

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

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

RECEIVED  
MAY 06 2013  
SC Court of Appeals

APPELLANT'S REPLY TO RETURN  
OF BERKELEY ELECTRIC  
COOPERATIVE, INC. IN OPPOSITION  
TO APPELLANT'S PETITION FOR  
REHEARING

Appellant's makes the following Reply to the Return of respondent Berkeley Electric Cooperative, Inc. (Berkeley Electric) in opposition to his Petition for Rehearing. Appellant's Petition was based upon a reasonable reading of the Court's opinion and facts in the Record which appellant believes have not been adequately considered. Because the facts are complex, appellant contends that Court must have an accurate basis for its decision.

**A. Lack of evidence of Berkeley Electric express easement across TMS 135**

Appellant contended that this Court's opinion reflected a misapprehension of the scope of the 1972 Brown easement which applied only to TMS 498. Petition at 1-2. Berkeley Electric urges that this contention was waived but its assertion has no basis in the Record. Return at page 2. As stated in the Appellant's Brief at page 23: "Simmons

contended and the evidence established that the 1972 Brown easement extended only up to the Seaboard Coastline Railroad right of way and that TMS 282-00-00-135 is to the east of that right of way. The Lacey plat shows that Berkeley Electric power lines run from the transmission line beyond the 75' easement west toward Kitford Road and east to the Anderson property. Berkeley Electric did not submit any evidence concerning its claim for any easement on TMS 282-00-00-135. . . .” Appellant’s counsel made this clear before the Master. R. p. 205, lines 204, line 7 top 205, line 9. Therefore, Berkeley Electric’s assertion is not made in good faith.

Berkeley Electric again asserts that appellant conceded the existence of express easements but that is another claim not made in good faith. Appellant has repeatedly distinguished between the 1956 easement which grants Berkeley Electric rights for a transmission line across the lands of the grantor, Heyward, ( including TMS 498 and 135) and the 1972 easement which grants Berkeley Electric rights across the lands of Brown; and the fact that Brown’s lands ended at the Seaboard Coastline Railway right of way, west of TMS 135. Appellant’s Brief at pages 11- 12, 23-24.

Berkeley Electric fails to mention that at the motion hearing before the Master, its counsel conceded that the 1972 easement was used as basis for asserting a claim of right to extend its distribution line across TMS 135. R . p. 193, line 6-7. This was also argued by appellant as a basis for reversal. Appellant’s Brief at page 12. Berkeley Electric in its Brief agreed that under the 1972 easement Berkeley electric had an easement to across TMS 498 and over TMS 136 to the north of Simmons property. Respondent’s Brief at 5.

Ultimately, Berkeley concedes that there is no evidence to support an express easement for a distribution line across TMS 135. “[N]either the Master nor this Court has

ever ruled that BEC's express easements cover every single inch of every power line that extends across Simmons property. " Return at page 4.

Appellant reasonably believes that both the Master and this Court did in fact rule that there was express easements to allow every power line based upon the written decisions. Appellant does not concede that this point is irrelevant, as Berkeley Electric argues , Return at 3-4. Appellant contends that the lack of proof of an express for a distribution lines across TMS 135 is extremely relevant because it underscores the importance of appellant's contentions about the proofs relating to prescriptive easements.

In summary, appellant has shown that all of Berkeley Electric's arguments about the basis for appellant's Petition regarding express easements are without merit. According, this Court should reconsider that part of its decision in connection with reconsideration of the entire appeal.

**B. Evidence as to Berkeley Electric prescriptive easements was insufficient**

Appellant's Petition argued that rehearing was required on the prescriptive easements because the evidence submitted by Berkeley Electric was insufficient to establish its claims and that there were disputed issues of fact. Petition at 3-9.

All of these were raised before the Master and on this appeal. R. p. 112-115, Brief at 24-27.

