Connie A. Wells  
Legal Assistant to Sterling G. Davies

2016 MAR 14 PM 3:17  
JULIE J. ARMSTRONG  
CLERK OF COURT

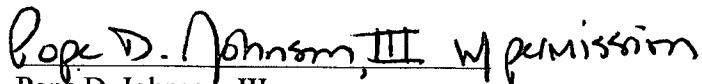
FILED



**WE CONSENT:**

  
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**Attorney for the Defendant  
Berkeley Electric Cooperative, Inc.**

  
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sdavies@mgclaw.com

**Attorney for the Defendant  
John Lucas Tree Expert, Co.**

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ELIZABETH LOFTON,

Plaintiff,

vs.

BERKELEY ELECTRIC COOPERATIVE,  
INC. AND JOHN LUCAS TREE EXPERT,  
CO.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-10-3681

**DEFENDANT JOHN LUCAS TREE  
EXPERT, CO.'S MOTION FOR  
SUMMARY JUDGMENT**

**YOU WILL PLEASE TAKE NOTICE** that pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, the Defendant John Lucas Tree Expert, Co., by and through their undersigned attorneys, move before the Presiding Judge at the Charleston County Courthouse, as soon as this matter may be heard, for an Order of Summary Judgment. This Motion is made on the ground that, taking the facts in the light most favorable to the Plaintiff, there is no genuine issue of material fact that would lead a reasonable jury to believe that this Defendant is liable for the alleged damages to the subject property. As such, Defendant John Lucas Tree Expert, Co. is entitled to judgment as a matter of law.

This motion is based on SCRCF, Rule 56, the discovery in this action, the depositions taken in this matter, and a supporting Memorandum of Law to be submitted, filed and served separately.

[Signature block on the next page]

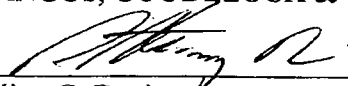
BY

JULIE J. ARMSTRONG  
CLERK OF COURT

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**FILED**

McANGUS, GOUDELOCK & COURIE, LLC

  
Sterling G. Davies

Joseph P. Bias

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ATTORNEYS FOR DEFENDANT JOHN LUCAS  
TREE EXPERT, CO.

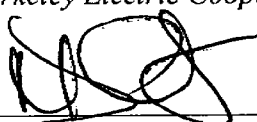
September 28, 2016  
Columbia, South Carolina

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 29<sup>th</sup> day of September, 2016 served a copy of Defendant John Lucas Tree Expert, Co.'s Motion for Summary Judgment and Defendant John Lucas Tree Expert, Co.'s Memorandum in Support of Motion for Summary Judgment, by mailing copies of same, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

Shawn M. Bevans, Esquire  
Harrell Law Firm, P.A.  
2000 Sam Rittenberg Boulevard, Suite 2001  
Charleston, South Carolina 29407  
*Attorney for Plaintiff Elizabeth Lofton*

Pope D. Johnson, III, Esquire  
1230 Richland Street  
Columbia, South Carolina 29201  
*Attorney for Defendant Berkeley Electric Cooperative, Inc.*

  
\_\_\_\_\_  
Michelle D. Laliberte  
Legal Assistant to Sterling G. Davies

BY \_\_\_\_\_

JULIE J. ARMSTRONG  
CLERK OF COURT

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FILED

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ELIZABETH LOFTON,

Plaintiff,

vs.

BERKELEY ELECTRIC COOPERATIVE,  
INC. AND JOHN LUCAS TREE EXPERT,  
CO.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-14368

**DEFENDANT JOHN LUCAS TREE  
EXPERT, CO.'S MEMORANDUM  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

2016 OCT -3 PM 2:38  
JULIE ARMSTRONG  
CLERK OF COURT

FILED

This matter comes before the Court pursuant to Defendant John Lucas Tree Expert, Co.'s ("Lucas Tree" or "Defendant") Motion for Summary Judgment dated September 28, 2016. For the reasons set forth below, this Defendant is entitled to an Order of this Court granting it summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

### I. FACTUAL BACKGROUND

Defendant Lucas Tree is a tree removal and vegetation management company. Defendant Berkeley Electric Cooperative ("Berkeley") is a not-for-profit member-owned electric utility serving Berkeley, Charleston, and Dorchester counties. Plaintiff Lofton is the trustee and member of a trust benefitting herself and her brothers Sandy Lofton and Wayne Lofton. Elizabeth Lofton Transcript, p. 73. The trust does not specifically spell out any portion of the land that the Plaintiff owns; instead, it merely states that the proceeds should be "divided equally or as we see fit." *Id.* Plaintiff has never personally paid property taxes on the tracts of land in question; instead, the Trust makes all such payments. *Id.* at 74. In short, Plaintiff does not own the land and does not have a claim against any Defendant, nor does she have standing to file suit.

Plaintiff claims Berkeley's representative Bud Easler approached her to obtain a "ten-foot easement" on the trust's property. *Id.* at 13. Per Plaintiff, Easler informed the Plaintiff that the easement was for Berkeley's trucks to access the lands to provide electricity and to turn trucks around if necessary. *Id.*

The Right of Way Easement Plaintiff admits to signing does not support her claims. Attachment 1: Right of Way Easement. Instead, the easement gives Defendants a 20 foot easement onto the Plaintiff's property. The Right of Way Easement gave Defendant Berkeley the right to "place, construct, operate, maintain, relocate, patrol and replace...an electric transmissions or distribution line or system and communications system, including the right to erect, install and construct...wires, cables and any necessary appurtenances and equipment deemed by the Cooperative to be necessary therefor." *Id.* The easement also clearly grants Berkeley the right to "cut and trim trees and shrubbery to the extent necessary to keep them clear of said electric line or system." *Id.*

Plaintiff signed the Easement and her friend Hart Felder signed as a witness. *Id.*, Lofton Deposition Transcript at 63. Plaintiff initially testified that the agreement was not filled in and that she knowingly endorsed a form without the bounds included. *Id.* at 20. She later amended her testimony to state that her friend Mr. Felder "read part of this to [her] because [she] just had eye surgery." *Id.* at 67. Plaintiff claims that, despite the Easement saying precisely the opposite, she was told that no trees were to be cut and no poles would be placed on her property. *Id.* at 25.

Berkeley contracted with Lucas Tree on December 12, 2014 to provide labor and equipment to Berkeley for purposes of clearing the power line rights of way on the trust's property. Attachment 2: Contract between Berkeley and Lucas Tree. Lucas Tree was provided with the easement for work on the trust's property, but was not privy to any conversations

between Berkeley and the Plaintiff. There is not any evidence that Lucas Tree performed any work that was not directed by Berkeley.

Plaintiff never saw Lucas Tree on the property, nor did she speak with any Lucas Tree employee at any time. Lofton Deposition Transcript at 58. Prior to her attorney telling her about Lucas Tree, she had “no knowledge whatsoever” about the company. *Id.* Importantly, Plaintiff admitted that there was nothing on the Right of Way Easement that she endorsed that would indicate to Lucas Tree that the document was not valid. *Id.* at 71.

Plaintiff’s Complaint alleges both Defendants trespassed on her property and she asserts causes of action for conversion, negligence and gross negligence, and violation of S.C. Code Ann § 16-11-580. Plaintiff filed additional causes of action against Defendant Berkeley for fraud/negligent misrepresentation and violation of South Carolina’s Unfair Trade Practices Act.

### ARGUMENT

A motion for summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Staubes v. City of Folly Beach, 331 S.C. 192, 500 S.E.2d 160 (1998); Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). A party opposing a properly supported motion for summary judgment may not rest on the mere allegations or denials of the pleading, but must set forth or point to specific facts showing there is a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 477 U.S. 242, 248 (1986). A party’s response to the motion must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If that party does not so respond, summary judgment should be entered against that party. Moody v. McLellan, 295 S.C. 157, 367 S.E.2d 449 (Ct. App. 1988).

#### **A. Plaintiff lacks the standing to file suit individually in this matter.**

To have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest. Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 519 S.E.2d 567 (1999). "A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Id.* at 181, 519 S.E.2d at 571 (quoting Anchor Point, Inc. v. Shoals Sewer Co., 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992)). For a plaintiff to possess standing, three elements must be satisfied. First, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 600–01, 550 S.E.2d 287, 291–92 (2001). Second, a causal connection must exist between the injury and the challenged conduct. *Id.* Third, it must be likely that a favorable decision will redress the injury. *Id.*

Plaintiff filed suit individually, not on behalf of the trust. Complaint, pg 1. She admits that the owner of the property in question is the irrevocable trust of which she is the trustee. Lofton Transcript at p. 73. The trust does not specifically delineate which tract of land is owned by which of the Loftons, and Plaintiff stated the trust was to be "divided equally or as we see fit." *Id.* Plaintiff has paid no taxes individually for the property. *Id.* at 74.

Plaintiff fails the test articulated in Sea Pines, as she, individually, has not suffered an injury-in-fact. The property referenced in the Right of Way Easement is owned by the trust, Plaintiff has no standing to sue in her individual capacity. As such, this matter should be dismissed as a matter of law.

**B. Plaintiff has not offered Evidence that any Defendant violated the Easement; in the alternative, Plaintiff has only alleged a few feet of potential overcutting and Defendant is entitled to partial summary judgment.**

The easement gives Defendants the right to cut and clean at least 20 feet onto Plaintiff's Trust's property plus the right to cut and clean other trees and vegetation that could affect the power lines. Plaintiff has not produced sufficient evidence of a breach of this easement and, therefore, this matter should be dismissed. In the event the Court finds Plaintiff has presented evidence of cutting outside the twenty-plus foot easement, then Lucas Tree is entitled to partial summary judgment as to all claims other than those related to cutting/clearing outside the Easement.

**C. Plaintiff's cause of action of conversion should be dismissed as a matter of law because Plaintiff cannot prove the elements of conversion.**

Conversion is defined as "the unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner." Mullis v. Trident Emergency Physicians, 351 S.C. 503, 507, 570 S.E.2d 549, 550-51 (Ct. App. 2002). To recover in an action for conversion, Plaintiff must prove the following elements: (1) an interest by the Plaintiff in the thing converted, (2) Defendant converted the property to his or her own use, and (3) the use was without Plaintiff's permission. SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990).

First, Plaintiff does not own the land, the trust does. Secondly, Plaintiff does not allege that Defendant Lucas Tree converted the property to their own use; instead, Plaintiff alleges Lucas Tree was working as an agent of Defendant Berkeley. Finally, Plaintiff gave her

permission when she signed a valid easement, a document which Plaintiff admits would not give Defendant Lucas Tree any indication that it was obtained as a result of coercion or any indication it was not valid. Plaintiff had no contact with Lucas Tree, did not see Lucas Tree on her property, and gave them no indication that any work done on her property was unwanted. Plaintiff, by all documentation made available to Lucas Tree, gave express permission to enter her property. As such, Plaintiff's cause of action for conversion against Defendant Lucas Tree fails as a matter of law.

**D. Plaintiff's negligence cause of action fails as a matter of law, as Lucas Tree did not breach any duty to Plaintiff.**

Plaintiff alleges that Defendant Lucas Tree was grossly negligent, willful, wanton, reckless, careless, and/or negligent in wrongfully converting Plaintiff's property, improperly destroying Plaintiff's property, destroying Plaintiff's property "beyond the extent necessary" to keep trees and shrubbery clear of said electric line or system, and in failing to check the relevant deeds to said properties over which an easement was sought.

The elements of a negligence cause of action are 1) a duty of care owed by the defendant to the plaintiff; 2) the defendant's breach of that duty by a negligent act or omission, i.e., failure to exercise the care of a reasonable man in the circumstances, and 3) damage proximately resulting from the breach of duty. Snow v. City of Columbia, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). The plaintiff bears the burden of proof on all three elements, including breach. *Id.* Failure by a plaintiff to prove any one of these elements defeats the claim. Rayfield v. S.C. Dept. of Corrections, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988).

Plaintiff gave express permission to Berkeley Electric for them to "cut and trim trees and shrubbery to the extent necessary to keep them clear of said electric line or system." Attachment

1: Right of Way Easement. Defendant Lucas Tree was authorized to be on the property as a subcontractor for Berkeley Electric, and admittedly had a duty to perform the job for which they were hired ably and without damaging property outside of the easement. Plaintiff has not offered any proof that Lucas Tree went outside the scope of the easement. Furthermore, Plaintiff did not suffer damages. Despite Plaintiff's references in her Complaint to "her land," Plaintiff does not own the land on which the easement was granted. Even if the easement was found to not be valid, and even if it is held that Lucas Tree should have known that the easement was invalid and breached their duty to the Plaintiff, then by Plaintiff's own admission, she is not the owner of the property in question and therefore cannot suffer the damages alleged. Plaintiff's cause of action for negligence fails as a matter of law.

**E. Plaintiff's cause of action regarding S.C. Code Ann § 16-11-580 is inapplicable to this matter.**

Plaintiff alleges a violation of S.C. Code Ann § 16-11-580, a criminal statute. That code section makes it unlawful for a person to knowingly and wilfully "cut, destroy, or remove forest products without the consent of the landowner" or "hire or counsel another person to cut, destroy, or remove forest products without the consent of the landowner." Plaintiff additionally relies on S.C. Code Ann § 16-11-615, which states "in all criminal prosecutions for violation of the provisions of Sections 16-11-520, 16-11-580, and 16-11-610, relating to cutting or destroying timber, the defendant may plead the payment of not to exceed exactly three times the fair market value of the timber as determined by a registered forester." 16-11-615 goes on to say that "if it is necessary to institute civil action to recover the fair market value of the timber, ...the owner, in case of private lands, shall receive damages of not to exceed exactly three times the fair market

value of the timber established by a registered forester if judgment is in favor of the State or the owner.”

Defendants Berkeley Electric and Lucas Tree were never prosecuted for a violation of S.C. Code Ann § 16-11-580, rendering this section inapplicable to the matter at Bar. While the statute does provide for a civil action to recover the fair market value of the timber, this section is only applicable to “criminal prosecutions” for violations of § 16-11-580. Because there was never a prosecution of Lucas Tree, the Plaintiff’s cause of action must fail as a matter of law.

Furthermore, Plaintiff signed an Easement and Plaintiff admits Lucas Tree would have no reason to question the easement. Therefore, Lucas Tree did not knowingly cut any timber “without the consent of the landowner.” Lucas Tree had the landowner’s consent via the easement.

**F. Plaintiff’s trespass cause of action fails, as Lucas Tree made no willful, affirmative act of trespass.**

Plaintiff alleges Lucas Tree trespassed on her property “with the intention of doing harm to the property” and that Lucas Tree was “without lawful authority to enter and destroy the property of the Plaintiff.” Plaintiff further alleges that Lucas Tree trespassed by interfering with Plaintiff’s property through intentional acts and without the Plaintiff’s permission.

Actionable trespass requires “an affirmative act, the invasion of the land must be intentional, and the harm caused must be the direct result of that invasion. [citation omitted]. Trespass does not lie for nonfeasance or failure to perform a duty.” *Snow v. City of Columbia*, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991). Intent, in turn, is proven by showing that a defendant “acted voluntarily and that he knew or should have known the result would follow from his act.” *Id.* The defendant must intend the act that causes the trespass even if he

does not intend or expect the resulting damages. *Id.* Like other torts, a trespass is “reckless, willful or wanton [if] it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff’s rights.” Hinson v. A.T. Sistare Constr. Co., Inc., 236 S.C. 125, 131-32, 113 S.E.2d 341, 344 (1960).

Lucas Tree was only given instructions from Berkeley and the facially valid easement endorsed by the Plaintiff. They were not a part of any conversations or negotiations between Defendant Berkeley and Plaintiff, nor were they provided any information or context outside of the documents they were provided. In the responses to Defendant Lucas Tree’s Requests to Admit, Plaintiff admitted that the easement granting Defendant Lucas Tree access to the trust’s property is authentic. Attachment 3: Plaintiff’s Responses to Defendant Lucas Tree’s First Requests to Admit. Furthermore, Plaintiff herself testified that there was nothing on the face of the easement that would indicate that the easement was invalid or obtained by alleged coercion. While Lucas Tree was on the trust’s property, Lucas Tree clearly did not intend the act nor did they or should they have known the consequences from the act. Defendant Lucas Tree did not trespass onto Plaintiff’s property, and Lucas Tree should be granted summary judgment as to Plaintiff’s trespass claim.

### **CONCLUSION**

For the foregoing reasons, each and/or every cause of action in Plaintiff’s Complaint against Defendant Lucas Tree must be dismissed, and summary judgment should be granted in favor of Lucas Tree.

McANGUS, GOUDELOCK & COURIE, LLC

  
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ATTORNEYS FOR DEFENDANT JOHN LUCAS  
TREE EXPERT, CO.

September 28, 2016

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Location Number 293  
RIGHT OF WAY EASEMENT



KNOW ALL MEN BY THESE PRESENTS that I (we) ELIZABETH HOFFMAN

ELIZABETH HOFFMAN, of the  
County of CHARLESTON, State of South Carolina, hereinafter referred to as  
Grantor(s) for the sum of One Dollar (\$1.00) to me (us) in hand paid, receipt of which is hereby  
acknowledged, does hereby grant unto BERKELEY ELECTRIC COOPERATIVE, INC., a corporation,  
whose Post Office Address is Moncks Corner, South Carolina, hereinafter called Cooperative, and  
to its Successors or Assigns, a right-of-way over route selected by Cooperative, having a width of  
TWENTY feet, that is to say TEN feet either side of centerline,  
upon, over and across land of Grantor(s), more particularly described as follows, to-wit:

A tract of land approximately 13.06 acres in CHARLESTON County, in or near  
McClellanville community and bounded as follows:

North by U.S.F.S.; Aiden's Way

East by Aiden's Way; Old Georgetown Rd.

South by Old Georgetown Rd.;

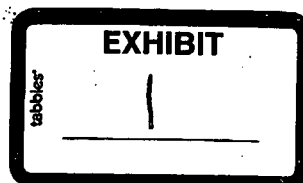
West by Gary E. Seyle; U.S.F.S.

Power lines are to be relocated to accommodate  
possible widening of Aiden's Way if needed.

together with the right to place, construct, operate, maintain, relocate, patrol and replace thereon and in  
or upon all streets, roads or highways abutting said lands an electric transmissions or distribution line or  
system and communications system, including the right to erect, install and construct, either overhead  
or underground, its electrical facilities and other transmission line structures, wires, cables and any  
necessary appurtenances and equipment deemed by the Cooperative to be necessary therefor, as well as  
the right to install, maintain and use anchors and guy wires on lands adjacent to the right-of-way herein  
granted; and to cut and trim trees and shrubbery to the extent necessary to keep them clear of said  
electric line or system and communication system and to cut down, from time to time, all dead, leaning  
or dangerous trees that are tall enough to strike the wires in falling.

Together also with the right, from time to time, to redesign, rebuild or alter said lines and to  
install such additional lines, apparatus and equipment as the Cooperative may at any time deem nec-  
essary, and the right to remove any line or any part thereof.

Together also with all rights of ingress and egress necessary for the full and complete use, occu-  
pancy, and enjoyment of the easement hereby granted and all rights and privileges incident thereto.



Grantor(s) agrees that all poles, wires and other facilities, including any main service entrance equipment installed on the above described lands at the Cooperative's expense, shall remain the property of the Cooperative, removable at the option of the Cooperative upon termination of service to or on said lands.

PROVIDED, HOWEVER, any damage to the property of Grantor(s) (other than the property cleared or removed as hereinafter provided) caused by the Cooperative in the course of constructing, rebuilding or repairing said lines shall be borne by the Cooperative.

TO HAVE AND TO HOLD, all the singular the aforesaid rights and privileges unto the Cooperative, its Successors and Assigns, as aforesaid.

