

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Mikell Scarborough, Master-In-Equity

Case No.: 2008-CP-10-1983

Roosevelt Simmons.....Appellant

v.

Berkeley Electric Cooperative, Inc.
and St. John's Water Company, Inc.....Respondent

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APR 25 2013

RESPONDENT BERKELEY ELECTRIC
COOPERATIVE INC.'s RETURN TO
APPELLANT'S MOTION FOR REHEARING

SC Court of Appeals

Appellant Roosevelt Simmons ("Simmons") moves for rehearing pursuant to Rule 221(a) SCACR. Respondent Berkeley Electric Cooperative, Inc. ("BEC") opposes Simmons' motion and respectfully requests that it be denied.

ARGUMENT

On January 13, 2011, Judge Mikell R. Scarborough, Master in Equity for Charleston County, granted summary judgment to BEC on Simmons' claim of trespass/unauthorized use of his property. Judge Scarborough ruled that BEC's power lines were authorized under express easements from Heyward in 1956 and

from E.C. Brown in 1972, that BEC use was “relatively limited, longstanding and not unreasonable,” and that “even if the express easements failed to authorize any particular power lines and poles as presently located and configured on Simmons’ property, BEC has acquired a prescriptive easement for that equipment.” R. 18.

On March 20, 2013, this Court issued an opinion unanimously affirming Judge Scarborough’s grant of summary judgment to BEC. *Simmons v. Berkeley Electric Cooperative, Inc.* Op. No.5099 (S.C. Ct. App. filed March 20, 2012). Simmons now claims that “the Court has misapprehended the facts as set forth in the Record which may have caused the Court to reach its decision” and, further, that “the Court did not correctly apply the standards for the granting of summary judgment.” Appellant’s Petition for Rehearing (“Petition,”) p. 1.

A petition for rehearing “shall state with particularity the points supposed to have been overlooked or misapprehended by the Court.” Rule 221(a) SCACR. The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time. Jean H. Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina*, Second Ed. 293 (2002) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 E.E. 234 (1933)). Simmons’ petition raises some new arguments. These are claims that he—not the Court—evidently overlooked or misapprehended. Such arguments have been waived and are not a proper subject for rehearing. *Id.* Simmons also rehashes various contentions raised in his

original and reply briefs. These points have not been overlooked or misapprehended by the Court—they were weighed, measured, and found lacking. Simmons is not entitled to retry his case and his motion should be denied. *Id.*

A. The Court Did Not Overlook or Misapprehend the Record Regarding Express Easements over TMS 135.

Simmons first argues that the record does not establish that BEC had an express easement covering all of the power lines allegedly extending over -135 and therefore the Court should have ruled that the Master erred in finding that BEC did not exceed the scope of its express easements.¹ Petition, pp. 3-4. As stated in the “Facts/Procedural History” section of its opinion, the seventy-five foot Heyward easement runs north to south over the northeast corner of -498. *Simmons v. Berkeley Electric Cooperative, Inc.* p. 2. The 1972 Brown easement gave BEC “permission to again cross -498.” *Id.* “According to Simmons, power lines cross -135 and twice and -498 twice and unreasonably affect his ability to sell or use his property.” *Id.*

In his order granting summary judgment to BEC, the Master did not attempt to specifically determine which power lines extending over -048 and which power lines extending over -135 (if any) were actually subject to the express easements produced in the case. R. 13-21. Such a determination was superfluous to the Master’s ruling because he found that, as stated above, “even if

¹ This is a repackaged argument raised in Simmons’ briefs. See Appellant’s Brief, pp. 23-24; Reply Brief, p. 9. It is not the purpose of the petition for rehearing to have the case tried in the appellate court a second time.

the express easements failed to authorize any particular power lines and poles as presently located and configured on Simmons' property, BEC has acquired a prescriptive easement for that equipment." R. 18. This Court affirmed that ruling. *Simmons v. Berkeley Electric Cooperative, Inc.* pp. 4-7.

Simmons now requests that the Court "reconsider its decision as [to] the existence of an express easement since there was no express easement created on TMS 135 for all the lines shown across it." Petition, p.3. Yet, the *existence* of BEC's express easements has been conceded over and over in this case by Simmons, and there is nothing for the Court to reconsider on this point. See Appellant's Brief, p. 23; R. 198, 201. Further, neither 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. Simmons wants to argue about on a ruling that was never made in this case.