Berkeley Electric contends that the Seeney and Frank affidavits should be interpreted to apply to TMS 135 as well as TMS 498. Return at 6-7. The Record indicates the contrary. Berkeley Electric submitted its original motion for summary judgment for a prescriptive easement in 2009 based upon the Seeney and Frank affidavits. These were non specific as to location and only mentioned power poles shown on exhibits not part of

the record. Appellant then pro se submitted an affidavit asserting that the power line to he objected on the westerly side of TMS 498 had not been there for 20 years. R p. 49-50. As a point of reference, he submitted a 2005 Plat showing this power line across TMS 498. R. p. 52. The plat did not show any power line extending to TMS 135. Id. Berkeley Electric then submitted an amended motion in 2010 that relied upon the same affidavits but referred to the same plat that Simmons had provided in response to Berkeley Electric's initial motion . R. p. 94, 101-104. In reply, appellant provided an amended plat showing Berkeley Electric's power line extending onto TMS 135. R. p. 130. Further appellant's affidavit in opposition refers to the westerly line on TMS as the line about which he filed suit. R 118.

In its Return, Berkeley Electric uses both plats as the reason to argue for this expansive interpretation of its own affidavits. Return at 7. However, on this appeal Berkeley Electric argued that the Bradley affidavit was introduced to show that its power lines were not on TMS 135. Respondent's brief at 26. Respondent never contended that the Seeney and Frank affidavits were introduced to establish a prescriptive easement across TMS 135, only the Bradley affidavit. Therefore, the Seeney and Frank affidavits cannot refer to any other power line than the westerly line across TMS 498 which extends across Kitford to one of the power poles identified by Seeney and Frank.

Berkeley Electric asks this Court to make a leap of logic: that Seeney and Frank establish that the power line across TMS 498 has been there for 20 years so that the power line down Kitford Road over TMS 135 must have been there for 20 years. Return at 8. Berkeley Electric's argument reflects the absurdity of its position. By that argument

the Seeney and Frank affidavits could be interpreted to cover everything everywhere. If so, why was the Bradley affidavit needed.

Further, the Bradley affidavit cannot establish a prescriptive easement across TMS 135 for Berkeley Electric's distribution lines. Berkeley Electric's asserts that the Bradley affidavit establishes that its power lines do not encroach on TMS 135. Return at 9. The Bradley affidavit refers only to the 1956 Heyward easement granting a 75 foot easement. The Bradley affidavit states that this easement "encroaches on property owned by Anderson TMS 136." R. p. 154. There is no mention of the 1972 easement which is in dispute.

The survey referenced by Bradley shows TMS 136 is to the north and TMS 135 to the south of the Berkeley Electric distribution line 75 foot easement. Simmons stated that this was part of his property and shown on the revised plat. R. p. 119. The Bradley affidavit does not say how long these power lines have been in place and Berkeley Electric has not response to this obvious deficiency in its proofs.

Berkeley Electric refers to appellant's supplemental affidavit as a way to cure its own evidential failure. Return at 8. Berkeley Electric contends that appellant admitted that the power line across TMS 135 had been there for many years. Id. What appellant said was that the power line had been serving the customers on the south side of Kitford Road for many years, not that the line running to his property had been there for many years. This is not evidence of the 20 years needed for a prescriptive easement.

Therefore, the Record establishes that the Seeney, Frank and Bradley affidavits cannot reasonably support Berkeley Electric's contention that they establish a prescriptive easement across TMS 135 using the 1972 easement as acclim of right.

**C. Evidence as to Berkeley Electric prescriptive easements was disputed.**

In his Petition, Appellant contended that a further basis for rehearing was because the Court did not give adequate consideration to appellant's evidence which created a disputed issue of fact as to prescriptive easements across TMS 135 and 498. In his Supplemental Affidavit submitted in opposition to summary judgment, appellant stated under oath contended that he had personal knowledge of the facts set forth in them. R. p. 118. He states that the power line across TMS 498 had not been there since 1980 as the Berkeley Electric employees stated it had. Id. That should have been sufficient for the Master and this Court to find that there were disputed issues of fact concerning how long the power lines had been on TMS 498. Further appellant stated that the area to the east and west of the 75' transmission line was part of TMS 135. R. p. 119. The Bradley affidavit claims that the area to the east is Anderson property but doesn't mention to area to the west.