And Grantor(s) agree(s) to warrant and forever defend the above granted rights against himself or his heirs and against any other person lawfully claiming or to plain the same or any part thereof.

It is further understood that whenever necessary, words used in this instrument in the singular shall be construed to read in the plural and that words used in the masculine gender shall be construed to read in the feminine.

IN WITNESS WHEREOF, the undersigned has set this hand and seal this 17<sup>th</sup> day of July, 20 13.

SIGNED, SEALED AND DELIVER  
IN THE PRESENCE OF

Candlen H. Felder  
Henry R. Easter Jr.

Elizabeth Lofton  
Elizabeth Lofton (L.S.)  
Elizabeth Lofton (L.S.)

STATE OF SOUTH CAROLINA  
COUNTY OF BERKELEY

PERSONALLY appeared before me Candlen H. Felder  
and made oath that (s)he saw the within named Elizabeth Lofton

sign the within instrument, and as h act and deed, deliver the Right-of-Way for the uses and purposes therein mentioned, and that (s)he with Henry R. Easter Jr., in the presence of each other, witnessed the due execution thereof.

SWORN to and subscribed before me this 17<sup>th</sup> day of July, 20 13.

Henry R. Easter Jr.  
NOTARY PUBLIC FOR SOUTH CAROLINA  
My Commission Expires: 4/4/2021

RETURN TO:  
BERKELEY ELECTRIC COOPERATIVE, INC.  
P.O. Box 1234  
Moncks Corner, S.C. 29461

# RECORDER'S PAGE

NOTE: This page MUST remain  
with the original document



Filed By:

BERKELEY ELECTRIC COOP  
ATTN: ROBERT BRADLEY  
PO BOX 1234  
MONCK'S CORNER SC 29461

## RECORDED

Date: January 23, 2014

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Charlie Lybrand, Register  
Charleston County, SC

MAKER:

LOFTON ELIZABETH

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Note:

RECIPIENT:

BERKELEY ELECTRIC COOP

Recording Fee \$ 10.00

Extra Reference Cost \$ -

Extra Pages \$ -

Postage \$ -

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## RIGHT-OF-WAY LUMP SUM CONTRACT

### GENERAL

This contract is entered into by Berkeley Electric Cooperative, Inc. (referred to as the Cooperative hereafter) and Lucas Tree on 12-12, 2014. The purpose of this contract is for the contractor to provide labor and equipment to the Cooperative for purposes of clearing power line Rights-of-Way.

### TERMS AND CONDITIONS

- 1) The prices (outlined in a bid dated September 5, 2014) and terms in this contract(s) shall be in effect January 1, 2015 through December 31, 2018 and shall be completed by scheduled dates determined by the Cooperative. Each circuit must be completed before starting another unless approved by Superintendent of Vegetative Management. Contract prices are lump sum per circuit.
- 2) The Cooperative reserves the right to require the removal of any the contractor's employees whose performance is not satisfactory to the Cooperative in its sole discretion. Each crew shall have at least one employee capable of speaking English to communicate with others and shall be the Crew Foreman.
- 3) The scope of work within this contract may be changed at the sole discretion of the Cooperative, or this contract may be cancelled or voided by the Cooperative at its sole discretion at any time by giving the contractor thirty (30) days written notice. In the event the Cooperative cancels or voids this contract, the compensation due to the Contractor will be limited only to a prorated amount based on completed linear footage.
- 4) The Contractor shall maintain a close relationship with the Cooperative's Superintendent of Vegetation Management to ensure schedules are met and to discuss problems, scheduling of work and other relevant items related to the scope of work described in the contract.
- 5) Unless other arrangements are made with the Cooperative's Superintendent of Vegetation Management, all work the Contractor performs on the Cooperative's system is to be completed Monday through Friday.
- 6) The relationship between the Cooperative and Lucas Tree is that of Independent Contractor. The Contractor may not represent himself as an employee of the Cooperative at any time.



- 7) The Contractor's Representative shall be accessible by pager or cellular telephone to the Superintendent of Vegetation Management at all times during working hours and after hours.
- 8) Neither this contract nor the duties to be performed herein shall be subcontracted, assigned, or delegated without prior consent from the Superintendent of Vegetation Management.
- 9) The contractor shall execute the attached Hold Harmless Agreement and comply with all terms of the agreement.
- 10) The contractor shall maintain and provide proof of Worker's Compensation Insurance at all times, as required by South Carolina Law.
- 11) This contract is binding upon the Cooperative, the Contractor, their heirs, administrators, executors, successors, or assignees.
- 12) The Contractor shall at all times perform all work in compliance with applicable state, local, and federal safety, and health laws and regulations.
- 13) All billing shall be for completed work and accepted by Superintendent of Vegetation Management. Workmanship found unsuitable shall be remedied by and at the expense of the Contractor prior to payment.
- 14) The Contractor shall hold the Cooperative harmless against any and all liabilities resulting from the performance of this contract. In addition, at all times the Contractor will have \$1,000,000.00 public liability insurance covering all work performed under this contract. The liability insurance shall cover all risks including, but not limited to, bodily injury, death, property damage, and vehicle liability. The Cooperative shall be named as an additional insured on said policy. Contractor shall not commence work pursuant to this contract prior to submitting to Cooperative proof of the insurance coverage required herein. Lucas Tree Experts will not be responsible, nor indemnify Cooperative, for Cooperatives acts of negligence, errors or omissions, related to the work or Contractors obligations under the Agreement.
- 15) The Contractor shall at all times manage all work covered by this contract in a manner that promotes a positive image of the Cooperative.
- 16) The Contractor shall follow the Cooperative and SCDOT safety rules and regulations.
- 17) Finding an appropriate place to park vehicles is solely the responsibility of the Contractor. The Contractor shall not park in the Cooperatives' substations.
- 18) The Contractor shall keep all work areas clear of trash, debris, etc. All material trimmed in Rights-of-Ways and yards shall be cleaned up daily, unless an agreement is made with the property owner. This shall include, but is not limited to fields, roads, and water channels.

- 19) No material shall be left on the ground in yards over weekends, holidays, or if the Contractor leaves the Cooperatives' system for other work.
- 20) Contractor warrants to the Cooperative that it has carefully examined work sites, accessibility, local conditions, and scope of contract prior to submitting its bid. The Cooperative is not providing an estimate of work to be performed or conditions a Contractor may encounter or create. It is the sole responsibility of the Contractor to utilize its due diligence.
- 21) The Contractor shall perform work in a manner consistent with all state and federal environmental laws and regulations.
- 22) In the event that an outage or electrical system damage is caused by the Contractor, the cost of all labor and machinery to repair the system. Contractor agrees to pay all costs of any such outage or damage.
- 23) In the event of a major outage on the Cooperatives' system, the Contractor may be asked to assist in power restoration on a time and equipment basis as indicated in the attached "Storm Rate" form(s). Under these circumstances, the total project deadline may be postponed by an amount of time equivalent to that spent on outage restoration.
- 24) Contractor is required to possess, maintain, and utilize personal protective equipment as required by OSHA standards including, but not limited to, hard hats and safety glasses.
- 25) The Contractor is not permitted to solicit work on the Cooperative's system during normal working hours.
- 26) The Contractor will not dump or dispose of any petroleum or hazardous material on the Cooperative's or landowner's property for any reason. In the event of an emergency situation, all hazardous material will need to be cleaned up and disposed of properly in accordance with OSHA and SCDHEC standards and practices.
- 27) Trimming during conditions of extremely wet ground conditions where excessive rutting could occur will not be permitted. The decision to suspend trimming operations for the sole reason will be at the discretion of the Superintendent of Vegetation Management.

## ACCEPTANCE OF CONTRACT

By signing this contract, the Contractor agrees to abide by all conditions, stipulations, specifications, and requirements described herein, and further agrees not to challenge, dispute, or make any claims against Berkeley Electric Cooperative pertaining to any and all decisions made by Berkeley Electric Cooperative with regard to the awarding of this Contract. All parties have reviewed and accepted this contract as evidence by signatures below.

Berkeley Electric Cooperative, Inc.

By: [Signature]

Title: CEO

Date: 12/12/14

(Contractor) Waco Tree

By: [Signature]

Title: CFO

Date: 12-12-2014



**BERKELEY**  
**ELECTRIC COOPERATIVE, INC.**

www.bec.coop Your Touchstone Energy Partner

**Addendum to an Existing Contract**

This document is in reference to a contract agreement dated 12/12/2014, between the following parties that are named below in this document.

May it be known that the undersigned parties, for good consideration, do hereby agree to make the following changes and / or additions that are outlined below. These additions shall be made valid as if they are included in the original stated contract.

Stated Contract for: BEC Right of Way Lump Sum Bid Request 2015/2016/2017/2018

**FUEL ADJUSTMENT CLAUSE:**

At the completion of 2016 and 2017 a fuel adjustment will be allowed if the price increases or decrease greater than \$0.20 per gallon of regular gas compared to the \$3.07 base rate set on October 27<sup>th</sup> 2014. If there is an increase in fuel cost, the difference will be invoiced separately. If there is a decrease in fuel cost, the contractor will apply the credit against the next payment. The base rate and all other adjustments will be determined using the EIA fuel report.

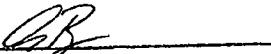
No other terms or conditions of the above mentioned contract shall be negated or changed as a result of this here stated addendum.

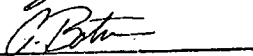
Signature 

Print Name DWAYNE CARTWRIGHT Date 12/12/14

Signature 

Print Name Peter Marion Date 12/22/14

Witness #1) 

Witness #2) 

Post Office Box 1234  
Moncks Corner, SC 29461  
(843) 761-8200 : (843) 825-3383  
Fax (843) 572-1280

Post Office Box 128  
Johns Island, SC 29457  
(843) 559-2458  
Fax (843) 559-3876

Post Office Box 1549  
Goose Creek, SC 29445  
(843) 553-3010  
Fax (843) 553-6761

7200 Highway 17 N  
Awendaw, SC 29429  
(843) 884-7525  
Fax (843) 884-3044



*Calculation*

**FUEL ADJUSTMENT CLAUSE**

*2016 2017 KMM*  
Lump Sum prices in the years ~~2015 thru~~ 2018 are subject to a fuel adjustment clause by an increase or decrease quarterly. An increase or decrease in the fuel index above the October 27, 2014 base rate of 3.07<sup>1</sup>, will adjust the lump sum billing for the quarter based on a percentage of fuel cost to total sales. Fuel costs are 8% of total sales historically.

For example at the end of 2015 Q1.

- The fuel index at March 31, 2015 (ie. Q1) increased \$0.20 to \$3.27 versus the 2014 base rate of \$3.07.
- The index increased 6.5%  $[(3.27 - 3.07)/3.07]$
- Total Lump Sum invoiced sales for the quarter were \$300,000.
- Fuel costs are 8% of total sales or \$24,000  $[300,000 \times 8\%]$
- A 6.5% increase in fuel cost would be a fuel adjustment of \$1,560.00 to be invoiced separately  $[24,000 \times .065]$

For example at the end of 2015 Q4

- The fuel index at December 31, 2015 (ie. Q1) decreased \$0.20 to \$2.87 versus the 2014 base rate of \$3.07.
- The index decreased -6.5%  $[(2.87 - 3.07)/3.07]$
- Total Lump Sum invoiced sales for the quarter were \$300,000.
- Fuel costs are 8% of total sales or \$24,000  $[300,000 \times 8\%]$
- A 6.5% decrease in fuel cost would be a fuel adjustment credit of \$1,560.00 to be applied against the next payment  $[24,000 \times -.065]$

*John A. Alaman*  
*12/30/2014*

<sup>1</sup> Based on EIA.gov, East Coast Lower Atlantic (PADD 1C)  
"Growing Naturally... Since 1926"

) IN THE COURT OF COMMON PLEAS  
) FOR THE NINTH JUDICIAL CIRCUIT  
) CASE NO.: 2015-CP-10-3681

) CASE NO.: 2015-CP-10-3681

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Plaintiff, Elizabeth Lofton, (hereinafter "Plaintiff"), by and through her undersigned attorney, hereby responds to Defendant, John Lucas Tree Expert, Co's Requests for Admissions pursuant to Rule 36 of the South Carolina Rules of Civil Procedure as follows:

- ANSWER:** Admitted. Plaintiff reserves the right to supplement this response to the extent further information is obtained through discovery.

- ANSWER:** Plaintiff admits so much that her signature is present on Attachment A. However, Plaintiff restates the allegations of her Complaint which claim that this Right of Way easement was fraudulently and/or improperly obtained. Plaintiff reserves the right to supplement this response to the extent further information is obtained through discovery.



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3. The easement granting Defendant John Lucas Tree Expert, Co. access to the Plaintiff's property was a legal document that is binding on the Plaintiff and the Defendants. (Attachment A).

**ANSWER: Denied.**

4. Defendant John Lucas Tree Expert, Co. was allowed to legally rely on the easement received from the Plaintiff to begin work on the property on which Plaintiff granted an easement.

**ANSWER: Denied, in so much that Plaintiff instructed Defendants to cease work cutting, clearing or otherwise destroying trees on her property.**

5. Plaintiff never spoke with an employee of Defendant John Lucas Tree Expert, Co. prior to her granting of the easement.

**ANSWER: Plaintiff admits that she never spoke with an employee of Defendant John Lucas Tree Expert Co. prior to the beginning date of clearing, removal and or destruction of trees on her property. Plaintiff reserves the right to supplement this response to the extent further information is obtained through discovery.**

6. Neither Plaintiff nor any representative or agent of the Plaintiff told Defendant to stop work on the easement after Defendant was hired to do work on the easement.

**ANSWER: Denied. Plaintiff instructed Defendants to cease work on the project upon becoming aware that Defendants were clearing, removing or otherwise destroying trees on her property.**

7. Plaintiff knows of no communication between Plaintiff and Defendant John Lucas Tree Expert, Co. regarding the allegations in the Complaint prior to the completion of the project on the easement.

**ANSWER: Denied. Plaintiff instructed Defendants to cease work on the project upon becoming aware that Defendants were clearing, removing or otherwise destroying trees on her property.**

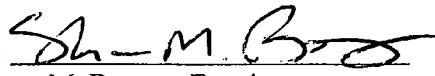
8. Plaintiff knows of no communication between Defendant Berkeley Electric Cooperative, Inc. and Defendant John Lucas Tree Expert, Co. regarding the allegations in the Complaint prior to the completion of the project on the easement.

**ANSWER: Denied.** Plaintiff is in possession of those documents produced through discovery in this action by Defendant Berkeley Electric Cooperative, Inc., several of which relate to the relationship between Defendant Berkeley Electric and Defendant John Lucas Tree Expert, Co.

9. Plaintiff never discussed the easement with any representative of Defendant prior to the completion of the project on the easement.

**ANSWER: Denied.** Plaintiff instructed Defendants to cease work on the project upon becoming aware that Defendants were clearing, removing or otherwise destroying trees on her property.

HARRELL LAW FIRM, P.A.

By:   
Shawn M. Bevens, Esquire  
2000 Sam Rittenberg Blvd., Suite 2001  
Charleston, South Carolina 29407  
T: (843) 766-4700  
F: (843) 766- 4784  
shawn@hlfp.com  
Attorney for Plaintiff

Charleston, South Carolina  
May 25, 2016

) IN THE COURT OF COMMON PLEAS

) FOR THE NINTH JUDICIAL CIRCUIT

)

) Civil Action No.: 2015-CP-10-3681

)

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JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_  
North Carolina

  
Pope D. Johnson, III

Attorney at Law  
1230 Richland Street  
Columbia, SC 29201  
803-799-9791  
803-253-6084 (Fax)  
[pope@popejohnsonlaw.com](mailto:pope@popejohnsonlaw.com)  
**Attorney for the Defendant**

Page 1 of 1

pg00078

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Elizabeth Lofton

☒ Plaintiff

v.

Berkeley Electric Cooperative, Inc.,

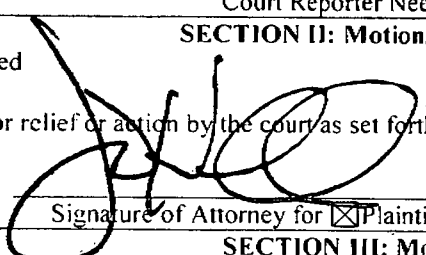
☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2015-CP-10-3681

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |  |                                                                                                                                                                                                                |  |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| <b>Plaintiff's Attorney:</b><br>John D. Harrell, Bar No.<br>Address:<br>2000 Sam Rittenberg Blvd, Suite 2001<br>Charleston, SC 29407<br>phone: (843)766-4700 fax: (843) 766-4784<br>e-mail: john@hlfpa.com other:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |  | <b>Defendant's Attorney:</b><br>Pope D. Johnson, III, Bar No.<br>Address:<br>1230 Richland Street<br>Columbia, SC 29201<br>Phone: (803) 799-9791 fax: (803) 253-6084<br>e-mail: pope@popejohnsonlaw.com other: |  |
| <input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)<br><input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)<br><input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |  |                                                                                                                                                                                                                |  |
| <b>SECTION I: Hearing Information</b><br>Nature of Motion: Consent Order of Dismissal per 40j<br>Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |  |                                                                                                                                                                                                                |  |
| <b>SECTION II: Motion/Order Type</b><br><input type="checkbox"/> Written motion attached<br><input checked="" type="checkbox"/> Form Motion/Order<br>I hereby move for relief or action by the court as set forth in the attached proposed order.<br><div style="text-align: center;"><br/>Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant<br/>Date submitted: 10-19-2016</div>                                                                                                                                                                                                                                                                                                                                                                                     |  |                                                                                                                                                                                                                |  |
| <b>SECTION III: Motion Fee</b><br><input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00<br><input type="checkbox"/> EXEMPT: (check reason)<br><input type="checkbox"/> Rule to Show Cause in Child or Spousal Support<br><input type="checkbox"/> Domestic Abuse or Abuse and Neglect<br><input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party<br><input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief<br><input type="checkbox"/> Motion for Stay in Bankruptcy<br><input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)<br><input type="checkbox"/> Proposed order submitted at request of the court; or,<br>reduced to writing from motion made in open court per judge's instructions<br>Name of Court Reporter:<br><input type="checkbox"/> Other: |  |                                                                                                                                                                                                                |  |
| <b>JUDGE'S SECTION</b><br><input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |  | JUDGE _____<br>CODE: _____ Date: _____                                                                                                                                                                         |  |
| <b>CLERK'S VERIFICATION</b><br>Collected by: _____ Date Filed: _____<br><input type="checkbox"/> MOTION FEE COLLECTED: _____<br><input type="checkbox"/> CONTESTED - AMOUNT DUE: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |  |                                                                                                                                                                                                                |  |

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
ELIZABETH LOFTON, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
BERKELEY COUNTY ELECTRIC )  
COOPERATIVE, INC. and JOHN LUCAS )  
TREE EXPERT, CO, )  
 )  
Defendants. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
CASE NO.: 2015-CP-10-3681

**CONSENT ORDER FOR DISMISSAL  
PURSUANT TO RULE 40(j)**

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2016 OCT 28 AM 11:41  
JULIE J. ARMSTRONG  
CLERK OF COURT

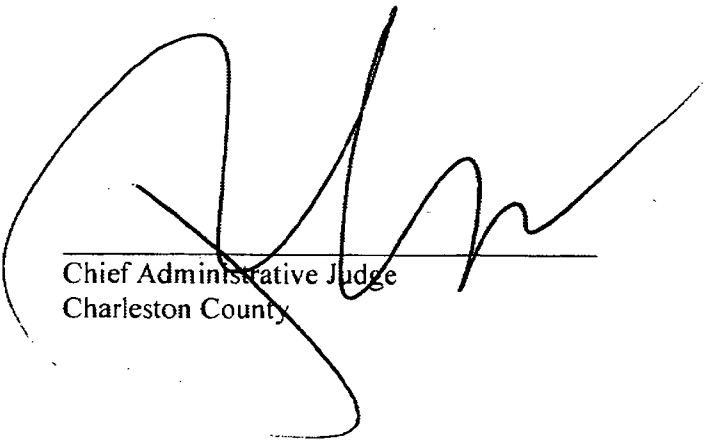
IT APPEARING, all parties consent and stipulate, by and through their undersigned attorneys, pursuant to Rule 40 (J) SCRCF, that this action be dismissed.

