

SUPPLEMENTAL 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,

SUPPLEMENTAL RECORD ON APPEAL

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Certificate of Counsel

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 20, 2019

/s/ Michael A. Whitsitt
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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. 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.¹

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).² 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.*

¹ 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.

² 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.³

³ 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.”

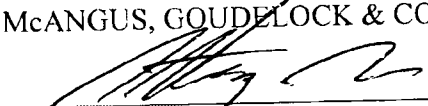
Defendants Berkeley Electric and Lucas Tree were never prosecuted for a violation of S.C. Code Ann § 16-11-580, rendering this section inapplicable to the instant matter. While the

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



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J. Adam Ribock, Bar No. 100731
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(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 21st day of May, 20 13.

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

Alicia B. Buckingham

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 Alicia B. Buckingham
witnessed the execution thereof.

Lilly Odell Healy

SWORN TO BEFORE ME this 21st day of
May, 20 13.

Alicia B. Buckingham
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.

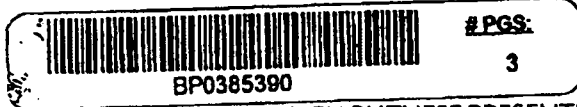
Being the same property conveyed to Irene N. Lofton by Deed of Mary L. Carroll and Irene N. Lofton, dated December 27, 2006, and recorded December 28, 2006, in Book C610, page 576, Charleston County RMC Office.

TMS No. 731-00-00-070

THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Location Number 293
RIGHT OF WAY EASEMENT



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.

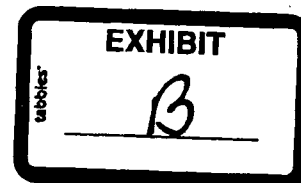
West by Gary E. Seyle; U.S.F.S.

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 17th 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 Candlen H. Felder 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 17th 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.



- 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) Lucas Tree

By: [Signature]

Title: CFO

Date: 12-12-2014

1 Q: Okay.

2 A: To have the poles there, no.

3 Q: Okay. Why did you sue Lucas Tree in this case?

4 A: I was informed that they were part of or hired
5 by Berkeley Electric as a subcontractor to do
6 tree removal. That was my understanding.

7 Q: And who informed you of that?

8 A: My attorney.

9 Q: Okay. And which attorney is that?

10 A: Shawn.

11 Q: Okay. Did you know anything about Lucas Tree
12 at all prior to your attorney telling you about
13 Lucas Tree?

14 A: No knowledge whatsoever.

15 Q: Okay. Did you ever talk with any employee of
16 Lucas Tree at any point?

17 A: Not that I'm aware of.

18 Q: Okay. Did you ever see any Lucas Tree piece of
19 equipment on your property at any time?

20 A: No, sir.

21 Q: Okay. Have you ever, since the cutting of this
22 land, talked to a representative of Lucas Tree?

23 A: No.

24 Q: Okay. Do you know exactly what Lucas Tree did
25 or didn't do regarding the project we're



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

1 language on page one of Exhibit 3 that was
2 added after you signed the document other than
3 the handwriting starting with McClellanville
4 and ending in needed. Is that correct?

5 A: Correct.

6 Q: Is that right?

7 A: Yes.

8 Q: Okay. Now, if Lucas Tree was shown a copy of
9 Exhibit 3 with your signature on it, do you
10 believe that they had a right to believe that
11 this was a valid right of way easement?

12 A: Well, if they'd looked at the plat ---

13 Q: I'm asking about Exhibit 3 right now, that's
14 all I'm asking you about.

15 A: All right.

16 Q: Is there anything on Exhibit 3 that would
17 indicate to Lucas Tree that Exhibit 3 is not a
18 valid right of way easement?

19 A: It would appear to be valid.

20 Q: Okay. So, then the answer to my question is
21 no, there's not anything on Exhibit 3 that
22 would appear to Lucas Tree to indicate that
23 Exhibit 3 is anything other than a valid right
24 of way easement? Do you agree with me?

25 A: Correct.



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?



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- 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



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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) SCRCP. "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*

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. The deed to the property reflects the Trust is the sole owner of the property.

Plaintiff admits the owner of the property in question is the Trust. Plaintiff Lofton is the trustee and a member of the Trust benefitting herself, Sandy Lofton and Wayne Lofton. 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." Plaintiff has never personally paid property taxes on the tracts of land in question and the Trust makes all such payments. Furthermore, the Trust has a 100% interest in the property.

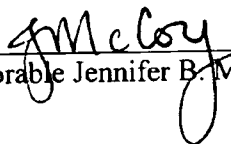
As a result, Plaintiff lacks standing under the first element of the test articulated in *Sea Pines*. Moreover, Plaintiff herself has not suffered an injury-in-fact. Rather, it is the Trust's property that allegedly has been damaged. Plaintiff does not own the property that is the subject

of this action, Plaintiff has not suffered any damages, and Plaintiff therefore lacks standing to lawfully make these claims.

CONCLUSION

Plaintiff lacks standing to bring the claims asserted in her Amended Complaint. Thus, the motions for summary judgment filed by both Defendants should be granted and Plaintiff's claims should be dismissed.

IT IS SO ORDERED.



The Honorable Jennifer B. McCoy