

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

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APR 25 2013

SC Court of Appeals

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

APPELLANT'S REPLY TO RETURN  
OF ST. JOHNS WATER COMPANY  
IN OPPOSITION TO APPELLANT'S  
PETITION FOR REHEARING

Appellant's makes the following Reply to the Return of respondent St. Johns Water Company (St. John's) in opposition to his Petition for Rehearing.

**A. Lack of evidence to establish prescriptive easement on TMS 498**

Respondent has not rebutted the appellant's argument that the evidence was inadequate to establish a prescriptive easement. Respondent does not deny that Horry County v. Laychur, 315 SC 364, 367 (1993) is the applicable standard, i.e. that it must show both "the identity of the thing enjoyed" and "a claim of right". As to the "identity of the thing enjoyed", this Court in its Decision stated that "a map illustrating the planned installation of pipe shows the water main running under -498." Decision at page 9. However as pointed out in the Petition, the map, U 25, does not contain any designation of any property lines, lots or other means to accurately identify that St. John's water line is crossing TMS 498. R. p. 245. The only identification shown on U 25 is of Kitford Road. Respondent does not deny that in its Return.

St. John's does not deny that the only basis for connecting U 25 to appellant's property was its counsel statement to the Master that U 25 referred to a dirt road crossing Simmons property. R. p. 216, line 1-3. Moreover, St. John's counsel did not identify the part of Simmons property to which he was referring, only that it was part of Kitford Road. R. p. 217, line 15-17. As appellant has pointed out in the Petition, factual statements by attorneys during oral argument may not be considered in determining whether a material issue of fact exists. Trivelas v. S.C. Dept of Trans., 348 SC 125,558 S.E.2<sup>nd</sup> 271,279 (Ct. App. 2001).

Appellant contends there is no other credible evidence in the Record to establish the identity of the thing enjoyed. The Miley affidavit to which St. John's refers as "ample evidence" cannot establish the identity of the thing enjoyed since it refers back to the map which has no identification of the Simmons property. Respondent has not pointed to anything else in the Record to rebut appellant's claim of a lack of any evidential connection between the map and appellant's property. Accordingly the Court should grant this Petition for Rehearing based upon that issue alone.

Furthermore, appellant asserted that there was no evidence upon which to establish a claim of right. Petition at page 11. The Return does not address that point. This Court said that the Miley affidavit established "his belief that the encroachment permits obtained from Charleston County covered the installation of the water main as illustrated on the map." Decision at page 9. This Court based its finding of a claim of right upon the premise that "[t]he fact the claim may have been based on a mistake does not negate the claim of right. . ." Decision at page 9. Appellant has not disagreed with that aspect of its decision but asserted that there must be a substantial basis for the belief citing Morrow v. Dyches, 328 S.C. 522, 528 492 S.E.2d 420, 423-424 (Ct. App. 1997).

The Miley affidavit cannot be the basis for a mistaken belief because Miley states that the water line was installed along Kitford Road. R. p. 59. Miley does not say that he installed a water line across Simmons property or why he thought it was part of Kitford Road. As asserted above, there is nothing in the Record to connect the map and TMS 498. Assuming that Miley relied upon the map and he was in error by installing a water line under TMS 498, he does not provide a substantial basis for his mistake. The reasonable inference to be drawn from the evidence is that Miley as an engineer must be capable of reading maps. Therefore, his error is unusual and not reasonable. There is no explanation of why he could have made such a mistake as to mislocate a water line. There is no substantial basis for his belief other than the allegation that he relied upon the map.

Assuming that Miley relied upon the map and the map was in error, there is no substantial basis for the map to be erroneous. Only the person preparing the map could testify as to why a water line was located across private property, TMS 498. In either case, Miley's mistaken belief or a mistake in the map, St. John's Return does not attempt to rebut appellant's assertion that the Record does not contain any evidence of a substantial basis for a mistaken belief.

Therefore based upon the reasonable inferences to be drawn for the affidavit and map, appellant asserts that the Court should grant Rehearing as to the lack of a substantial basis for a mistaken belief upon which to establish a prescriptive easement.

**B. Opportunity to respond to introduction of U 25**

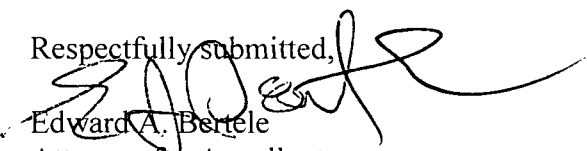
Appellant also requested Rehearing because the Court did not address his inability to respond to the introduction of U 25, which was the basis for the Master's decision. Petition at page 12. Respondent contends that the issue was already decided because the Court permitted the

map to be made part of the Record. Return at page 2. However, respondent argued in its opposition to appellant's motion to strike U 25 that the basis for allowing the map to be part of the Record was that it was shown to the Master. Respondent's Opposition to Appellants Motion to Strike Certain Material at page 3. Respondent did not dispute that U 25 was shown to the Master without identifying it for the record, showing it to opposing counsel or filing it with the Clerk. Appellant raised his objection to the Master's reliance upon U 25 before this Court. Appellant asserts that he was prejudiced by St. John's counsel's unusual conduct in introducing U 25 which prevented his counsel from requesting the opportunity to provide a rebuttal based upon these circumstances. This Court did not address the issue in its decision. Accordingly, the issue of appellant's lack of an opportunity to address U 25 before the Master is an independent basis for rehearing

### CONCLUSION

Appellant respectfully requests for the reasons set forth herein that this Court grant his Petition for Rehearing of the Decision affirming the Master in Equity's order granting summary judgment to St. Johns as to a prescriptive easement for a water main.

Respectfully submitted,

  
Edward A. Berete  
Attorney for Appellant

April 20, 2013

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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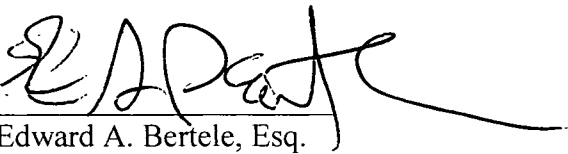
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ST. JOHNS WATER COMPANY, INC.)  
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CERTIFICATION OF SERVICE

I hereby certify that a true copy of the Reply to the Return of St. John's Water Company to Appellant's Petition for Rehearing was served upon the respondents' attorneys, John Williams, Esq. and Gaines Smith, Esq. by regular mail postage prepaid at their last known mailing address.

  
Edward A. Bertele, Esq.

April 20, 2013

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**EDWARD A. BERTELE, ESQ.**  
**ATTORNEY AT LAW**  
**1812 PIERCE STREET**  
**CHARLESTON, SC 29492**  
**Email: [ebertele@msn.com](mailto:ebertele@msn.com)**

Member: SC, NJ & NY bars

Ph: (843) 471-2082  
Fax: (843) 471-2082

April 20, 2013


Ms. V. Claire Allen, Deputy Clerk  
Court of Appeals  
1015 Sumter St.  
PO Box 11629  
Columbia, SC 29211

**Re: Simmons v. Berkeley Electric Cooperative, Inc.  
and St. John's Water Company, Inc.,  
Case No. 2011192409**

Dear Ms. Allen:

I am enclosing for filing the following: original and six copies of Appellant's Reply to Return of St. John's Water Company in opposition to Appellant's Petition for Rehearing and the original Certification of Service. If you have any questions, please do not hesitate to call. Thank you for your kind assistance.

Very truly yours

  
Edward A. Bertele

Encl:

CC: John B. Williams, Esq. w/encl  
Gaines W. Smith, Esq. "

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