THEREFORE, having been consented to by all parties, and it appearing that good cause is shown, it should be,

ORDERED, ADJUDGED and DECREED that the Plaintiff is granted leave to dismiss the above referenced case pursuant to SCRCF Rule 40 (J), with leave to return it to the General Docket with a new civil action number.

IT IS SO ORDERED!

Charleston, South Carolina  
October 27, 2016

  
\_\_\_\_\_  
Chief Administrative Judge  
Charleston County

**Consent Order for Dismissal  
Pursuant to Rule 40j**

---

John D. Harrell, Sr.  
Shawn M. Bevans  
Harrell Square Building  
2000 Sam Rittenberg Blvd., Suite 2001  
Charleston, South Carolina 29407  
Phone: (843) 766-4700  
Fax: (843) 766- 4784  
john@hlfpa.com  
shawn@hlfpa.com  
**Attorneys for Plaintiff**

---

Pope D. Johnson, III  
1230 Richland Street  
Columbia, SC 29201

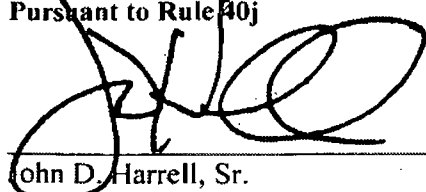
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*For* John B. "Jack" Williams  
Williams and Hulst, LLC  
209 E. Main Street // P.O. Box 1288  
Moncks Corner, SC 29461  
**Attorneys for the Defendant Berkeley County  
Electric Cooperative, Inc.**

---

Sterling G. Davies  
McAngus Goudelock & Courier, LLC  
P. O. Box 12519  
Columbia, SC 29211  
**Attorney for Defendant John Lucas Tree Expert, Co**

**Consent Order for Dismissal  
Pursuant to Rule 40j**



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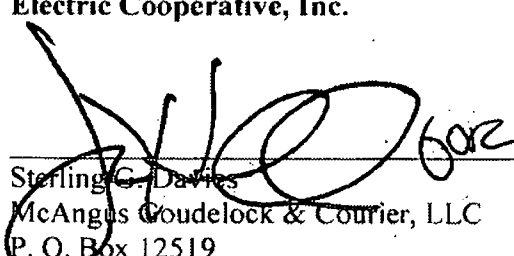
John D. Harrell, Sr.  
Shawn M. Bevans  
Harrell Square Building  
2000 Sam Rittenberg Blvd., Suite 2001  
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Phone: (843) 766-4700  
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john@hlfpa.com  
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**Attorneys for Plaintiff**

---

Pope D. Johnson, III  
1230 Richland Street  
Columbia, SC 29201

---

John B. "Jack" Williams  
Williams and Hulst, LLC  
209 E. Main Street // P.O. Box 1288  
Moncks Corner, SC 29461  
**Attorneys for the Defendant Berkeley County  
Electric Cooperative, Inc.**



---

Sterling G. Davis  
McAngus Goudelock & Courier, LLC  
P. O. Box 12519  
Columbia, SC 29211  
**Attorney for Defendant John Lucas Tree Expert, Co**

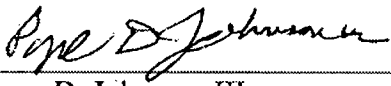
*602*  
*w/ express permission.*

**Consent Order for Dismissal  
Pursuant to Rule 40j**

---

John D. Harrell, Sr.  
Shawn M. Bevans  
Harrell Square Building  
2000 Sam Rittenberg Blvd., Suite 2001  
Charleston, South Carolina 29407  
Phone: (843) 766-4700  
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john@hlfpa.com  
shawn@hlfpa.com  
**Attorneys for Plaintiff**

---

  
Pope D. Johnson, III  
1230 Richland Street  
Columbia, SC 29201

---

John B. "Jack" Williams  
Williams and Hulst, LLC  
209 E. Main Street // P.O. Box 1288  
Moncks Corner, SC 29461  
**Attorneys for the Defendant Berkeley County  
Electric Cooperative, Inc.**

---

Sterling G. Davies  
McAngus Goudelock & Courier, LLC  
P. O. Box 12519  
Columbia, SC 29211  
**Attorney for Defendant John Lucas Tree Expert, Co**



**HARRELL  
LAW FIRM, PA**

**ATTORNEYS AND COUNSELORS AT LAW**

**John D. Harrell, Sr., Esquire**  
john@hlfp.com

**Katherine J. Dahlheim, Esquire**  
katie@hlfp.com

**Shawn M. Bevans, Esquire**  
shawn@hlfp.com

♦ Certified South Carolina Circuit Court Mediator

October 21, 2016

Honorable Julie J. Armstrong  
Charleston County Common Pleas  
100 Broad Street  
Charleston, SC 29401

**RE: *Elizabeth Lofton v. Berkeley Electric Cooperative, Inc. and John Lucas Tree  
Expert, Co.***  
**Case No.: 2015-CP-10-3681**  
**HLFPA File No.: 715005**

Dear Julie:

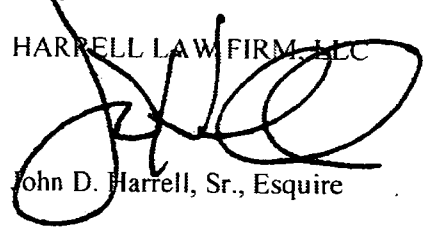
Enclosed please find the original and one (1) copy of the Consent Order for Dismissal Pursuant to Rule 40(j) in the above-referenced matter. Please have the administrative judge sign where indicated, if it meets with approval, then file the original and return the clocked copy in the stamped, self-addressed envelope. I have enclosed my firm's check in the amount of \$25.00.

Should you have any questions, please do not hesitate to call.

With kind regards, I remain

Sincerely,

HARRELL LAW FIRM, LLC

  
John D. Harrell, Sr., Esquire

JDH, Sr/jlc  
Enclosures

cc: Pope D. Johnson, III, Esquire (w/enc.)(via electronic mail)  
John B. Williams, Esquire (w/enc.)(via electronic mail)  
Sterling G. Davies, Esquire (w/enc.)(via electronic mail)

STATE OF SOUTH CAROLINA )

COUNTY OF CHARLESTON )

ELIZABETH LOFTON )

Plaintiff, )

vs. )

BERKELEY COUNTY ELECTRIC ET AL )

Defendant. )

IN THE COURT OF COMMON PLEAS

9th JUDICIAL CIRCUIT

2015 8681  
CASE NO.: ~~2016~~-CP-10-4279

**MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET**

Plaintiff's Attorney:

MICHAEL A WHITSITT, Bar No. 100323

Address:

1476 BEN SAWYER BLVD, STE 3

MT PLEASANT SC 29464

Phone: 8436968904Fax \_\_\_\_\_

E-mail: mawhitsitt@gmail.com Other: \_\_\_\_\_

Defendant's Attorney:

\_\_\_\_\_, Bar No. \_\_\_\_\_

Address:

Phone: \_\_\_\_\_ Fax \_\_\_\_\_

E-mail: \_\_\_\_\_ Other: \_\_\_\_\_

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

**SECTION I: Hearing Information**

Nature of Motion: Motion to Restore Pursuant to 40(J)

Estimated Time Needed: 5 min

Court Reporter Needed: ☒ **YES** / ☐ **NO**

**SECTION II: Motion/Order Type**

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

[Signature]  
Signature of Attorney for ☒ Plaintiff / ☐ Defendant

September 28, 2017

Date submitted

**SECTION III: Motion Fee**

☒ **PAID - AMOUNT: \$** 25.00

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_

☐ Other: \_\_\_\_\_

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: \_\_\_\_\_

JUDGE CODE \_\_\_\_\_

Date: \_\_\_\_\_

**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_

☐ **MOTION FEE COLLECTED: \$** \_\_\_\_\_

☐ **CONTESTED - AMOUNT DUE: \$** \_\_\_\_\_

STATE OF SOUTH CAROLINA )  
)  
COUNTY OF CHARLESTON )  
)  
)  
)  
Elizabeth Lofton )  
)  
)  
Plaintiff )  
-vs- )  
)  
BERKELEY COUNTY ELECTRIC )  
COOPERATIVE, INC. and )  
JOHN LUCAS TREE EXPERT CO. )  
)  
Defendant(s) )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
CASE NO. 2016-CP-10-4279  
2015 3681

**NOTICE OF MOTION AND  
MOTION TO RESTORE CLAIM  
PURSUANT TO RULE 40(J)**

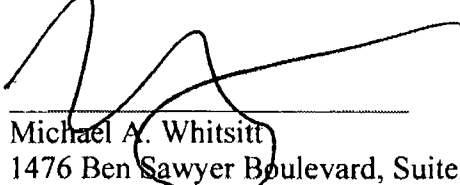
2017 SEP 28 AM 9:51  
JULIE J. MITCHELL  
CLERK OF COURT  
BY DS

**TO: POPE D. JOHNSON III, ATTORNEY FOR DEFENDANT BERKELEY and  
STERLING GRAYDON DAVIES, ATTORNEY FOR DEFENDANT JOHN LUCAS  
TREE EXPERT CO.:**

**YOU WILL PLEASE TAKE NOTICE** that pursuant to Rule 40(J) of the South Carolina Rules of Civil Procedure, the Plaintiff, by and through their attorney, Michael A. Whitsitt, move before the Presiding Judge at Charleston County Courthouse, within 10 days or as soon as this matter may be heard thereafter, for an order restoring the Plaintiff's claim. This motion is made on the grounds set forth in Rule 40(J) and as a matter of right invested in the Plaintiff, pursuant to the Consent Order for Dismissal Pursuant to Rule 40(J) made order of this court on 28 October, 2016.

(REMAINDER OF PAGE LEFT BLANK; SIGNATURE BLOCK ON NEXT PAGE)

**The Whitsitt Law Firm**

  
Michael A. Whitsitt  
1476 Ben Sawyer Boulevard, Suite 3  
Mt. Pleasant, South Carolina 29464  
(843)696-8904  
*ATTORNEY FOR PLAINTIFFS*

September 28, 2017  
Mount Pleasant, South Carolina

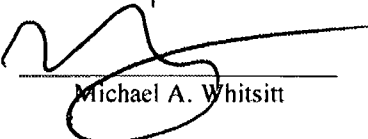
Counsel Served: Sterling G Davies, Esquire  
1320 Main Street, 10<sup>th</sup> Floor (29201)  
Post Office Box 12519  
Columbia, South Carolina 29211  
*Attorney for Defendant John Lucas*

Pope D. Johnson III, Esquire  
1230 Richland Street  
Columbia, South Carolina 29201  
*Attorney for Defendant Berkeley*

CERTIFICATE OF SERVICE

The undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of the same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this

28 day of September, 2017.

  
Michael A. Whitsitt

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Elizabeth Lofton

Plaintiff(s)

vs.

Berkeley Electric Cooperative, Inc. and John Lucas  
Tree Expert, Co.

Defendant(s)

IN THE COURT OF COMMON PLEAS

MOTION AND ORDER INFORMATION FORM  
AND COVER SHEET

C/A No: 2015-CP-10-3681

Plaintiff's Attorney:  
Michael A. Whitsitt, Esquire Bar No.  
Address:  
1476 Ben Sawyer Boulevard, Suite 3  
Mt. Pleasant, South Carolina 29464  
phone: (843) 696-8904 fax: \*\*\*Plaintiff Counsel Phone Type  
Fax\*\*\*  
e-mail: mawhittsitt@gmail.com other:

Defendant's Attorney:  
Sterling G. Davies Bar No. 5840  
Address: McAngus, Goudelock & Courie, LLC  
Post Office Box 12519, Capitol Station  
Meridian, 1320 Main Street, 10<sup>th</sup> Floor (29201)  
Columbia, South Carolina 29211-2519  
(803) 779-2300  
Direct number: (803) 227-2235 Fax: (803) 748-0526  
e-mail: sdavies@mgclaw.com other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)  
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)  
☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Consent Order Restoring Case Pursuant to Rule 40(J)  
Estimated Time Needed: N/A Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

- ☐ Written motion attached  
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

January 11, 2018  
Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$150.00  
☐ EXEMPT: (check reason)  
☐ Rule to Show Cause in Child or Spousal Support  
☐ Domestic Abuse or Abuse and Neglect  
☐ Indigent Status ☐ State Agency v. Indigent Party  
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief  
☐ Motion for Stay in Bankruptcy  
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)  
☐ Proposed order submitted at request of the court; or,  
reduced to writing from motion made in open court per judge's instructions  
Name of Court Reporter:  
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.  
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: \_\_\_\_\_

- ☐ MOTION FEE COLLECTED: \_\_\_\_\_  
☐ CONTESTED - AMOUNT DUE: \_\_\_\_\_

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ELIZABETH LOFTON,

Plaintiff,

v.

BERKELEY ELECTRIC COOPERATIVE,  
INC. AND JOHN LUCAS TREE EXPERT,  
CO.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-10-3681

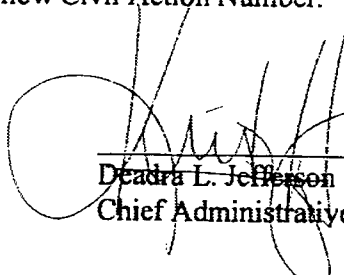
**CONSENT ORDER RESTORING  
CASE PURSUANT TO RULE 40(J)**

Pursuant to Plaintiff's Motion to Restore and the previously filed Consent Order of Dismissal Pursuant to Rule 40(j) (filed October 28, 2016), the parties hereby stipulate and consent and the Court hereby orders that the above-referenced matter shall be restored to the General Docket and shall be given a new Civil Action Number.

AND IT IS SO ORDERED.

Date: January 16, 2017

Charleston, South Carolina

  
Deadra L. Jefferson  
Chief Administrative Judge, 9<sup>th</sup> Judicial Circuit

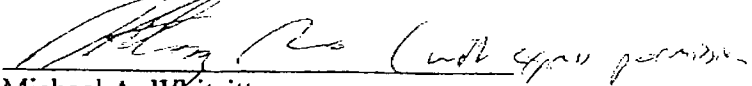
(Signature Pages to Follow)

FILED  
2018 JAN 24 PM 2:26  
JULIE D. BROWN  
CLERK OF COURT

Elizabeth Lofton vs. Berkeley County Electric Cooperative, Inc. and John Lucas Tree Expert Co.  
Civil Action No. 2015-CP-10-3681

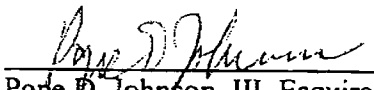
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**WE CONSENT:**

  
\_\_\_\_\_

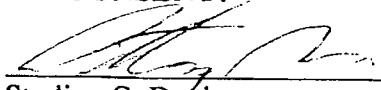
Michael A. Whitsitt  
The Whitsitt Law Firm  
1476 Ben Sawyer Boulevard, Suite 3  
Mt. Pleasant, South Carolina 29464  
(843) 696-8904  
mawhitsitt@gmail.com  
*Attorney for Plaintiff Elizabeth Lofton*

**WE CONSENT:**

  
\_\_\_\_\_

Pope D. Johnson, III, Esquire  
1230 Richland Street  
Columbia, South Carolina 29201  
(803) 799-9791  
pope@popejohnsonlaw.com  
*Attorney for Defendant Berkeley Electric Cooperative, Inc.*

**WE CONSENT:**

  
\_\_\_\_\_

Sterling G. Davies  
McAngus, Goudelock & Courie, LLC  
Post Office Box 12519  
1320 Main Street, 10th Floor (29201)  
Columbia, South Carolina 29211  
779-2300  
[sdavies@mgclaw.com](mailto:sdavies@mgclaw.com)  
*Attorneys for Defendant John Lucas Tree Expert Company*

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ELIZABETH LOFTON,

Plaintiff,

vs.

BERKELEY ELECTRIC COOPERATIVE,  
INC. AND JOHN LUCAS TREE EXPERT,  
CO.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2018-CP-10-00323

**DEFENDANT JOHN LUCAS TREE  
EXPERT, CO.'S MOTION FOR  
SUMMARY JUDGMENT**

FILED  
2018 AUG 31 PM 2:37  
JULIE J. ARP  
CLERK OF COURT

**YOU WILL PLEASE TAKE NOTICE** that pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, the Defendant John Lucas Tree Expert, Co., by and through the undersigned attorneys, move before the Presiding Judge at the Charleston County Courthouse, as soon as this matter may be heard, for an Order of Summary Judgment. This Motion is made on the ground that, taking the facts in the light most favorable to the Plaintiff, there is no genuine issue of material fact that would lead a reasonable jury to believe that this Defendant is liable for the alleged damages to the subject property. As such, Defendant John Lucas Tree Expert, Co. is entitled to judgment as a matter of law. This motion is based on SCRPC, Rule 56, the discovery in this action, and the depositions taken in this matter. The motion is further supported and explained in more detail in the Defendant's supporting Memorandum of Law that is being submitted separately but is hereby incorporated herein as if repeated verbatim.

[Signature block on the next page]

McANGUS, GOUDELOCK & COURIE, LLC



---

Sterling G. Davies, Bar No. 5840  
J. Adam Ribock, Bar No. 100731  
1320 Main Street, 10<sup>th</sup> Floor (29201)  
Post Office Box 12519  
Columbia, South Carolina 29211  
(803) 779-2300  
sdavies@mgclaw.com  
adam.ribock@mgclaw.com

ATTORNEYS FOR DEFENDANT JOHN LUCAS  
TREE EXPERT, CO.

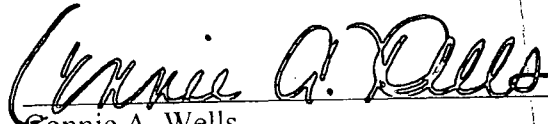
August 29, 2018  
Columbia, South Carolina

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 29<sup>th</sup> day of August, 2018 served a copy of Defendant John Lucas Tree Expert, Co.'s Motion for Summary Judgment and Defendant John Lucas Tree Expert, Co.'s Memorandum in Support of Motion for Summary Judgment, by mailing copies of same, postage prepaid, in the United States mail, with sufficient postage affixed as follows:

Michael A. Whitsitt, Esquire  
The Whitsitt Law Firm  
1476 Ben Sawyer Boulevard, Suite 3  
Mt. Pleasant, South Carolina 29464  
*Attorney for Plaintiff Elizabeth Lofton*

Pope D. Johnson, III, Esquire  
1230 Richland Street  
Columbia, South Carolina 29201  
*Attorney for Defendant Berkeley Electric Cooperative, Inc.*

  
Connie A. Wells  
Legal Assistant to Sterling G. Davies  
and J. Adam Ribock

FILED  
2018 AUG 31 PM 2:37  
JULIE J. ARMSTRONG  
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ELIZABETH LOFTON,

Plaintiff,

vs.

BERKELEY ELECTRIC COOPERATIVE,  
INC. AND JOHN LUCAS TREE EXPERT,  
CO.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2018-CP-10-00323

**DEFENDANT JOHN LUCAS TREE  
EXPERT, CO.'S MEMORANDUM IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendant John Lucas Tree Expert, Co. ("Lucas Tree" or "Defendant"), by and through their undersigned counsel, respectfully submits this Memorandum of Law in Support of their Motion for Summary Judgment.