Respondent attempts to parse the language of the Supplemental to argue that it doesn't mean what it says. Return at 12-13. However, the role of the fact finder is not to parse the statement but to find whether it raises a question of fact, giving all inferences to the opponent of the motion. Appellant's statement should have been accepted at face value. The Seeney and Frank affidavits are based upon their recollection of events over thirty years ago. Appellant questions why his recollection is not entitled to the same weight.

The Bradley affidavit refers to a map he reviewed and relied upon. R. p. 154, 157. Bradley does not identify the date or source of this map or what it depicts. Yet this Court found that it was the basis to sustain the Master's decision that there was an express

easement across all of TMS 135 even the part to the west of its transmission easement that Bradley does not reference ; and even when the map Bradley relied upon shows the property belonged to Simmons. Again why does appellant's testimony that the area to the west of the 75' easement is part of TMS 135 given no credence when a contradictory statement by Bradley is given conclusive effect.

The same double standard has also been applied to the Gaillard plat and the Shuler Survey. Respondent does not address the discrepancy in the Shuler survey at all. The Shuler survey was provided in discovery by Berkeley Electric. It is entitled "Area under Power Line Easement". It shows the existence of a power line across TMS 119 and adjacent properties but does not show any line to the south as Seeney and Frank contend. Respondent's argument that the absence of its power lines on the Shuler survey does not mean it wasn't there in the 1980 is simply argument. Return at Berkeley Electric did no present any rebuttal evidence ( like the Bradley affidavit) that the Shuler plat was not intended to show its power line to the south across TMS 498. Berkeley Electric has the burden of proof . There is a reasonable inference to be drawn that the Shuler survey supports appellant's contention. Therefore in absence of undisputed evidence that the survey didn't intend to include such information , the inference from what is shown on it should have cause the denial of the motion.

Similarly the Gaillard survey and Berkeley Electric's system maps were held to a different standard than Berkeley Electric 's employees affidavits and map. The former were considered as inclusive, the latter with vague language as conclusive.

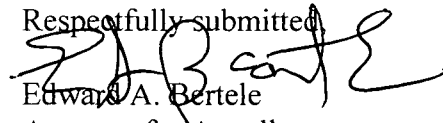
Based upon what was submitted to him , the Master should have required Berkeley Electric to submit its evidence in support of a prescriptive easement at a hearing subject

to cross examination. Instead, the Master and this Court weighed the evidence and tipped the scales toward Berkeley Electric.

### 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 Berkeley Electric Cooperative, Inc.

Respectfully submitted,



Edward A. Bertele

Attorney for Appellant

May 1, 2013

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APPEAL FROM CHARLESTON COUNTY  
Case No. 2008 - CP -10 - 1983  
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COOPERATIVE, INC. and )  
ST. JOHNS WATER COMPANY, INC.)  
Defendants, Respondents )

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the Reply to the Return of Berkeley electric Cooperative, Inc. 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.

May 1, 2013

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May 1, 2013

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:

Enclosed for filing are the original and 6 copies of the Reply of appellant in response to the Return of Berkeley Cooperative, Inc. to appellant's Petition for Rehearing; and the original Certification of Service. Thank you for your courtesy.

Cordially,

  
Edward A. Bertele

Encl:

CC: John B. Williams, Esq.  
Gaines W. Smith, Esq.

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

Dear Ms. Allen:

This letter is to confirm that counsel for respondent Berkeley electric Cooperative, Inc. has agreed to allow appellant until May 1<sup>st</sup> to file his Reply to its Return to appellant's Petition for Rehearing. If you have any questions, please do not hesitate to call.

Cordially,

  
Edward A. Bertele

CC: Jay Hulst, Esq.  
Gaines Smith, Esq.

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