**FACTUAL BACKGROUND**

Plaintiff, Elizabeth Lofton, solely in an individual capacity, filed her First Amended Complaint on January 19, 2016. The case was later removed from the General Docket per Rule 40(j) of the SCRCF and restored earlier this year.

In her Complaint, Plaintiff claims she owns a tract of land in Charleston County that has been damaged by acts of both defendants, Berkeley Electric Cooperative ("Berkeley") and Lucas Tree. (See generally Complaint). Plaintiff asserts the following causes of action against Lucas Tree: trespass, conversion, negligence/gross negligence, and violation of South Carolina Timber statute. Plaintiff further alleges Berkeley coerced her into signing a right of way easement and Berkeley and/or Lucas Tree cut trees on her personal property outside of the easement.

(Complaint ¶ 15-17). However, Plaintiff does not own the property that is the subject of this action and therefore lacks standing to lawfully make these claims.<sup>1</sup>

Plaintiff readily admits the owner of the property in question is the Trust. (Elizabeth Lofton Deposition, p. 73 , l. 3-6, See also Deed, Attached as Exhibit A). Plaintiff Lofton is the trustee and a member of the Trust benefitting herself, Sandy Lofton and Wayne Lofton. (Elizabeth Lofton Deposition, p. 73, l. 3-23). The Trust does not specifically spell out any portion of the land that the Plaintiff owns in an individual capacity; instead, it merely states that the proceeds should be “divided equally or as [the beneficiaries] see fit.” (*Id.* at l. 20). Plaintiff has never personally paid property taxes on the tracts of land in question and the Trust makes all such payments. (*Id.*, p. 74, l. 2-8). Furthermore, the Trust has a 100% interest in the property. (See Deed). In short, Plaintiff does not own the land individually and therefore does not have standing to file suit.

Even if Plaintiff has standing to file suit, her claims against Lucas Tree also fail as a matter of law. The executed easement gives Berkeley a 20-foot easement onto the property. (Easement, Attached as Exhibit B).<sup>2</sup> The easement provides Berkeley has the right to “place, construct, operate, maintain, relocate, patrol and replace...an electric transmissions or distribution line or system and communications system, including the right to erect, install and construct...wires, cables and any necessary appurtenances and equipment deemed by the Cooperative to be necessary therefor.” *Id.* The easement also clearly grants Berkeley the right to “cut and trim trees and shrubbery to the extent necessary to keep them clear of said electric line or system.” *Id.*

---

<sup>1</sup> By reason, if Plaintiff did not own the property, she could not sign an easement on the property. That issue is a separate and distinct action that has not been alleged by Plaintiff. Rather, Plaintiff continues to assert she owns the property.

<sup>2</sup> Plaintiff disputes the validity of the easement she signed.

Berkeley contracted with Lucas Tree on December 12, 2014 to provide labor and equipment to Berkeley for purposes of clearing the power line rights-of-way near or on the Trust's property. (Exhibit C, Contract between Berkeley and Lucas Tree). Lucas Tree was not privy to any conversations between Berkeley and the Plaintiff and there is no evidence that Lucas Tree performed any work that was not directed by Berkeley.

Plaintiff never saw Lucas Tree on the property, nor did she speak with any Lucas Tree employee at any time. (Elizabeth Lofton Deposition, p. 58, l. 3-23). Plaintiff also admitted there was nothing on the Right of Way Easement (that she admittedly endorsed) to indicate to Lucas Tree that the document was not valid. (Elizabeth Lofton Deposition, p. 71, l. 16-19).

### ARGUMENT

Under Rule 56 of the South Carolina Rules of Civil Procedure, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c) SCRPC. "In determining whether summary judgment is appropriate, the evidence and its reasonable inference must be viewed in a light most favorable to the non-moving party." *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E. 2d 537, 545 (1991).

Although facts and inferences to be drawn must be viewed in the light most favorable to the non-moving party, the non-moving party must still produce some evidence to support each element of each claim against the moving party; and show a material issue as to the contested elements. *See e.g., Bd of Trs. For the Fairfield County School Dist. v. State of South Carolina*, 409 S.C. 119, 761 S.E.2d 241 (2014); *Eadie v. Krause*, 381 S.C. 55, 671 S.E.2d 389 (S.C. Ct. App. 2008); *McLaughlin v. Williams*, 379 S.C. 451, 665 S.E.2d 667 (S.C. Ct. App. 2008).

### **Plaintiff Lacks Standing**

"To have standing, one must have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest." *Charleston County Sch. Dist. v. Charleston County Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999) (internal citation omitted). "A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Id.* at 181, 519 S.E.2d at 571 (quoting *Anchor Point, Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992)).

For a plaintiff to possess standing, three elements must be satisfied. *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 550 S.E.2d 287 (2001). First, the plaintiff must have suffered an injury-in-fact, or a particularized harm. *Id.* at 345 S.C. 601, 550 S.E.2d 291. Second, a causal connection must exist between the injury and the challenged conduct. *Id.* Third, it must be likely that a favorable decision will redress the injury. *Id.* A party seeking to establish standing carries the burden of demonstrating each of the three elements. *Id.*

Plaintiff filed suit individually and not on behalf of the Trust, yet readily admits the owner of the property in question is the Trust. (Elizabeth Lofton Deposition, p. 73 , l. 3-6, See also Deed). As a result, Plaintiff lacks standing under the first element of the test articulated in *Sea Pines*. Plaintiff herself has not suffered an injury-in-fact. Rather, it is the Trust's property that allegedly has been damaged.<sup>3</sup>

---

<sup>3</sup> Lucas Tree believes it is entitled to summary judgment on all of Plaintiff's claims based on lack of standing. In the alternative, Lucas Tree also hereby moves for summary judgment on the claims asserted by Plaintiff as discussed below.

**Plaintiff Has Failed to Produce Any Evidence to Support  
Lucas Tree Violated the Easement**

The easement, signed by Plaintiff, gives Defendants the right cut and trim trees and shrubbery to the extent necessary to keep them clear of the electric lines on or near the Trust property. Plaintiff has failed to show and has not produced evidence sufficient to demonstrate that her injuries resulted from Lucas Tree violating the easement. Without direct evidence, any and all allegations related to whether Defendants went outside the easement are speculative. While South Carolina adheres to the "scintilla of evidence" rule, it does not authorize the submission of speculative, theoretical, or hypothetical evidence, nor does it permit a verdict to stand upon conjecture or speculation. *Turner v. American Motorists Ins. Co.*, 176 S.C. 260, 262-263, 180 S.E. 55, 56 (1934). Plaintiff's failure to secure such evidence is a fatal blow to her suit.

**Lucas Tree Did Not Breach Any Duty To Plaintiff**

Plaintiff alleges that Defendant Lucas Tree was grossly negligent, willful, wanton, reckless, careless, and/or negligent in wrongfully converting Plaintiff's property, improperly destroying Plaintiff's property, destroying Plaintiff's property "beyond the extent necessary" to keep trees and shrubbery clear of said electric line or system, and in failing to check the relevant deeds to said properties over which an easement was sought.

As this Court is fully aware, the elements of a negligence cause of action are 1) a duty of care owed by the defendant to the plaintiff; 2) the defendant's breach of that duty by a negligent act or omission, i.e., failure to exercise the care of a reasonable man in the circumstances, and 3) damage proximately resulting from the breach of duty. *Snow v. City of Columbia*, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). The plaintiff bears the burden of proof on all three elements, including breach. *Id.* Failure by a plaintiff to prove any one of these elements defeats

the claim. *Rayfield v. S.C. Dept. of Corrections*, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988).

Assuming *arguendo* Plaintiff is the owner of the property, she gave express permission to Berkeley in that capacity to “cut and trim trees and shrubbery to the extent necessary to keep them clear of said electric line or system.” (Easement, Exhibit B). Defendant Lucas Tree was authorized to be on the property as a subcontractor for Berkeley, and admittedly had a duty to perform the job for which they were hired ably and without damaging property outside of the easement. Plaintiff has not offered any proof that Lucas Tree went outside the confines of the easement.

**S.C. Code Ann § 16-11-580**  
**Is Inapplicable To This Matter**

Plaintiff also alleges a violation of S.C. Code Ann § 16-11-580, a criminal statute which makes it unlawful for a person to knowingly and wilfully “cut, destroy, or remove forest products without the consent of the landowner” or “hire or counsel another person to cut, destroy, or remove forest products without the consent of the landowner.” Plaintiff additionally relies on S.C. Code Ann § 16-11-615, which states “in all criminal prosecutions for violation of the provisions... relating to cutting or destroying timber, the defendant may plead the payment of not to exceed exactly three times the fair market value of the timber as determined by a registered forester...” (emphasis added). § 16-11-615 also provides that “if it is necessary to institute civil action to recover the fair market value of the timber, ...the owner, in case of private lands, shall receive damages of not to exceed exactly three times the fair market value of the timber established by a registered forester if judgment is in favor of the State or the owner.”

Defendants Berkeley Electric and Lucas Tree were never prosecuted for a violation of S.C. Code Ann § 16-11-580, rendering this section inapplicable to the instant matter. While the

statute does provide for a civil action to recover the fair market value of the timber, this section is only applicable to "criminal prosecutions" for violations of § 16-11-580. Because there was never a prosecution of Lucas Tree, Plaintiff's cause of action under § 16-11-580 must fail as a matter of law.

### **CONCLUSION**

Plaintiff lacks standing to bring the claims asserted in her Amended Complaint. In the alternative, Plaintiff has failed to allege specific facts sufficient to show that Lucas Tree violated the easement granted to Berkeley by Plaintiff. Thus, for the reasons stated above, the motion for summary judgment should be granted, and Plaintiff's claims against Lucas Tree should be dismissed.

McANGUS, GOUDELOCK & COURIE, LLC



Sterling G. Davies, Bar No. 5840  
J. Adam Ribock, Bar No. 100731  
1320 Main Street, 10<sup>th</sup> Floor (29201)  
Post Office Box 12519  
Columbia, South Carolina 29211  
(803) 779-2300  
sdavies@mgclaw.com  
adam.ribock@mgclaw.com

ATTORNEYS FOR DEFENDANT JOHN LUCAS  
TREE EXPERT, CO.

August 29, 2018

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE MATTER OF: IRENE N. LOFTON

PROBATE COURT

DEED OF DISTRIBUTION

CASE NUMBER: 2010ES10-1065

RMC BK 0332 Pg 617 : pg 1 \*

WHEREAS, the decedent died on June 18, 2010, and,

WHEREAS, the estate of the decedent is being administered in the Probate Court for Charleston County, South Carolina, in File No. 2010ES10-1065, and,

WHEREAS, the grantee herein is either a beneficiary or heir at law, as appropriate, of the decedent; and,

WHEREAS, the undersigned Personal Representative is appointed and qualified fiduciary in this matter; and,

NOW, THEREFORE, in accordance with the laws of the State of South Carolina, the Personal Representative has bargained, sold and released, and by these Presents do grant, bargain, sell and release to:

Name: ELIZABETH A. LOFTON, Successor Trustee of the 100% interest  
Irene N. Lofton Revocable Living Trust UTD 2/12/2007  
and restated 8/27/2008

Address: 10027 Randall Rd., McClellanville, SC 29458

the following described property:

See attached Exhibit A

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises/Property belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises/Property unto the said ELIZABETH A. LOFTON, Successor Trustee of the Irene N. Lofton Revocable Living Trust UTD 2/12/2007 and restated 8/27/2008, her successors and assigns forever.



IN WITNESS WHEREOF, the undersigned, as Personal Representative of the estate of the decedent, has executed this Deed, this 21<sup>st</sup> day of May, 2013.

RMC BK 0332 Pg 617 : pg 2 •

SIGNED, SEALED AND DELIVERED in the PRESENCE OF:

Lilly Odell Healy

Elizabeth Anne Lofton P.R.  
ELIZABETH ANNE LOFTON, Personal  
Representative for the Estate of Irene N. Lofton

Irene N. Lofton

STATE OF SOUTH CAROLINA

PROBATE

COUNTY OF CHARLESTON

PERSONALLY appeared before me Lilly Odell Healy, and made oath that he/she saw the within named Personal Representative(s) sign, seal, and as their act and deed, deliver the within written Deed, and that he/she with Irene N. Lofton witnessed the execution thereof.

Lilly Odell Healy

SWORN TO BEFORE ME this 21<sup>st</sup> day of May, 2013.

Irene N. Lofton  
Notary Public for South Carolina

My Commission Expires: 10/9/2013

Send tax bill to: 10027 Randall Rd., McClellanville, SC 29458

## EXHIBIT A

RMC BK 0332 Pg 617 : pg 3 \*

All that lot, piece, parcel or tract of land, with the buildings and improvements thereon, situate, lying and being in St. James Santee Parish, County of Charleston, State of South Carolina, containing 13.06 acres, more or less, known as Lot 2 of Grantor's property, butting and bounding as follows: beginning at a #5 rebar on Old Georgetown Road, thence 338.51 feet South 45°52'03" West along the right of way for said road to a #4 rebar; thence 74.11 feet North 40°45'19" West to a ¾" pipe; thence 299.67 feet North 35°50'00" West to a ¾" pipe; thence 145.78 feet North 26°38'11" West to a ¾" pipe; thence 139.37 feet North 26°25'44" West to a ¾" pipe; thence 327.94 feet North 27°48'03" West to a ¾" pipe; thence 226.02 feet North 28°49'07" West to a ¾" pipe; thence 215.21 feet North 27°15'13" West to a #4 rebar; thence 496.85 feet North 36°22'42" West to a 2" x ½" iron; thence 294.40 feet North 27°16'58" East bordering lands of Francis Marion National Forest to a #5 rebar; thence 1,999.55 feet South 34°01'30" East to the point of beginning; said property being more fully shown as Lot 2 on a plat of property of Mary L. Carroll & Irene N. Lofton by James O. McClellan, III, PE and LS, dated November 2, 2005, revised December 7, 2005, and recorded on July 7, 2006, in Plat Book DF, Page 164, Charleston County RMC Office.

Together with a perpetual non-exclusive easement over Lot 1 on the said plat to allow vehicular, pedestrian and utility access from Old Georgetown Road across Lot 1 to Lot 2, as set forth more fully in the Deed from Mary L. Carroll and Irene N. Lofton to Mary L. Carroll, dated December 27, 2006, and recorded December 28, 2006, in Book C610, Page 571, Charleston County RMC Office.

Being the same property conveyed to Irene N. Lofton by Deed of Mary L. Carroll and Irene N. Lofton, dated December 27, 2006, and recorded December 28, 2006, in Book C610, page 576, Charleston County RMC Office.

TMS No. 731-00-00-070

THE STATE OF SOUTH CAROLINA

Location Number 293  
RIGHT OF WAY EASEMENT

COUNTY OF CHARLESTON



KNOW ALL MEN BY THESE PRESENTS that I (we) ELIZABETH LOFTON

, of the  
County of CHARLESTON, State of South Carolina, hereinafter referred to as  
Grantor(s) for the sum of One Dollar (\$1.00) to me (us) in hand paid, receipt of which is hereby  
acknowledged, does hereby grant unto BERKELEY ELECTRIC COOPERATIVE, INC., a corporation,  
whose Post Office Address is Moncks Corner, South Carolina, hereinafter called Cooperative, and  
to its Successors of Assigns, a right-of-way over route selected by Cooperative, having a width of  
TWENTY feet, that is to say TEN feet either side of centerline,  
upon, over and across land of Grantor(s), more particularly described as follows, to-wit:

A tract of land approximately 13.06 acres in CHARLESTON County, in or near  
McClellanville community and bounded as follows:

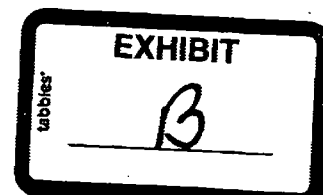
North by U.S.F.S.; Aiden's Way  
East by Aiden's Way; Old Georgetown Rd.  
South by Old Georgetown Rd.  
West by Gary E. Seyle; U.S.F.S.

Power lines are to be relocated to accommodate  
possible widening of Aiden's Way if needed.

together with the right to place, construct, operate, maintain, relocate, patrol and replace thereon and in  
or upon all streets, roads or highways abutting said lands an electric transmissions or distribution line or  
system and communications system, including the right to erect, install and construct, either overhead  
or underground, its electrical facilities and other transmission line structures, wires, cables and any  
necessary appurtenances and equipment deemed by the Cooperative to be necessary therefor, as well as  
the right to install, maintain and use anchors and guy wires on lands adjacent to the right-of-way herein  
granted; and to cut and trim trees and shrubbery to the extent necessary to keep them clear of said  
electric line or system and communication system and to cut down, from time to time, all dead, leaning  
or dangerous trees that are tall enough to strike the wires in falling.

Together also with the right, from time to time, to redesign, rebuild or alter said lines and to  
install such additional lines, apparatus and equipment as the Cooperative may at any time deem nec-  
essary, and the right to remove any line or any part thereof.

Together also with all rights of ingress and egress necessary for the full and complete use, occu-  
pancy, and enjoyment of the easement hereby granted and all rights and privileges incident thereto.



Grantor(s) agrees that all poles, wires and other facilities, including any main service entrance equipment installed on the above described lands at the Cooperative's expense, shall remain the property of the Cooperative, removable at the option of the Cooperative upon termination of service to or on said lands.

PROVIDED, HOWEVER, any damage to the property of Grantor(s) (other than the property cleared or removed as hereinafter provided) caused by the Cooperative in the course of constructing, rebuilding or repairing said lines shall be borne by the Cooperative.

TO HAVE AND TO HOLD, all the singular the aforesaid rights and privileges unto the Cooperative, its Successors and Assigns, as aforesaid.

And Grantor(s) agree(s) to warrant and forever defend the above granted rights against himself or his heirs and against any other person lawfully claiming or to plain the same or any part thereof.

It is further understood that whenever necessary, words used in this instrument in the singular shall be construed to read in the plural and that words used in the masculine gender shall be construed to read in the feminine.

IN WITNESS WHEREOF, the undersigned has set this hand and seal this 17<sup>th</sup> day of July, 20 13.

SIGNED, SEALED AND DELIVERED  
IN THE PRESENCE OF

Candlen H. Felder  
Henry R. Easter Jr.

Elizabeth Lofton  
Elizabeth Lofton (L.S.)  
Elizabeth Lofton (L.S.)

STATE OF SOUTH CAROLINA  
COUNTY OF BERKELEY

PERSONALLY appeared before me Candlen H. Felder  
and made oath that (s)he saw the within named Elizabeth Lofton

sign the within instrument, and as h\_\_\_ act and deed, deliver the Right-of-Way for the uses and purposes therein mentioned, and that (s)he with Henry R. Easter Jr. in the presence of each other, witnessed the due execution thereof.

SWORN to and subscribed before me this 17<sup>th</sup> day of July, 20 13.

Henry R. Easter Jr.  
NOTARY PUBLIC FOR SOUTH CAROLINA  
My Commission Expires: 4/4/2021

RETURN TO:  
BERKELEY ELECTRIC COOPERATIVE, INC.  
P.O. Box 1234  
Moncks Corner, S.C. 29461

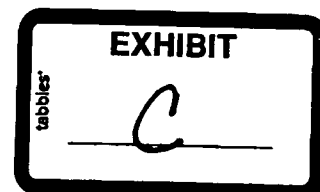
## RIGHT-OF-WAY LUMP SUM CONTRACT

### GENERAL

This contract is entered into by Berkeley Electric Cooperative, Inc. (referred to as the Cooperative hereafter) and Lucas Tree on 12-12, 2014. The purpose of this contract is for the contractor to provide labor and equipment to the Cooperative for purposes of clearing power line Rights-of-Way.

### TERMS AND CONDITIONS

- 1) The prices (outlined in a bid dated September 5, 2014) and terms in this contract(s) shall be in effect January 1, 2015 through December 31, 2018 and shall be completed by scheduled dates determined by the Cooperative. Each circuit must be completed before starting another unless approved by Superintendent of Vegetative Management. Contract prices are lump sum per circuit.
- 2) The Cooperative reserves the right to require the removal of any the contractor's employees whose performance is not satisfactory to the Cooperative in its sole discretion. Each crew shall have at least one employee capable of speaking English to communicate with others and shall be the Crew Foreman.
- 3) The scope of work within this contract may be changed at the sole discretion of the Cooperative, or this contract may be cancelled or voided by the Cooperative at its sole discretion at any time by giving the contractor thirty (30) days written notice. In the event the Cooperative cancels or voids this contract, the compensation due to the Contractor will be limited only to a prorated amount based on completed linear footage.
- 4) The Contractor shall maintain a close relationship with the Cooperative's Superintendent of Vegetation Management to ensure schedules are met and to discuss problems, scheduling of work and other relevant items related to the scope of work described in the contract.
- 5) Unless other arrangements are made with the Cooperative's Superintendent of Vegetation Management, all work the Contractor performs on the Cooperative's system is to be completed Monday through Friday.
- 6) The relationship between the Cooperative and Lucas Tree is that of Independent Contractor. The Contractor may not represent himself as an employee of the Cooperative at any time.



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ELIZABETH LOFTON,

Plaintiff,

vs.

BERKELEY ELECTRIC COOPERATIVE,  
INC., AND JOHN LUCAS TREE  
EXPERT, CO.,

Defendants.

2018 CP 10-323  
IN THE COURT OF COMMON PLEAS

Civil Action No. 2018-CP-10-00323

**DEFENDANT BERKELEY ELECTRIC  
COOPERATIVE, INC.'S MOTION  
FOR SUMMARY JUDGMENT**

**YOU WILL PLEASE TAKE NOTICE** that pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, the Defendant Berkeley Electric Cooperative, Inc., by and through its undersigned attorneys, will move before the Presiding Judge at the Charleston County Courthouse, as soon as this matter may be heard, for an Order of Summary Judgment. This Motion is made on the grounds that, taking the facts in the light most favorable to the Plaintiff, there is no genuine issue of material fact that would lead a reasonable jury to believe that this Defendant is liable for the alleged damages to the subject property. As such, Defendant Berkeley Electric Cooperative, Inc. is entitled to judgment as a matter of law. This motion is based on SCRCF, Rule 56, the discovery in this action, and the depositions taken in this matter. The motion is further supported and explained in more detail in the Defendant's supporting Memorandum of Law that is being submitted separately but is hereby incorporated herein as if repeated verbatim.

[Signature block on the next page]

FILED  
2018 SEP 19 PM 3:18  
JULIE J. ARMSTRONG  
CLERK OF COURT  
pg00107

For

Pope D. Johnson, III, Bar No. 3048  
Attorney at Law  
1230 Richland Street  
Columbia, SC 29201  
803-799-9791  
803-253-6084 (fax)  
pope@popejohnsonlaw.com

John B. Williams, Esquire  
Williams & Hulst, LLC  
209 East Main Street  
Moncks Corner, SC 29461  
jbw@williamsandhulst.com

ATTORNEYS FOR DEFENDANT BERKELEY  
ELECTRIC COOPERATIVE INC.

Columbia, South Carolina  
September 18, 2018

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
CASE NO.: 2018-CP-10-00323

Elizabeth Lofton,

Plaintiff,

v.

Berkeley Electric Cooperative, Inc., and  
John Lucas Tree Expert, Co.,

Defendants.

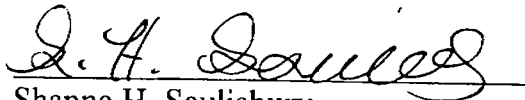
CERTIFICATE OF SERVICE

FILED  
2018 SEP 19 PM 3:19  
JULIE J. ARMSTRONG  
CLERK OF COURT

I hereby certify that on this 18th day of September, 2018, a copy of Defendant Berkeley Electric Cooperative, Inc.'s Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment was served on Michael A. Whitsitt, attorney for the Plaintiff and Sterling G. Davis, attorney for Defendant John Lucas Tree Expert, Co., in the above captioned matter by emailing and mailing same postage prepaid and addressed as follows:

Michael A. Whitsitt, Esq.  
1476 Ben Sawyer Blvd., Suite 3  
Mt. Pleasant, SC 29464  
mawhitsitt@gmail.com

Sterling G. Davis, Esq.  
1320 Main Street, 10<sup>th</sup> Floor  
Columbia, SC 29211  
sdavies@mgclaw.com

  
Shanna H. Saulisbury  
Paralegal to John B. Williams, Esq.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ELIZABETH LOFTON,

Plaintiff,

vs.

BERKELEY ELECTRIC COOPERATIVE,  
INC., AND JOHN LUCAS TREE  
EXPERT, CO.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2018-CP-10-00323

**DEFENDANT BERKELEY ELECTRIC  
COOPERATIVE, INC.'S  
MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT**

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Defendant Berkeley Electric Cooperative, Inc. ("BEC" or "Defendant"), by and through their undersigned counsel, respectfully submits this Memorandum of Law in Support of their Motion for Summary Judgment.

**FACTUAL BACKGROUND**

Plaintiff, Elizabeth Lofton, solely in an individual capacity, filed her First Amended Complaint on January 19, 2016.

In her Complaint, Plaintiff claims she owns a tract of land in Charleston County that has been damaged by acts of both defendants, Berkeley Electric Cooperative, Inc., ("BEC") and John Lucas Expert Co. ("Lucas Tree"). (See generally Complaint). Plaintiff asserts the following causes of action against BEC for trespass, conversion, negligence/gross negligence, and violation of South Carolina Timber statute. Plaintiff further alleges BEC coerced her into signing a right of way easement and BEC and/or Lucas Tree cut tress on her personal property outside of the easement. The case was later removed from the General Docket per Rule 40(j) of the SCRCF and restored earlier this year.

The plaintiff alleges that BEC and/or Lucas Tree cut trees on her personal property outside of the easement. (Complaint ¶ 15-17). However, Plaintiff does not own the property that is the subject of this action and therefore lacks standing to lawfully make these claims.<sup>1</sup>

Plaintiff readily admits the owner of the property in question is the Trust. (Elizabeth Lofton Deposition, p. 73, l. 3-6, See also Deed, Attached as Exhibit A). Plaintiff Lofton is the trustee and a member of the Trust benefitting herself, Sandy Lofton and Wayne Lofton. (Elizabeth Lofton Deposition, p. 73, l. 3-23). The Trust does not specifically spell out any portion of the land that the Plaintiff owns in an individual capacity; instead, it merely states that the proceeds should be “divided equally or as [the beneficiaries] see fit.” (*Id.* at l. 20). Plaintiff has never personally paid property taxes on the tracts of land in question and the Trust makes all such payments. (*Id.*, p. 74, l. 2-8). Furthermore, the Trust has a 100% interest in the property. (See Deed). In short, Plaintiff does not own the land individually and therefore does not have standing to file suit.

### ARGUMENT

Under Rule 56 of the South Carolina Rules of Civil Procedure, summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c) SCRPC. “In determining whether summary judgment is appropriate, the evidence and its reasonable inference must be viewed in a light most favorable to the non-moving party.” *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E. 2d 537, 545 (1991).

---

<sup>1</sup> By reason, if Plaintiff did not own the property, she could not sign an easement on the property. That issue is a separate and distinct action that has not been alleged by Plaintiff. Rather, Plaintiff continues to assert she owns the property.

Although facts and inferences to be drawn must be viewed in the light most favorable to the non-moving party, the non-moving party must still produce some evidence to support each element of each claim against the moving party; and show a material issue as to the contested elements. *See e.g., Bd of Trs. For the Fairfield County School Dist. v. State of South Carolina*, 409 S.C. 119, 761 S.E.2d 241 (2014); *Eadie v. Krause*, 381 S.C. 55, 671 S.E.2d 389 (S.C. Ct. App. 2008); *McLaughlin v. Williams*, 379 S.C. 451, 665 S.E.2d 667 (S.C. Ct. App. 2008).

### **Plaintiff Lacks Standing**

"To have standing, one must have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest." *Charleston County Sch. Dist. v. Charleston County Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999) (internal citation omitted). "A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Id.* at 181, 519 S.E.2d at 571 (quoting *Anchor Point, Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992)).

For a plaintiff to possess standing, three elements must be satisfied. *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 550 S.E.2d 287 (2001). First, the plaintiff must have suffered an injury-in-fact, or a particularized harm. *Id.* at 345 S.C. 601, 550 S.E.2d 291. Second, a causal connection must exist between the injury and the challenged conduct. *Id.* Third, it must be likely that a favorable decision will redress the injury. *Id.* A party seeking to establish standing carries the burden of demonstrating each of the three elements. *Id.*

Plaintiff filed suit individually and not on behalf of the Trust, yet readily admits the owner of the property in question is the Trust. (Elizabeth Lofton Deposition, p. 73 , l. 3-6, See also Deed). As a result, Plaintiff lacks standing under the first element of the test articulated in

*Sea Pines*. Plaintiff herself has not suffered an injury-in-fact. Rather, it is the Trust's property that allegedly has been damaged.<sup>2</sup>

**Plaintiff Has Failed to Produce Any Evidence to Support  
BEC Violated the Easement**

The easement, signed by Plaintiff, gives Defendants the right cut and trim trees and shrubbery to the extent necessary to keep them clear of the electric lines on or near the Trust property. Plaintiff has failed to show and has not produced evidence sufficient to demonstrate that her injuries resulted from BEC violating the easement. Without direct evidence, any and all allegations related to whether Defendants went outside the easement are speculative. While South Carolina adheres to the "scintilla of evidence" rule, it does not authorize the submission of speculative, theoretical, or hypothetical evidence, nor does it permit a verdict to stand upon conjecture or speculation. *Turner v. American Motorists Ins. Co.*, 176 S.C. 260, 262-263, 180 S.E. 55, 56 (1934). Plaintiff's failure to secure such evidence is a fatal blow to her suit.

**BEC Did Not Breach Any Duty To Plaintiff**

Plaintiff alleges that BEC was grossly negligent, willful, wanton, reckless, careless, and/or negligent in wrongfully converting Plaintiff's property, improperly destroying Plaintiff's property, destroying Plaintiff's property "beyond the extent necessary" to keep trees and shrubbery clear of said electric line or system, and in failing to check the relevant deeds to said properties over which an easement was sought.

As this Court is fully aware, the elements of a negligence cause of action are 1) a duty of care owed by the defendant to the plaintiff; 2) the defendant's breach of that duty by a negligent act or omission, i.e., failure to exercise the care of a reasonable man in the circumstances, and 3)

---

<sup>2</sup> BEC believes it is entitled to summary judgment on all of Plaintiff's claims based on lack of standing. In the alternative, BEC also hereby moves for summary judgment on the claims asserted by Plaintiff as discussed below.

damage proximately resulting from the breach of duty. *Snow v. City of Columbia*, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). The plaintiff bears the burden of proof on all three elements, including breach. *Id.* Failure by a plaintiff to prove any one of these elements defeats the claim. *Rayfield v. S.C. Dept. of Corrections*, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988).

Assuming arguendo Plaintiff is the owner of the property, she gave express permission to BEC in that capacity to "cut and trim trees and shrubbery to the extent necessary to keep them clear of said electric line or system." (Easement, Exhibit B). Defendant Lucas Tree was authorized to be on the property as a subcontractor for BEC, and admittedly had a duty to perform the job for which they were hired ably and without damaging property outside of the easement. Plaintiff has not offered any proof that BEC went outside the confines of the easement.

**S.C. Code Ann § 16-11-580**  
**Is Inapplicable To This Matter**

Plaintiff also alleges a violation of S.C. Code Ann § 16-11-580, a criminal statute which makes it unlawful for a person to knowingly and willfully "cut, destroy, or remove forest products without the consent of the landowner" or "hire or counsel another person to cut, destroy, or remove forest products without the consent of the landowner." Plaintiff additionally relies on S.C. Code Ann § 16-11-615, which states "in all criminal prosecutions for violation of the provisions... relating to cutting or destroying timber, the defendant may plead the payment of not to exceed exactly three times the fair market value of the timber as determined by a registered forester..." (emphasis added). § 16-11-615 also provides that "if it is necessary to institute civil action to recover the fair market value of the timber, ...the owner, in case of

private lands, shall receive damages of not to exceed exactly three times the fair market value of the timber established by a registered forester if judgment is in favor of the State or the owner.”

Defendants BEC and Lucas Tree were never prosecuted for a violation of S.C. Code Ann § 16-11-580, rendering this section inapplicable to the instant matter. While the statute does provide for a civil action to recover the fair market value of the timber, this section is only applicable to “criminal prosecutions” for violations of § 16-11-580. Because there was never a prosecution of BEC, Plaintiff’s cause of action under § 16-11-580 must fail as a matter of law.

### CONCLUSION

Plaintiff lacks standing to bring the claims asserted in her Amended Complaint. In the alternative, Plaintiff has failed to allege specific facts sufficient to show that BEC violated the easement granted to BEC by Plaintiff. Thus, for the reasons stated above, the motion for summary judgment should be granted, and Plaintiff’s claims against BEC should be dismissed.

for

Pope D. Johnson, III, Bar No. 3048  
Attorney at Law  
1230 Richland Street  
Columbia, SC 29201  
803-799-9791  
803-253-6084 (fax)  
pope@popejohnsonlaw.com

John B. Williams, Esquire  
Williams & Hulst, LLC  
209 East Main Street  
Moncks Corner, SC 29461  
jbw@williamsandhulst.com

ATTORNEYS FOR DEFENDANT BERKELEY  
ELECTRIC COOPERATIVE INC.

Columbia, South Carolina  
September 18, 2018

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE MATTER OF: IRENE N. LOFTON

PROBATE COURT

DEED OF DISTRIBUTION

CASE NUMBER: 2010ES10-1065

RMC BK 0332 Pg 617 : Pg 1 \*

WHEREAS, the decedent died on June 18, 2010, and,

WHEREAS, the estate of the decedent is being administered in the Probate Court for Charleston County, South Carolina, in File No. 2010ES10-1065, and,

WHEREAS, the grantee herein is either a beneficiary or heir at law, as appropriate, of the decedent; and,

WHEREAS, the undersigned Personal Representative is appointed and qualified fiduciary in this matter; and,

NOW, THEREFORE, in accordance with the laws of the State of South Carolina, the Personal Representative has bargained, sold and released, and by these Presents do grant, bargain, sell and release to:

Name: ELIZABETH A. LOFTON, Successor Trustee of the 100% interest  
Irene N. Lofton Revocable Living Trust UTD 2/12/2007  
and restated 8/27/2008  
Address: 10027 Randall Rd., McClellanville, SC 29458

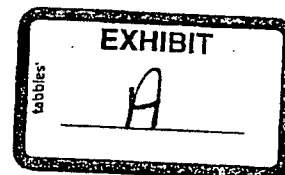
the following described property:

See attached Exhibit A

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises/Property belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises/Property unto the said ELIZABETH A. LOFTON, Successor Trustee of the Irene N. Lofton Revocable Living Trust UTD 2/12/2007 and restated 8/27/2008, her successors and assigns forever.

SEP 20 2018



IN WITNESS WHEREOF, the undersigned, as Personal Representative of the estate of  
the decedent, has executed this Deed, this 21<sup>st</sup> day of May, 2013.

RMC BK 0332 Pg 617 : pg 2 \*

SIGNED, SEALED AND DELIVERED in the  
PRESENCE OF:

Lilly Odell Healy

Elizabeth Anne Lofton P.R.  
ELIZABETH ANNE LOFTON, Personal  
Representative for the Estate of Irene N. Lofton

Shirley B. Buckington

STATE OF SOUTH CAROLINA

PROBATE

COUNTY OF CHARLESTON

PERSONALLY appeared before me Lilly Odell Healy, and made oath  
that he/she saw the within named Personal Representative(s) sign, seal, and as their act and  
deed, deliver the within written Deed, and that he/she with Shirley B. Buckington  
witnessed the execution thereof.

Lilly Odell Healy

SWORN TO BEFORE ME this 21<sup>st</sup> day of  
May, 2013.

Shirley B. Buckington  
Notary Public for South Carolina

My Commission Expires: 10/8/2013

Send tax bill to: 10027 Randall Rd., McClellanville, SC 29458

EXHIBIT A

RMC BK 00332 Pg 617 : pg 3

All that lot, piece, parcel or tract of land, with the buildings and improvements thereon, situate, lying and being in St. James Santee Parish, County of Charleston, State of South Carolina, containing 13.06 acres, more or less, known as Lot 2 of Grantor's property, butting and bounding as follows: beginning at a #5 rebar on Old Georgetown Road, thence 338.51 feet South 45°52'03" West along the right of way for said road to a #4 rebar; thence 74.11 feet North 40°45'19" West to a ¾" pipe; thence 299.67 feet North 35°50'00" West to a ¾" pipe; thence 145.78 feet North 26°38'11" West to a ¾" pipe; thence 139.37 feet North 26°25'44" West to a ¾" pipe; thence 327.94 feet North 27°48'03" West to a ¾" pipe; thence 226.02 feet North 28°49'07" West to a ¾" pipe; thence 215.21 feet North 27°15'13" West to a #4 rebar; thence 496.85 feet North 36°22'42" West to a 2" x ½" iron; thence 294.40 feet North 27°16'58" East bordering lands of Francis Marion National Forest to a #5 rebar; thence 1,999.55 feet South 34°01'30" East to the point of beginning; said property being more fully shown as Lot 2 on a plat of property of Mary L. Carroll & Irene N. Lofton by James O. McClellan, III, PE and LS, dated November 2, 2005, revised December 7, 2005, and recorded on July 7, 2006, in Plat Book DF, Page 164, Charleston County RMC Office.

Together with a perpetual non-exclusive easement over Lot 1 on the said plat to allow vehicular, pedestrian and utility access from Old Georgetown Road across Lot 1 to Lot 2, as set forth more fully in the Deed from Mary L. Carroll and Irene N. Lofton to Mary L. Carroll, dated December 27, 2006, and recorded December 28, 2006, in Book C610, Page 571, Charleston County RMC Office.

Being the same property conveyed to Irene N. Lofton by Deed of Mary L. Carroll and Irene N. Lofton, dated December 27, 2006, and recorded December 28, 2006, in Book C610, page 576, Charleston County RMC Office.

TMS No. 731-00-00-070

THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Location Number 293  
RIGHT OF WAY EASEMENT



KNOW ALL MEN BY THESE PRESENTS that I (we) ELIZABETH LOFTON

County of CHARLESTON, State of South Carolina, hereinafter referred to as Grantor(s) for the sum of One Dollar (\$1.00) to me (us) in hand paid, receipt of which is hereby acknowledged, does hereby grant unto BERKELEY ELECTRIC COOPERATIVE, INC., a corporation, whose Post Office Address is Moncks Corner, South Carolina, hereinafter called Cooperative, and to its Successors or Assigns, a right-of-way over route selected by Cooperative, having a width of TWENTY feet, that is to say TEN feet either side of centerline, upon, over and across land of Grantor(s), more particularly described as follows, to-wit:

A tract of land approximately 13.06 acres in CHARLESTON County, in or near McClellanville community and bounded as follows:

North by U.S.F.S.; Aiden's Way

East by Aiden's Way; Old Georgetown Rd.

South by Old Georgetown Rd.

West by Gary E. Seale; U.S.F.S.

Power lines are to be relocated to accommodate possible widening of Aiden's Way if needed.

together with the right to place, construct, operate, maintain, relocate, patrol and replace thereon and in or upon all streets, roads or highways abutting said lands an electric transmissions or distribution line or system and communications system, including the right to erect, install and construct, either overhead or underground, its electrical facilities and other transmission line structures, wires, cables and any necessary appurtenances and equipment deemed by the Cooperative to be necessary therefor, as well as the right to install, maintain and use anchors and guy wires on lands adjacent to the right-of-way herein granted; and to cut and trim trees and shrubbery to the extent necessary to keep them clear of said electric line or system and communication system and to cut down, from time to time, all dead, leaning or dangerous trees that are tall enough to strike the wires in falling.

Together also with the right, from time to time, to redesign, rebuild or alter said lines and to install such additional lines, apparatus and equipment as the Cooperative may at any time deem necessary, and the right to remove any line or any part thereof.

Together also with all rights of ingress and egress necessary for the full and complete use, occupancy, and enjoyment of the easement hereby granted and all rights and privileges incident thereto.

SEP 20 2018



Grantor(s) agrees that all poles, wires and other facilities, including any main service entrance equipment installed on the above described lands at the Cooperative's expense, shall remain the property of the Cooperative, removable at the option of the Cooperative upon termination of service to or on said lands.

PROVIDED, HOWEVER, any damage to the property of Grantor(s) (other than the property cleared or removed as hereinafter provided) caused by the Cooperative in the course of constructing, rebuilding or repairing said lines shall be borne by the Cooperative.

TO HAVE AND TO HOLD, all the singular the aforesaid rights and privileges unto the Cooperative, its Successors and Assigns, as aforesaid.

And Grantor(s) agree(s) to warrant and forever defend the above granted rights against himself or his heirs and against any other person lawfully claiming or to plain the same or any part thereof.

It is further understood that whenever necessary, words used in this instrument in the singular shall be construed to read in the plural and that words used in the masculine gender shall be construed to read in the feminine.

IN WITNESS WHEREOF, the undersigned has set this hand and seal this 17<sup>th</sup> day of July, 20 13.

SIGNED, SEALED AND DELIVERED  
IN THE PRESENCE OF

Candler H. Felder  
Henry R. Easter Jr.

Elizabeth Lofton  
Elizabeth Lofton (L.S.)  
Elizabeth Lofton (L.S.)

STATE OF SOUTH CAROLINA  
COUNTY OF BERKELEY

PERSONALLY appeared before me Candler H. Felder  
and made oath that (s)he saw the within named Elizabeth Lofton

sign the within instrument, and as h act and deed, deliver the Right-of-Way for the uses and purposes therein mentioned, and that (s)he with Henry R. Easter Jr. in the presence of each other, witnessed the due execution thereof.

SWORN to and subscribed before me this 17<sup>th</sup> day of July, 20 13.

Henry R. Easter Jr.  
NOTARY PUBLIC FOR SOUTH CAROLINA  
My Commission Expires: 4/4/2021

RETURN TO:  
BERKELEY ELECTRIC COOPERATIVE, INC.  
P.O. Box 1234  
Moncks Corner, S.C. 29461

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
CASE NO.: 2018-CP-10-00323

Elizabeth Lofton )

**PLAINTIFF'S MOTION TO AMEND**

Plaintiff )

-vs- )

BERKELEY COUNTY ELECTRIC )  
COOPERATIVE, INC. and )  
JOHN LUCAS TREE EXPERT CO. )

Defendant(s) )

FILED  
2018 NOV 26 PM 2:00  
JULIA J. HARRIS  
CLERK OF COURT

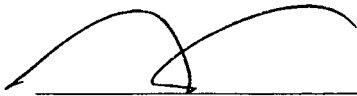
**TO: POPE D. JOHNSON III, ATTORNEY FOR DEFENDANT BERKELEY and  
STERLING GRAYDON DAVIES, ATTORNEY FOR DEFENDANT JOHN LUCAS  
TREE EXPERT CO.:**

YOU WILL PLEASE TAKE NOTICE that the Petitioner above-named, by and through the undersigned counsel, on the tenth day after service hereof or at such time and place as the Court may set, will move before the Court pursuant to Rule 15 of the South Carolina Rules of Civil Procedure for an Order amending the Petition; wherefore, Plaintiff intends only to amend to change the named Plaintiff in the lawsuit to the Trust for which current Plaintiff is the trustee. This motion is based upon the following grounds:

1. That the amendment of the petition shall be freely given when justice so requires and does not prejudice any other party.

The undersigned counsel for Petitioner hereby certifies, pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, that consultation with opposing counsel will take place prior to hearing of this matter.

(REMAINDER OF PAGE LEFT BLANK; SIGNATURE BLOCK ON NEXT PAGE)



Michael A. Whitsitt  
1476 Ben Sawyer Boulevard, Suite 3  
Mt. Pleasant, South Carolina 29464  
(843)696-8904  
*ATTORNEY FOR PLAINTIFFS*

Nov 26, 2018  
Mount Pleasant, South Carolina

Counsel Served: Sterling G Davies, Esquire  
1320 Main Street, 10<sup>th</sup> Floor (29201)  
Post Office Box 12519  
Columbia, South Carolina 29211  
*Attorney for Defendant John Lucas*

Pope D. Johnson III, Esquire  
1230 Richland Street  
Columbia, South Carolina 29201  
*Attorney for Defendant Berkeley*

CERTIFICATE OF SERVICE

The undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by **hand delivery** or by depositing a copy of the same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this  
26 day of November, 2018



Michael A. Whitsitt

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
CASE NO.: 2018-CP-10-00323

Elizabeth Lofton )

Plaintiff )

-vs- )

BERKELEY COUNTY ELECTRIC )  
COOPERATIVE, INC. and )  
JOHN LUCAS TREE EXPERT CO. )

Defendant(s) )

**PLAINTIFF'S RESPONSE  
TO DEFENDANTS' MOTIONS  
FOR SUMMARY JUDGMENT**

2018 NOV 26 PM 2:01  
CLERK OF COURT

**TO: POPE D. JOHNSON III, ATTORNEY FOR DEFENDANT BERKELEY and  
STERLING GRAYDON DAVIES, ATTORNEY FOR DEFENDANT JOHN LUCAS  
TREE EXPERT CO.:**

Plaintiff Elizabeth Lofton (hereinafter "Plaintiff"), by and through her undersigned attorney, requests the Court to enter an Order denying Defendants' Motions for Summary Judgment. Plaintiff concedes that, as named, she lacks standing to bring her claim in a personal capacity; However, Plaintiff would show that she is the executrix of the estate and that she has the right to bring the suit as the executrix of her mother's estate and that she is also the trustee of the trust that holds the property at issue. Plaintiff would show that a simple amendment of the named Plaintiff would remedy this defect. Plaintiff would request leave of the court to amend. Plaintiff would argue her intention to amend to change the Plaintiff to herself as the named trustee acting on behalf of the trust would not prejudice the Defendants, because the Defendants were already aware of the nature of the claims being brought against them. See Collins Entm't, Inc. v. White, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005) (finding that the prejudice that the civil procedure rules envision, as would warrant denial of a motion to amend the pleadings, is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it).

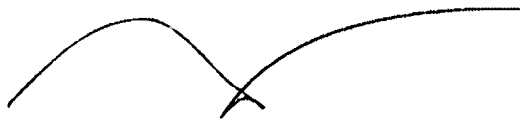
Secondarily, Plaintiff would show the court that the law favors amendment were possible over summary judgment: Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.; Pruitt v. Bowers, 330 S.C. 483, 489,

499 S.E.2d 250, 253 (Ct. App. 1998) ("It is well established that a motion to amend is addressed to the sound discretion of the [circuit court] . . ."). Gregory v. Riley Pope & Laney, LLC (S.C. App., 2017)

Defendants' next claim is that Plaintiff improperly cited the statute regarding timber damages. Plaintiff denies that they did not properly reference the timber statute, and would show the court that the statute is applicable and that they properly referenced the statute in their complaint: S.C. Code Section 16-11-615 states in part the following: If it is necessary to institute civil action to recover the fair market value of the timber, the State, in case of state lands, and the owner, in case of private lands, shall receive damages of not to exceed exactly three times the fair market value of the timber established by a registered forester if judgment is in favor of the State or the owner. Furthermore, Plaintiff has properly stated the elements necessary to recover under this statute, which Defendants do not dispute.

Lastly, Plaintiff would show the court that the only remaining issue for summary judgment is whether or not the Plaintiff has produced evidence to support whether or not the Defendants had a valid easement and whether or not they violated said easement and/or caused damage to Plaintiff's property by way of negligence or any other theory.

In regard to Plaintiff's remaining claims regarding the actual damage to her property, Plaintiff can demonstrate the following: 1) That she did not give them express permission to the extent which they Defendants claim and that she never would have given them permission for the easement that was recorded (Plaintiff Dep. 5:4-16); 2) That Defendants in fact had no right at all to cut any trees (Plaintiff Dep 9:6-12 & 9:14-25); 3) That the Defendants in so doing actually went beyond the bounds even of the easement that was recorded (Plaintiff Dep 9:14-25); 4) That they cut the trees in such a way that large pines and oaks fell back into the property causing damage (Plaintiff Dep 9:14-25); 5) That the easement was obtained by Defendant BEC in an underhanded and deceitful manner which would constitute fraud and fraudulent inducement. (Plaintiff Dep. 20:3-25) and 6) That the Plaintiff instructed the Defendants to stop all work and they ignored her; Plaintiff Dep. 23:12-19)



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*ATTORNEY FOR PLAINTIFFS*

Nov 26, 2018  
Mount Pleasant, South Carolina

Counsel Served: Sterling G Davies, Esquire  
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Post Office Box 12519  
Columbia, South Carolina 29211  
*Attorney for Defendant John Lucas*

Pope D. Johnson III, Esquire  
1230 Richland Street  
Columbia, South Carolina 29201  
*Attorney for Defendant Berkeley*

CERTIFICATE OF SERVICE

The undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action **by hand delivery** or by depositing a copy of the same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this

26 day of November, 2018

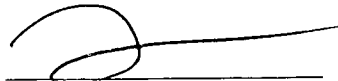
  
\_\_\_\_\_  
Michael A. Whitsitt

**EXHIBIT A: Selected Portions of Plaintiff's Deposition**

1 Q: All right. I want to start out by having you  
2 tell me about the property that is involved in  
3 this dispute.

4 A: Well, it's been passed down in my family for  
5 hundreds of years, and it's our farm property.  
6 It has been subdivided for a future  
7 subdivision, and I guess what the contention is  
8 that when the prop- -- it's Aiden's Way is the  
9 roadway into the property, and my mother gave  
10 my cousin one side of the farm, and we retained  
11 the other side of the farm. But she gave it  
12 Mary on the understanding, and it's written and  
13 recorded in the RMC office, that all right of  
14 ways, all water lines, any poles, anything goes  
15 on Mary's side of the property. Nothing is to  
16 go on our side of the property.

17 Q: When you say our and we, our property, whose  
18 property are you referring to?

19 A: Well, that would include my brother, Sandy  
20 Lofton, and my brother, Wayne Lofton.

21 Q: And how much property do they own?

22 A: We're dividing it equally in thirds.

23 Q: Well, do you have a deed to any property  
24 yourself?

25 A: Yes, sir.



1 mother's estate, you're the trustee and the  
2 trust owns the farm property?

3 A: Yes, sir.

4 Q: And how do you claim the farm property was  
5 impacted by actions of the defendant?

6 A: Well, for one thing, it was a trespassing.  
7 Another thing, they cut trees when they  
8 specifically told me there were no trees gonna  
9 be cut. And there was no sense in it 'cause  
10 they had all the right of way on Mary's side.  
11 That's what it was designated for, in the  
12 recorded papers.

13 Q: So ---

14 A: And also, when they cut the trees, they cut  
15 trees that my great-grandfather had planted,  
16 pecans and oaks. I didn't think you were even  
17 allowed to cut large trees like that, and they  
18 fell them back into the farm property instead  
19 of laying them along the roadway where they  
20 could easily be cleaned up. And I have a  
21 nursery that I go and dig these little  
22 underlings and use those to provide stock for  
23 my nursery. And those huge 60- to 80-foot pine  
24 trees and gum trees that they cut and fell back  
25 into the property, crushed all those little



1 Q: And in exchange, he lives there?

2 A: Yes, sir.

3 Q: All right, were there any other witnesses to  
4 the conversation with Bud Easley (sic) on the  
5 first visit?

6 A: No, sir.

7 Q: All right. I want you to tell me everything  
8 you can remember that occurred during that that  
9 was said or done during that conversation.

10 A: Specifically, he approached me about allowing  
11 them to get a ten-foot easement on our side of  
12 the property in the event that they had a  
13 catastrophic incident, whatnot, and needed to  
14 perhaps turn some equipment around. There was  
15 never any mention of cutting the first tree.

16 Q: So what -- he asked you what?

17 A: He ask about getting a ten-foot easement to  
18 have me sign for a ten-foot easement in the  
19 event that they had to turn around large  
20 equipment or something because problem being,  
21 my cousin, Mary received half of the farm, but,  
22 and with the requirement, that she put the rock  
23 road all the way back to the Francis Marion  
24 Forest, where our property line ends. So that  
25 we'd have access to all of our properties.



1 Well, she put the road about maybe two-thirds  
2 of the way back and sold the rest of the road  
3 to some entity and he has fenced off the road,  
4 so there's no turnabout for any large  
5 equipment. So, you know, I could understand  
6 where he would be concerned about having some  
7 place or space to turn the equipment around in,  
8 and that was what we had discussed was just a  
9 ten-foot easement. And then, I said, well, you  
10 know, we definitely don't want any poles on our  
11 side the road. You do understand that, and I  
12 brought out the contract and showed him where  
13 it was written right there that everything is  
14 to go on Mary's side of the road,. And he then  
15 -- and I brought out a plat and he then pointed  
16 where each one of the poles were going on  
17 Mary's side of the road.

18 Q: I thought you said he approached you about an  
19 easement to turn around on.

20 A: He asked me about the -- getting a ten-foot  
21 easement on our side in the event that they  
22 needed to turn equipment around or something,  
23 you know, like Hugo, a catastrophic storm or  
24 something and they've got to get big equipment  
25 in there, and they may have to have access to



1 more than just the 30-foot road.

2 Q: Is the road 30 foot wide?

3 A: Yes, sir, it is.

4 Q: All right. So did he ask you or discuss with  
5 you anything other than an easement for the  
6 turning around of equipment?

7 A: He asked me at one point if I would like to  
8 give Berkeley 20 feet of a right of way and I  
9 said, why? Are you offering to come in there  
10 and landscape it real nice and maintain it? He  
11 says, no, we couldn't do that. I said, well  
12 absolutely not then, that would be ridiculous.

13 Q: Well was -- what was he wanting an easement for  
14 20 feet for?

15 A: I have no idea. He didn't say. He just asked  
16 me if I would be willing to give that away, and  
17 I said, absolutely not.

18 Q: Were the poles that were in existence on the  
19 roadway at that time, on your side of the road?

20 A: No sir, there was nothing there. It was virgin  
21 land.

22 Q: Where did your -- where was the poles that  
23 served your home?

24 A: We haven't built anything on that property.

25 Q: You're talking about the farm.



1 straight over. So, it's very odd looking and  
2 being a landscape designer, that bothered me.  
3 So, I asked him if I could make a time and make  
4 myself present if they wouldn't correct the  
5 shape of that tree. And he said, oh,  
6 absolutely, we'll be happy to do that for you.

7 Q: Whose tree is that?

8 A: Well, I would imagine it would be the county's,  
9 but I know they've done a lot better job on  
10 other trees than what they did to this one.

11 Q: All right, do you recall anything else being  
12 discussed with Bud Easley (sic) when he met  
13 with you, other than what you've now told me?

14 A: The only other item was after we he pointed out  
15 the poles on Mary's side, I said, well due to  
16 our situation in trying to resolve the roadway,  
17 going back to get Mary to retrieve that  
18 property, and put that road all the back to un-  
19 handlock our side, I said I would allow you to  
20 a temporary pole at the very back where the  
21 fence line goes across the roadway now.

22 Q: Is that on the farm property?

23 A: Yes, sir, that would have been on the farm  
24 property.

25 Q: You told them they could put a temporary pole?



1       like, what? What are you talking about? He  
2       says they're cutting all your trees down? I  
3       said, what, you've got to be kidding me. So,  
4       I ran down there to check it out and, sure  
5       enough, they were cutting along.

6       Q:    When was this?

7       A:    It was probably -- I don't know for certain,  
8       but it, you know, sometime following that,  
9       maybe a week or two after meeting with Bud  
10      Easley (sic), could have been three. I'm, I'm  
11      not certain. That's been some time ago.

12     Q:    So, two or three weeks after you met with Bud  
13     Easley (sic) the first -- the one time you met  
14     with him ---

15     A:    Yes, sir.

16     Q:    --- you -- your neighbor reported to you they  
17     were cutting trees on the farm property?

18     A:    Correct.

19     Q:    And had you had any communication with anyone  
20     from the co-op between the time you met with  
21     Bud Easley (sic) and you had the report they  
22     were cutting trees on your property?

23     A:    No, sir.

24     Q:    All right, so your neighbor tells you that,  
25     tell me what you do? Who was the neighbor?



1 A: Dwayne and Ruthie Merritt, M-E-R-R-I-T-T. And  
2 Dwayne is the harbor master in McClellanville  
3 and Ruthie works at the hospital, and that's --  
4 they live in the house that my daddy was born  
5 in, right across from the farm.

6 Q: And the wife -- the man or the woman came and  
7 told you they were cutting?

8 A: Dwayne, the man.

9 Q: All right. And so what did you do when Dwayne  
10 told you that?

11 A: I jumped in my truck and went down there.

12 Q: And what did you see when you got there?

13 A: I saw them cutting trees.

14 Q: Let me ask you this, had you planted any of  
15 those trees?

16 A: We had planted some of those trees. We had a  
17 Christmas tree farm there prior.

18 Q: So, you -- how -- what trees had you planted  
19 that were cut?

20 A: Well, those were actually smashed by the huge  
21 canopies of the other trees that they had cut.

22 Q: Okay, my question was did you plant any of the  
23 trees that were cut?

24 A: No, sir, I did not.

25 Q: All right. So, you run down there and you see



1           them cutting trees, can you identify who was  
2           cutting the trees?

3       A:    All I saw was Berk -- several Berkeley Electric  
4           trucks,       and I asked to speak to the  
5           supervisor, and I don't recall his name now,  
6           but I explained to him that they were not  
7           supposed to be on our property and they needed  
8           to stop what they were doing.

9       Q:    And did they?

10      A:    They did for a short period of time.

11      Q:    How long?

12      A:    I'm not certain because I went back two days  
13           later and they were back there cutting again.  
14           So, I went and posted notes. At that time,  
15           they were starting to put poles in, and I  
16           posted notes on the poles to cease all work  
17           until they contacted myself and my attorney,  
18           Sherrisse, and I gave them the numbers to  
19           contact us.

20      Q:    And, did they?

21      A:    Berkeley did not.       My attorney finally  
22           contacted me, and this was several weeks  
23           later, that I finally got a copy of the  
24           document that I supposedly signed, and I had to  
25           get it through my attorney. They never did



1           revocable living trust.   Isn't that what it  
2           says?

3       A:    Yes, sir.

4       Q:    So    this    is    the    distribution,    deeded  
5           distribution transferring the property, the  
6           farm property, to you as trustee?

7       A:    I believe this is on the Randall Road property.  
8           Is it not?

9       Q:    You tell me.

10      A:    This has got to be the farm 'cause Mary's  
11           involved.

12      Q:    So is that ---

13      A:    But, this is just because it went into the  
14           trust account and I am the trustee of those  
15           properties.

16      Q:    What is the trust -- what does the trust say  
17           about when it's to be distributed and to who  
18           it's to be distributed?

19      A:    It to be distributed amongst myself and my  
20           brothers, and as we see fit.   They're pretty  
21           open, you know, on what we decide to do with  
22           it.

23      Q:    Do you have a copy of the trust?

24      A:    I do.

25      Q:    Could you provide it to your lawyer so we can



2018-CP-10-323

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ELIZABETH LOFTON,

Plaintiff,

vs.

BERKELEY ELECTRIC COOPERATIVE,  
INC. AND JOHN LUCAS TREE EXPERT,  
CO.,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2018-CP-10-00323

**ORDER GRANTING SUMMARY  
JUDGMENT**

FILED  
2018 FEB 22 PM 12:23  
JULIE J. ARMSTRONG  
CLERK OF COURT

This matter is currently before the Court on motions for summary judgment filed by both Defendants. A hearing on the motions was held before the undersigned on November 26, 2018. After consideration of the pleadings, discovery, deposition testimony, applicable South Carolina common law and statutory law, as well as the evidence in the record, Defendants' motions for summary judgment are granted for the reasons set out below.

**FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff, Elizabeth Lofton, solely in an individual capacity, filed her First Amended Complaint on January 19, 2016. The case was later removed from the General Docket per Rule 40(j) of the SCRCF and restored by consent order on January 16, 2018.

In her Complaint, Plaintiff claims she owns a tract of land in Charleston County that has been damaged by acts of both defendants, Berkeley Electric Cooperative, Inc. ("Berkeley") and John Lucas Tree Expert Company ("Lucas Tree"). Plaintiff asserts the following causes of action against Lucas Tree: trespass, conversion, negligence/gross negligence, and violation of South Carolina Timber statute. Plaintiff further alleges Berkeley coerced her into signing a right of way

easement and Berkeley and/or Lucas Tree cut trees on her personal property outside of the easement.

Lucas Tree filed a motion for summary judgment on August 31, 2018. Berkeley filed their motion for summary judgment on September 19, 2018. Both Defendants argued, in part, that the true owner of the property at issue is the Irene N. Lofton Revocable Living Trust (“the Trust”).

### **LEGAL STANDARD**

Under Rule 56 of the South Carolina Rules of Civil Procedure, summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c) SCRCPP. “In determining whether summary judgment is appropriate, the evidence and its reasonable inference must be viewed in a light most favorable to the non-moving party.” *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E. 2d 537, 545 (1991).

Although facts and inferences to be drawn must be viewed in the light most favorable to the non-moving party, the non-moving party must still produce some evidence to support each element of each claim against the moving party; and show a material issue as to the contested elements. See e.g., *Bd of Trs. For the Fairfield County School Dist. v. State of South Carolina*, 409 S.C. 119, 761 S.E.2d 241 (2014); *Eadie v. Krause*, 381 S.C. 55, 671 S.E.2d 389 (S.C. Ct. App. 2008); *McLaughlin v. Williams*, 379 S.C. 451, 665 S.E.2d 667 (S.C. Ct. App. 2008).

### **ANALYSIS**

“To have standing, one must have a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest.” *Charleston County Sch. Dist. v. Charleston County*

|                                       |   |                                     |
|---------------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA               | ) | IN THE COURT OF COMMON PLEAS        |
|                                       | ) | 9th JUDICIAL CIRCUIT                |
| COUNTY OF <u>CHARLESTON</u>           | ) |                                     |
|                                       | ) | CASE NO.: <u>2018 -CP-10-00323</u>  |
| <u>ELIZABETH LOFTON</u>               | ) | <b>MOTION AND ORDER INFORMATION</b> |
| Plaintiff,                            | ) | <b>FORM AND COVERSHEET</b>          |
| vs.                                   | ) |                                     |
|                                       | ) |                                     |
| BERKELEY COUNTY ELECTRIC              | ) |                                     |
| COOPERATIVE, INC. and JOHN LUCAS TREE | ) |                                     |
| EXPERT CO.                            | ) |                                     |
| Defendant.                            | ) |                                     |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------|--------------------------------------------------------------|--------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------|--------------------------------------------------------|----------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------|---------------------------------------|
| Plaintiff's Attorney:<br><u>Michael A. Whitsitt, Bar No. 100323</u><br>Address:<br><u>1476 Ben Sawyer Boulevard, Suite 3</u><br>Phone: <u>8436968904</u> Fax _____<br>E-mail: <u>mawhitsitt@gmail.com</u> Other: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Defendant's Attorney:<br>_____, Bar No. _____<br>Address: _____<br>Phone: _____ Fax _____<br>E-mail: _____ Other: _____ |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| <input checked="" type="checkbox"/> <b>MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)</b><br><input type="checkbox"/> <b>FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)</b><br><input type="checkbox"/> <b>PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| <b>SECTION I: Hearing Information</b><br>Nature of Motion: <u>Motion to Reconsider</u><br>Estimated Time Needed: <u>20 min</u> Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| <b>SECTION II: Motion/Order Type</b><br><input checked="" type="checkbox"/> Written motion attached<br><input type="checkbox"/> Form Motion/Order<br>I hereby move for relief or action by the court as set forth in the attached proposed order.<br><div style="text-align: center; margin-top: 20px;"> <br/>         Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant       </div> <div style="text-align: right; margin-top: 10px;"> <u>March 4, 2019</u><br/>         Date submitted       </div>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| <b>SECTION III: Motion Fee</b><br><input checked="" type="checkbox"/> PAID – AMOUNT: \$ _____<br><input type="checkbox"/> EXEMPT: (check reason) <table style="margin-left: 20px; border: none;"> <tr> <td><input type="checkbox"/> Rule to Show Cause in Child or Spousal Support</td> </tr> <tr> <td><input type="checkbox"/> Domestic Abuse or Abuse and Neglect</td> </tr> <tr> <td><input type="checkbox"/> Indigent Status    <input type="checkbox"/> State Agency v. Indigent Party</td> </tr> <tr> <td><input type="checkbox"/> Sexually Violent Predator Act    <input type="checkbox"/> Post-Conviction Relief</td> </tr> <tr> <td><input type="checkbox"/> Motion for Stay in Bankruptcy</td> </tr> <tr> <td><input type="checkbox"/> Motion for Publication    <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)</td> </tr> <tr> <td><input type="checkbox"/> Proposed order submitted at request of the court; or,<br/>             reduced to writing from motion made in open court per judge's instructions</td> </tr> <tr> <td>Name of Court Reporter: _____</td> </tr> <tr> <td><input type="checkbox"/> Other: _____</td> </tr> </table> |                                                                                                                         | <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support | <input type="checkbox"/> Domestic Abuse or Abuse and Neglect | <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party | <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief | <input type="checkbox"/> Motion for Stay in Bankruptcy | <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) | <input type="checkbox"/> Proposed order submitted at request of the court; or,<br>reduced to writing from motion made in open court per judge's instructions | Name of Court Reporter: _____ | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| <input type="checkbox"/> Domestic Abuse or Abuse and Neglect                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| <input type="checkbox"/> Motion for Stay in Bankruptcy                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| <input type="checkbox"/> Proposed order submitted at request of the court; or,<br>reduced to writing from motion made in open court per judge's instructions                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| Name of Court Reporter: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| <input type="checkbox"/> Other: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| <b>JUDGE'S SECTION</b><br><input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | JUDGE CODE _____<br><br>Date: _____                                                                                     |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |
| <b>CLERK'S VERIFICATION</b><br><br>Collected by: _____ Date Filed: _____<br><input type="checkbox"/> MOTION FEE COLLECTED: \$ _____<br><input type="checkbox"/> CONTESTED – AMOUNT DUE: \$ _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                         |                                                                         |                                                              |                                                                                                  |                                                                                                        |                                                        |                                                                                                                |                                                                                                                                                              |                               |                                       |

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
CASE NO.: 2018-CP-10-00323

ELIZABETH LOFTON )

**PLAINTIFF'S NOTICE OF MOTION AND  
MOTION TO RECONSIDER  
SUMMARY JUDGMENT  
(ORAL ARGUMENT REQUESTED)**

Plaintiff )

-vs-

BERKELEY COUNTY ELECTRIC )  
COOPERATIVE, INC. and )  
JOHN LUCAS TREE EXPERT CO. )

Defendant(s) )

FILED  
2019 MAR -4 PM 3:58  
JULIE J. ARMSTRONG  
CLERK OF COURT

**TO: POPE D. JOHNSON III, ATTORNEY FOR DEFENDANT BERKELEY and  
STERLING GRAYDON DAVIES, ATTORNEY FOR DEFENDANT JOHN LUCAS  
TREE EXPERT CO.:**

**BE ADVISED THAT** the Plaintiff/Appellant pursuant to SCRCP 59 and 60, by and through his undersigned attorney, will move before the presiding Judge in the Court of Common Pleas in Charleston, South Carolina on the tenth day after the date of this Motion, or as soon thereafter as may be heard for relief from the NOVEMBER 9, 2018 ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT. Specifically, the Plaintiff will request reconsideration of the order. This motion is made on the following grounds:

- 1) The order states that the courts decision was based on the analysis of standing of "*Sea Pines Ass'n for the Prot. Of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594" granted on the basis that Plaintiff lacks standing because she cannot demonstrate each of the three elements, but Plaintiff would show the following: 1) That she has suffered an injury-in-fact; 2) That there is a causal connection existing between the injury and the challenged conduct; and 3) It is likely that a favorable decision will redress the injury;
- 2) An analysis was performed by the court as to whether she would have standing as personal representative of her mother's estate and not as to whether she had standing as Successor Trustee of the Living Revocable Trust of Irene Lofton;

- 3) Plaintiff would show that a simple amendment of the named Plaintiff would remedy any defect and/or a substitution of the parties. Plaintiff would show that her motion to amend filed 26 Nov 2018 is properly before the court. Plaintiff would argue her intention to amend to change the Plaintiff to herself as the named trustee acting on behalf of the trust would not prejudice the Defendants, because the Defendants were already aware of the nature of the claims being brought against them. See Collins Entm't, Inc. v. White, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005) (finding that the prejudice that the civil procedure rules envision, as would warrant denial of a motion to amend the pleadings, is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it). Here there is no new issue being tried.
- 4) Plaintiff would show the court that the law favors amendment were possible over summary judgment: "Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." Pruitt v. Bowers, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998) ("It is well established that a motion to amend is addressed to the sound discretion of the [circuit court] . . . "). Gregory v. Riley Pope & Laney, LLC (S.C. App., 2017). Here it is within the perfect discretion of the court not to deny the Plaintiff her day in court by allowing her to amend, if the court deems necessary.
- 5) Plaintiff would also show that Amendment is not necessary and that she does have standing authorized by statute, because she is the successor trustee of her mother's revocable living trust and has enumerated powers under the South Carolina Probate Code, specifically she has the power to prosecute any claim on behalf of the trust in accordance with §62-7-816(24). Plaintiff can simply clarify

in the pleadings that she is prosecuting the matter on behalf of the trust, but no actual substitution of parties need take place.

**The Whitsitt Law Firm**



Michael A. Whitsitt  
1476 Ben Sawyer Boulevard, Suite 3  
Mt. Pleasant, South Carolina 29464  
(843)696-8904  
**Attorney for the Plaintiff**

March 4, 2019  
Mount Pleasant, South Carolina

Counsel Served: Sterling G Davies, Esquire  
1320 Main Street, 10<sup>th</sup> Floor (29201)  
Post Office Box 12519  
Columbia, South Carolina 29211  
**Attorney for Defendant John Lucas**

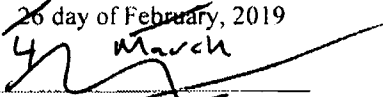
Pope D. Johnson III, Esquire  
1230 Richland Street  
Columbia, South Carolina 29201  
**Attorney for Defendant Berkeley**

CERTIFICATE OF SERVICE

The undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of the same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this

26 day of February, 2019

4 March

  
Michael. A. Whitsitt

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON  
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2018-CP-10-00323

Elizabeth Lofton

Berkeley County Electric Cooperative, Inc.,  
and John Lucas Tree Expert Company

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant  
or  
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Motion to Reconsider filed on March 4, 2019, is DENIED without hearing.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

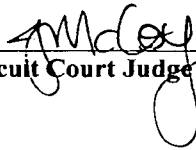
| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be<br>Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|-------------------------------------------------------------|
| N/A                                          |                                          |                                                             |

If applicable, describe the property, including tax map information and address, referenced in the order:  
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

  
Circuit Court Judge

2764

Judge Code

3/4/19

Date

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2018-CP-10-00323

FILED  
2019 MAR 29 PM 2:12  
JULIE J. ARNOLD  
CLERK OF COURT

Elizabeth Lofton,

Appellant,

v.

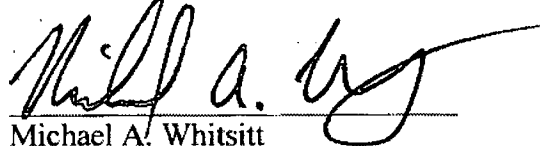
Berkeley County Electric  
Cooperative Inc & John Lucas  
Tree Expert Company,

Respondents.

NOTICE OF APPEAL

Elizabeth Lofton appeals the order/judgment of the Honorable Jennifer B. McCoy dated February 22, 2019. Appellant received written notice of denial of her motion to reconsider on March 12, 2019.

THE WHITSITT LAW FIRM



Michael A. Whitsitt  
1476 Ben Sawyer Boulevard, Suite 3  
Mount Pleasant, South Carolina 29464  
(843)696-8904  
ATTORNEY FOR APPELLANT

3/29, 2019  
Mount Pleasant, South Carolina

Other Counsel of Record:

Sterling G Davies, Esquire  
1320 Main Street, 10th Floor (29201)  
Post Office Box 12519  
Columbia, South Carolina 29211  
Attorney for Defendant John Lucas Tree Expert Co.

Pope D. Johnson III, Esquire  
1230 Richland Street  
Columbia, South Carolina 29201  
Attorney for Defendant Berkeley County Electric Cooperative Inc.

**PROOF OF SERVICE OF A NOTICE OF APPEAL**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2018-CP-10-00323

Elizabeth Lofton,

Appellant,

v.

Berkeley County Electric  
Cooperative, Inc. and John  
Lucas Tree Expert Co.,

Respondents.

**PROOF OF SERVICE**

I certify that I have served the Notice of Appeal on Berkeley County Electric Cooperative, Inc. and John Lucas Tree Expert Co., by depositing a copy of it in the United States Mail, postage prepaid, on March 29, 2019, addressed to its attorneys of record, Sterling G Davies, Esquire (Post Office Box 12519 Columbia, South Carolina 29211) and Pope D. Johnson III, Esquire (1230 Richland Street Columbia, South Carolina 29201)

THE WHITSITT LAW FIRM



Michael A. Whitsitt  
1476 Ben Sawyer Boulevard, Suite 3  
Mount Pleasant, South Carolina 29464  
(843)696-8904  
ATTORNEY FOR APPELLANT

3/29, 2019  
Mount Pleasant, South Carolina

FILED  
2019 MAR 29 PM 2:12  
JULIE J. ADAMS-TRAVIS  
CLERK OF COURT

- 1 A: Yes, sir.
- 2 Q: All right. What other property do you own an  
3 interest in?
- 4 A: I have some property in Augusta, Georgia.
- 5 Q: No, no. I'm referring to where your home is?
- 6 A: Oh, no sir.
- 7 Q: So, you own a one-third interest in, did you  
8 tell me 13 acres?
- 9 A: Yeah, thereabouts.
- 10 Q: The farm.
- 11 A: Yes, sir.
- 12 Q: And you own your lot and home?
- 13 A: Yes, sir.
- 14 Q: And tell me again the street address or the  
15 address of your home?
- 16 A: My home, I just gave you that ---
- 17 Q: You did? Maybe I didn't write it down.
- 18 A: Oh, I'm sorry. 10027 Randall Road, that's with  
19 two Ls.
- 20 Q: All right. And who owns the other two-thirds  
21 of the farm?
- 22 A: My two brothers, Sandy Lofton and Wayne Lofton.
- 23 Q: And what property was impacted by the cutting  
24 of the right of way?
- 25 A: All of our property, I mean the farm property



1 on our side.

2 Q: So, your complaining about what was done on the  
3 farm property?

4 A: Yes, sir.

5 Q: And was anything done on your lot and home?

6 A: No sir, the only thing was -- no. Nothing was  
7 done there.

8 Q: All right. And so, when did you and your  
9 brothers acquire the farm property?

10 A: Upon my mother's death in May of 2010.

11 Q: And was the property distributed to the three  
12 of you at that time?

13 A: Yes, sir.

14 Q: I saw that you were a trustee of some trust.  
15 What trust were you a trustee of?

16 A: Irene N. Lofton ---

17 Q: That's your mother?

18 A: --- my mother.

19 Q: All right, is that trust dissolved?

20 A: Not yet.

21 Q: And what is that trust on?

22 A: Well ---

23 Q: Is it on the farm property?

24 A: It includes the farm property.

25 Q: So, the trustee of the trust under your



1 mother's estate, you're the trustee and the  
2 trust owns the farm property?

3 A: Yes, sir.

4 Q: And how do you claim the farm property was  
5 impacted by actions of the defendant?

6 A: Well, for one thing, it was a trespassing.  
7 Another thing, they cut trees when they  
8 specifically told me there were no trees gonna  
9 be cut. And there was no sense in it 'cause  
10 they had all the right of way on Mary's side.  
11 That's what it was designated for, in the  
12 recorded papers.

13 Q: So ---

14 A: And also, when they cut the trees, they cut  
15 trees that my great-grandfather had planted,  
16 pecans and oaks. I didn't think you were even  
17 allowed to cut large trees like that, and they  
18 fell them back into the farm property instead  
19 of laying them along the roadway where they  
20 could easily be cleaned up. And I have a  
21 nursery that I go and dig these little  
22 underlings and use those to provide stock for  
23 my nursery. And those huge 60- to 80-foot pine  
24 trees and gum trees that they cut and fell back  
25 into the property, crushed all those little



1 Q: Yes, ma'am.

2 A: Why would you say that?

3 Q: Well, the owner of that property is really the  
4 trust, right, the irrevocable trust that you're  
5 trustee of, correct?

6 A: Yes, so what does that ---

7 Q: Okay.

8 A: How does that make a difference?

9 Q: Yeah, the beauty of this system from my seat is  
10 I just, I ask questions. So that's what I'm  
11 doing. Okay, and does the trust specifically  
12 spell out between you and Sandy Lofton and  
13 Wayne Lofton, who owns which tracts of land or  
14 the lot 2 tracts?

15 A: No.

16 Q: Okay, does the trust specifically spell out  
17 that you, Sandy and Wayne each own a third of  
18 the totality of the land?

19 A: Not specifically. It is to be -- well, I think  
20 it does say divided equally or as we see fit.

21 Q: Okay.

22 A: 'Cause we're pretty close and we can usually  
23 work things out amongst us.

24 Q: What are the other assets of the trust, if any?  
25 What else is in the trust?



- 1 A: Some other property and some moneys.
- 2 Q: Who pays the property tax on the lot 2 pieces  
3 of land we've been discussing?
- 4 A: The trust does right now.
- 5 Q: Okay. Have you ever, have you ever personally  
6 paid any property taxes on the lot 2 tracts of  
7 land that we see in Exhibit 2?
- 8 A: I don't believe so.
- 9 Q: Okay. How much money or cash is in the trust  
10 right now?
- 11 A: Approximately 18,000.
- 12 Q: Okay. What are the -- what's the annual tax  
13 that the trust pays on this property?
- 14 A: You're talking about starting this year, or  
15 prior to this year?
- 16 Q: Well, tell me this year, then we'll go  
17 backwards. How about that?
- 18 A: Okay. Well, they haven't given me this year's  
19 because I applied to go back agricultural.
- 20 Q: Okay. Tell me about that. So, what does that  
21 mean?
- 22 A: Agricultural is only 4 percent, these  
23 (indicating) are now at 6 percent.
- 24 Q: Okay. And so when you say these ---
- 25 A: Approximately, like \$1,600 a piece, roughly for



STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON ) 2018-CP-10-00323

ELIZABETH LOFTON, )

Plaintiff, )

vs. )

BERKELEY ELECTRIC )  
COOPERATIVE, INC. AND )  
JOHN LUCAS TREE EXPERT )  
COMPANY, )

Defendants. )

**Transcript of Record**

November 26, 2018

**B E F O R E:**

Honorable Jennifer B. McCoy  
Charleston County Courthouse  
Charleston, South Carolina

**A P P E A R A N C E S:**

Michael A. Whitsitt, Esquire  
**Attorney for Plaintiff**

Adam B. Riback, Esquire  
Pope D. Johnson, III  
**Attorneys for Defendants**

Kay H. Richardson  
**Circuit Court Reporter**

I N D E X

NOVEMBER 26, 2018

Pg.

|                                     |    |
|-------------------------------------|----|
| Motions .....                       | 3  |
| Certificate of Court Reporter ..... | 18 |

E X H I B I T S

No.

ID

EV

|    |                                |    |
|----|--------------------------------|----|
| C1 | Deposition of Elizabeth Lofton | 17 |
|----|--------------------------------|----|

1 NOVEMBER 26, 2018 - 2:57 P.M.

2 THE COURT: All right. We have cross motions for summary  
3 judgment; is that correct?

4 MR. RIBACK: Yes, Judge. Adam Riback for John Lucas  
5 Tree. Both defendants have filed a motion for summary  
6 judgment.

7 THE COURT: Oh, okay. I'm sorry. There we go. I see.  
8 Okay.

9 All right. I'm happy to hear them in whichever order you  
10 wish to deliver them.

11 MR. RIBACK: All right, Judge. Adam Riback again for  
12 John Lucas Tree Expert Company.

13 THE COURT: Okay.

14 MR. RIBACK: Just by way of background, this case  
15 involves some trees that were cut down on the plaintiff's  
16 property, although it's really not the plaintiff's property  
17 and I'll get to that. The original complaint was filed in  
18 January of 2016. In October of 2016, John Lucas filed a  
19 motion for summary judgment. And then later that month, the  
20 case was 40(j)'d.

21 THE COURT: Okay.

22 MR. RIBACK: So, it came back up in January of this year  
23 and we filed a renewed motion for summary judgment on August  
24 31st, 2018.

25 THE COURT: All right.

1           MR. RIBACK: Elizabeth Lofton in an individual capacity  
2 has filed a lawsuit against Berkeley Electric Coop and John  
3 Lucas Tree Company. She's testified in her deposition that  
4 she does not own the land. It's rather a trust owns the land  
5 and she is the trustee of the alleged trust. So, our first  
6 argument in asking for summary judgment is that plaintiff does  
7 not have standing to bring this claim. She has suffered no  
8 injury. In fact, whether -- rather if there is any injury  
9 it's the trust that's suffered that under *Sea Pines v. DNR*.  
10 So, we'd ask that it be dismissed as she lacks standing. Rule  
11 17 goes to whether you should dismiss an action. Rule 17 is  
12 pretty clear and it says that it doesn't need to be dismissed  
13 until a reasonable time has been elapsed. And the original  
14 complaint was filed January of 2016, we filed a motion for  
15 summary judgment telling him the plaintiff should have  
16 standing on October of 2016 and yet nothing has been done in  
17 two years.

18           So, our first argument is that plaintiff lacks standing  
19 to bring this claim.

20           THE COURT: All right.

21           MR. RIBACK: If the Court finds she does have standing we  
22 still believe summary judgment is proper as there is no  
23 dispute Berkeley Electric Coop had an easement to maintain the  
24 power lines, a 20-foot easement. And Plaintiff's counsel will  
25 argue that there's some issues with the easement. Maybe they

1 got it to the sleight of hand but John Lucas was not involved  
2 with getting of the easements. John Lucas was hired by  
3 Berkeley County to cut down some trees within the easement.  
4 Now, whether the easement is valid does not pertain to the  
5 John -- the claim against John Lucas. The only claims against  
6 John Lucas is that we somehow went outside the easement but  
7 there is no evidence in the record to support that. I know  
8 plain law -- scintilla of the evidence, but they -- that's not  
9 even alleged in this case and her deposition testimony doesn't  
10 even give that. All it is speculation. Speculation is not  
11 enough to survive summary judgment. The language of the  
12 easement is pretty clear. It says cutting trees and shrubbery  
13 to the extent necessary to keep them clear of the electric  
14 line or system. The plaintiff testified she never saw Lucas  
15 on the property and she never talked to them. There's nothing  
16 along that -- she also said there's nothing on the easement to  
17 alert Lucas that it may have not been valid.

18 Plaintiff on Page 9 of her deposition claims that Lucas  
19 destroyed the property because they went beyond the easement  
20 and they cut down some old trees, and the way the trees fell  
21 damaged her property. But whether the trees fell outside the  
22 easement or not, there's no evidence to that and there's no  
23 evidence that Lucas ever went outside of the 20-foot easement.  
24 So, therefore, we believe summary judgment is appropriate for  
25 John Lucas Tree Expert Company.

1 THE COURT: All right.

2 MR. WHITSITT: Your Honor, may I respond to them and then

3 --

4 THE COURT: Yeah, we'll do it like that. Yeah, sure, go  
5 ahead.

6 MR. WHITSITT: Pretty much everything he said is correct.  
7 So, the plaintiff is indeed -- the property itself is actually  
8 owned by a trust. And whoever had this case first did not  
9 file it in the trust's name, and that was an error. I have as  
10 of today filed a motion to amend only to change the  
11 plaintiff's name -- or the named plaintiff to be the trust.  
12 In terms of the authority that my client has to bring the  
13 lawsuit, she is indeed the trustee of the trust. She's also  
14 the executor of her mother's estate, which is where the trust  
15 comes from. So, there has been some issues with my client's  
16 health. She's been near death a couple of times now. So,  
17 that's why we haven't been able -- I haven't been able to  
18 meaningfully consult with her regarding what she wanted to do  
19 about the trust. I think they thought when they originally  
20 filed this case that the trust would be wrapped up before this  
21 case went anywhere, but that is not what happened. And so, it  
22 is true, the trust is indeed -- or the property is indeed  
23 owned by the trust but my client does have the right to bring  
24 that lawsuit on behalf of the trust as the trustee. And so I  
25 simply ask the Court to allow her leave to amend to that

1 effect. And the reason that I'm doing that is because I would  
2 show Your Honor, it's been a longstanding position of this  
3 Court and, and talking about in terms of forfeiture, it's  
4 really a technicality, and I think that the law would favor  
5 her being able to amend versus being -- her case being  
6 disposed of on summary judgment.

7 Now, if it were one of her brothers trying to bring the  
8 case, who is not the trustee, or someone who doesn't have the  
9 authority to do that otherwise, then I would say that the case  
10 shouldn't be -- be dismissed on that ground and summary  
11 judgment should be in favor of the plaintiff there. But  
12 that's not the case here. She had the authority to bring the  
13 suit. She's really just improperly named in it as the  
14 plaintiff, and she should not be named as the plaintiff, the  
15 trust should.

16 The other -- there is one thing that the defendant's  
17 counsel that I entirely disagree with. He claims that there  
18 is no evidence that leads Lucas Tree Experts on the hook.  
19 But, the testimony, Your Honor, and I have the selected  
20 portions of the plaintiff's deposition, there's more than a  
21 scintilla of evidence for this case to move forward in terms  
22 of dealing with Lucas Tree, because the evidence and her  
23 testimony show that, firstly, she didn't give them expressed  
24 permission to -- to record the easement in the way that it was  
25 recorded. What happened in this particular case was my client

1 was sick, she was ill, she couldn't read the paper. So, Mr.  
2 Easley, Bud Easley, who is the one who is responsible for  
3 getting the easement came to meet with her and they talked  
4 about what the easement would say, and what it mean, and what  
5 it would do. And she signed a blank easement and she -- and  
6 Mr. Easley told her that she -- he would fill it in the rest  
7 of the way. But, he told her that at that time no trees were  
8 going to be cut on her side of the property. And it was only  
9 in case they ever needed it, that they would never install  
10 poles there and they had a very long conversation, because he  
11 had come to her previously three or four times trying to get  
12 this easement. And she said, no, no, no. I'm never gonna  
13 give any easement to do these things. So, the last time she  
14 -- he comes, and he's asking for an easement in case they need  
15 to turn around their vehicles or something like that. And  
16 they tell her that they're not gonna cut any trees, they're  
17 not gonna install any poles. And she has previously told him,  
18 look, my cousin Mary owns the property on the other side of  
19 the road. The way we set it up was that the poles would be on  
20 her side. You already have an easement there to place the  
21 poles. There's no way we're gonna give you this 10-foot  
22 easement. Well, beyond the 10-foot easement, what Lucas Tree  
23 did on behalf of Berkeley County was they came in and they  
24 just clear cut like 20 feet on the side of the road, on my  
25 client's side. Cut down really old pecan trees, really old

1 live oaks that were valuable. My client and her family have  
2 owned that property for over a hundred years. They've used it  
3 for their nursery that has run in Charleston County for 50  
4 years. And that -- she's gotten a lot of stock from there in  
5 terms of saplings and other things. And she had a whole area  
6 where she had a lot -- probably, she believes upwards of  
7 \$10,000 worth of pots laid there. When Lucas Tree Company  
8 came and they were doing the actual cutting, they didn't cut  
9 the trees so that they would fall away from the property.  
10 They actually fell into the property, smashed the pots,  
11 smashed a lot of saplings, cut trees she never thought that  
12 they would be cut. But that's not even the end of it. The  
13 day they started cutting, she testifies in her deposition that  
14 she went there and she tried to stop them. She posted notes  
15 on all of the trees that they had marked to be cut that said  
16 stop what you're doing. You don't have permission to do this.  
17 This is not the easement that was given. Please contact my  
18 attorney. Work proceeded regardless of what she had posted.  
19 And we believe that we have stated several theories in the  
20 complaint that would hold Lucas Tree Company accountable --  
21 Tree Company accountable for that as well as Berkeley  
22 Electric.

23 So, in terms of the actual merits of summary judgment  
24 apart from the plaintiff's inability to bring the claim in a  
25 personal way, we believe there are no merits for summary

1 judgment and we would argue that there aren't. And I did file  
2 a brief response to their motion for summary judgment that  
3 attaches as exhibits the selected portions of her testimony  
4 and I'm happy to pass that up to you.

5 THE COURT: That would be great, yeah; thank you.

6 MR. WHITSITT: These are just the exhibits to it.

7 May I approach, Your Honor?

8 THE COURT: Uh-huh, (affirmative response). Thank you.

9 MR. WHITSITT: The rest of my response does not go to his  
10 motion but the other.

11 THE COURT: All right. Briefly, do you want to respond?

12 MR. RIBACK: Your Honor, in the event that it would be  
13 futile because our second point is that there's no genuine  
14 issue as to material fact as to John Lucas. Mr. Whitsitt  
15 talked a lot about the easement that Mr. -- whoever gave him,  
16 that all pertains to Berkeley County Coop, it did not pertain  
17 to John Lucas Tree Company. There's absolutely no evidence  
18 that he can point to or his client can point to that we went  
19 outside of the easement. And the quote -- I'll read directly  
20 from her deposition. And she's talking for the plaintiff:  
21 Also, when they cut the trees, they cut trees by ---

22 MR. WHITSITT: Can you say where you're reading from?

23 MR. RIBACK: Yeah, Page 9, Line 14. And also when they  
24 cut the trees, they cut trees that my great grandfather had  
25 planted, pecan and oaks. I didn't think you were even allowed

1 to cut large trees like that, and they fell them back into the  
2 farm property instead of laying them on the roadway where they  
3 could've easily been cleaned up. I have a nursery that I go  
4 and dig these little underlings up and use those to provide  
5 stock for my nursery. Those huge 60 to 80-foot pine trees and  
6 gum trees that they cut and fell back into the property  
7 crushed all those babies that I could have access to for  
8 stock.

9 So, whether the trees are old or young, there's no  
10 evidence anywhere that John Lucas Tree Company went outside  
11 the easement that she signed. Granted he mentioned that they  
12 were blank and all that, that has nothing to do with John  
13 Lucas Tree Company. Therefore, we think that summary judgment  
14 is -- giving all inferences to the plaintiff is still  
15 appropriate.

16 MR. WHITSITT: Your Honor, if I may, just briefly.

17 THE COURT: Uh-huh, (affirmative response).

18 MR. WHITSITT: They're the ones who fell the trees.

19 THE COURT: All right. Let's hear from Berkeley Electric  
20 Coop.

21 MR. JOHNSON: May it please the Court, I'm Pope Johnson.  
22 Jack Williams is here with me on behalf of Berkeley.

23 Your Honor, there's no affidavit before you that the  
24 plaintiff has been ill health that has somehow affected her  
25 ability to proceed in this matter. This is no affidavit that

1 attaches the trust that shows that she has authority as  
2 trustee to bring lawsuits, nothing, nada. Now, there's  
3 something fundamental about the idea that you've got to be  
4 damaged to bring a claim. And here she has had no damage in  
5 her status as plaintiff in this case. It's our position that  
6 she lacks standing to bring this suit.

7 Counsel said he's filed a motion to amend. I've not seen  
8 the motion to amend. Counsel did bring a copy of his brief  
9 for us to look at. But in terms of the motion to amend, we  
10 would say that would be futile because the statute of  
11 limitations has run on the trustee.

12 Your Honor, there was a book written that said that all  
13 life is determined by the rules of the playground. And I  
14 think of that when I think of summary judgment because summary  
15 judgment is put up or shut up time. He's brought you not the  
16 first affidavit to support his position. He's known about  
17 their motion for -- since it was filed. Mine was filed in  
18 September. The timing in this case is now. There are no  
19 genuine issues of material fact. We'd ask that you grant the  
20 motion.

21 THE COURT: Mr. Whitsitt, he brings up a good point.

22 MR. WHITSITT: Yes, Your Honor.

23 THE COURT: About the affidavit, why hadn't that been  
24 filed?

25 MR. WHITSITT: Well, firstly, my client had just gotten

1 out of the hospital yesterday is my understanding. I'm happy  
2 to supplement the Court with any affidavits immediately  
3 showing that she has the authority as the trustee. However,  
4 in the -- in her deposition, she talks about how she is the  
5 trustee of that trust and that's how they came to understand  
6 that she didn't own the property. So, it's disingenuous to  
7 say that there is no evidence before the Court that would show  
8 that she is the trustee. Well, there is. And it was a major  
9 part of her deposition that they discussed at length, and Mr.  
10 Johnson has been in possession of that. Otherwise, he is  
11 correct in terms of the fact that she simply lacks standing  
12 but we think, you know, Your Honor, if we -- if the Court were  
13 given -- if the plaintiff were given leave to file amended  
14 complaint where she's bringing the case as the trustee, we can  
15 easily do that immediately. And that would not prejudice them  
16 in any way.

17 And in terms of the statute of limitations, the amendment  
18 would date back to the original, that's -- to the original  
19 pleadings and that's well settled. So, the issue that there's  
20 a statute of limitations issue here is delusory in the sense  
21 that the law would treat it as being filed on the date that  
22 the original pleadings were filed.

23 And so in dealing with that, the only other issue that he  
24 -- we talked about how the deposition shows that we're able on  
25 the claims to meet each element and show that there is more

1 than enough evidence that shows how the trees were handled,  
2 how they were cut, what damage they did to her property, what  
3 the value of those trees were. At a certain point, the only  
4 real issue before my client in this Court that would actually  
5 prevent her legally from bringing the case is her standing  
6 issue. And really all we can do, Your Honor, is ask that it's  
7 in your sound discretion that she be allowed to amend it.

8 THE COURT: Well, I really don't think that a motion to  
9 amend is properly before this Court at this time. Certainly -  
10 --

11 MR. WHITSITT: It's not at this time, no.

12 THE COURT: Certainly the other parties would need to  
13 receive notice and an opportunity to prepare for such a  
14 hearing.

15 MR. WHITSITT: Absolutely, and I will ---

16 THE COURT: So, I'm not prepared today to really move  
17 forward and make any kind of ruling on that.

18 MR. WHITSITT: And I would state to the Court that I only  
19 just today filed that motion.

20 THE COURT: Okay.

21 MR. WHITSITT: And I do have copies.

22 THE COURT: Did you file a memoranda with this exhibit  
23 you handed me?

24 MR. WHITSITT: No, I just -- that's just the exhibit to a  
25 brief response that I filed, because there were only three

1 short issues.

2 THE COURT: Uh-huh, (affirmative response).

3 MR. WHITSITT: And the only issue ---

4 THE COURT: Did you file a response? I mean, in other  
5 words, is there another part of this?

6 MR. WHITSITT: Yes, there is. I have it here.

7 THE COURT: Did you email it to me or anything?

8 MR. WHITSITT: I did not, Your Honor. It was just filed  
9 this morning.

10 THE COURT: That's okay. If you just want to email it to  
11 my clerk. Or, do you have a copy?

12 MR. WHITSITT: Yes.

13 THE COURT: Okay.

14 MR. WHITSITT: You can have this copy.

15 THE COURT: Okay.

16 All right. Anything else you want to say to respond?  
17 I'll look at this brief response.

18 MR. WHITSITT: Just that, Your Honor, if -- you know,  
19 whoever her attorney was originally that brought the case on  
20 behalf of her instead of the trust, that was in error and, you  
21 know, she would just ask that -- she would show the Court that  
22 -- the cleanup alone, the costs that we're aware of in terms  
23 of just the cleanup are \$20,000. The amount and the worth of  
24 the timber almost triples that amount. So, really, she would  
25 be at a huge loss here if she were not given leave to amend.

1 THE COURT: When did you take this case over?

2 MR. WHITSITT: I would say probably at the beginning of  
3 the summer, but I'm not sure. I'd have to check.

4 THE COURT: Okay.

5 Yes, sir? Happy to hear from you again in response.

6 MR. JOHNSON: It's almost a year since he filed or --  
7 just hearing a motion about some motion to amend.

8 THE COURT: Yeah, I'm not -- definitely, like I said, I'm  
9 not taking that up today, and I understand your point loud and  
10 clear. Okay. Well, I'll look this over.

11 Is there anything else anybody wants to say for the  
12 record?

13 MR. RIBACK: Judge, the only thing is I have a copy of  
14 the full transcript if you want that.

15 THE COURT: The deposition transcript?

16 MR. RIBACK: Yes.

17 THE COURT: Yeah, I might -- I'm happy to ---

18 MR. WHITSITT: I have no objection to making it a part of  
19 the record.

20 MR. RIBACK: The only thing is that on Page 9 ---

21 THE COURT: Why don't we mark it as a Court exhibit? How  
22 is that?

23 I'm sorry, what were you gonna say?

24 MR. RIBACK: On Page 9, I did highlight her testimony he  
25 cites in his memorandum.

1 MR. WHITSITT: Yeah, and I ---

2 THE COURT: Okay.

3 MR. RIBACK: And you have a copy of our memorandum.

4 THE COURT: I do have it. Yeah, thank you very much.

5 This will be Court's Exhibit 1.

6 COURT'S EXHIBIT NUMBER 1

7 MARKED FOR IDENTIFICATION

8 THE COURT: All right. Thank you gentlemen. Pleasure  
9 having you today.

10 MR. RIBACK: Thank you.

11 MR. WHITSITT: Thank you, Your Honor.

12 (ADJOURNED - 3:18 P.M.)

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Elizabeth Lofton v. Berkeley Electric Cooperative and John Lucas Tree Expert Company, held in the Court of Common Pleas for Charleston County, Charleston County Courthouse, Charleston, South Carolina, on November 26, 2018.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

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Kay H. Richardson  
Official Court Reporter

May 31, 2019