Simmons cites selected phrases out of context to manufacture a "conclusion" supposedly reached by the Court on this issue:

With respect to the Master's conclusion that that there were express easements allowing the lines in question, this Court concluded: "The evidence presented established that the electric **lines** had been in their current configuration for an extended period of time" and that "such configuration did not exceed the intended scope of the easements." (emphasis added.) Decision p. 5.

Petition, p. 2, emphasis in original. This is what the Court actually said:

The express easements to Berkeley Electric were broad. However, the original parties to the easements could have used more specificity if they intended the use to be more

restricted. The evidence presented established the electric lines had been in their current configuration for an extended period of time. This demonstrates the easement holder and the landowners' understanding that such configuration did not exceed the intended scope of the easements.

Simmons v. Berkeley Electric Cooperative, Inc. p. 5. The Court was addressing Simmons' claims that BEC's express easements took advantage of unsophisticated landowners and that the results were unintended. *See e.g.*, Appellant's Brief, pp. 24-25; Appellant's Reply Brief, pp. 15-17. This Court did not conclude, as Simmons now insists, that every single inch of every power line on or over Simmons' property was authorized by an express easement.

The 1956 Heyward easement authorizes BEC's transmission lines across TMS -498 and -135. R. 130-131. The 1972 Brown easement authorizes BEC's distribution line which crosses -498 and extends out in both directions along Kitford Road. R. 130, 132-133. To the extent that the Kitford Road line runs into the Seaboard Coastline Railroad right-of-way and crosses (as argued by Simmons) over some portion of -135, that section of the line is covered by a prescriptive easement.² R. 45-46, 47-48, 52, 119, 130. The Court did not overlook or misapprehend the record on this issue and there is no basis for a rehearing. Simmons' petition should therefore be denied.

² Simmons initial and amended plats do not show -135. R. 52, 130. Simmons' revised plat shows a line crossing over Simmons' driveway in the Seaboard Coastline Railroad right-of-way. That property is not -135 and it does not belong to Simmons.

B. The Court Did Not Overlook or Misapprehend the Record Regarding BEC's Prescriptive Easement over -135.

Next, Simmons attacks the Court's ruling affirming the Master's finding of a prescriptive easement, claiming that BEC failed to establish the all of the necessary elements required for such a determination. Simmons now argues that the Seeney and Frank affidavits fail to establish "the identity of the thing enjoyed." Petition, p. 4. Simmons complains about details of the Seeney and Frank affidavits—that they used the term "utility line" and did not specifically identify the Seaboard Coastline Railroad right-of-way—and argues that these sworn statements *must* be interpreted to apply exclusively to the branch of BEC's Kitford Road line extending across -498. *Id.* Simmons further argues that because the Seeney and Frank affidavits were served before Simmons had his plat revised to show the Kitford Road line extending through the Seaboard Coastline Railroad right-of-way, these sworn statements somehow no longer establish that BEC's Kitford Road line had been in place for well over 20 years. *Id.* These arguments are specious.³

The Seeney and Frank affidavits are not restricted to just that part of BEC's line extending across -498.⁴ Their sworn statements cover the entire length of the

³ These arguments were never raised before the Master and were not preserved. Also, Simmons argued these points in his Reply Brief (*see* Appellant's Reply Brief, p. 27-29) and is improperly seeking to try this issue for a second time. *See* Toal, *et al.*, *Appellate Practice in South Carolina*, at 293.

⁴ The Seeney and Frank affidavits provided facts establishing a prescriptive easement. BEC did not need these affidavits to establish a prescriptive easement

Kitford Road line and, to the extent that line crosses the Seaboard Coastline Railroad right-of-way and runs over Simmons' driveway as he claims, Seeney and Frank's statements apply with equal force to -135. The Seeney and Frank affidavits both describe the "utility line located at 3507 Kitford Road." R. 45, 47. That is physical address of the property designated as "Lot A" on Simmons' original and revised plats.⁵ R. 52, 130. As shown on both plats, this utility line extends across -498 and then branches out in each direction along Kitford Road in at the pole marked "C4." R. 52, 130. The line runs along the entire length of Lot A—i.e., 3507 Kitford Road. R. 52, 130. Simmons' original plat shows this line ending in the middle of the Seaboard Coastline Railroad right-of-way. R. 52. Plaintiff's revised plat shows the line running across the Seaboard Coastline Railroad right-of-way and into BEC's 75 foot transmission line easement. R. 130. As indicated by Seeney and Frank, the line extending along 3507 Kitford Road is clearly visible, obvious, and has been operated on or above Simmons' property since for over 20 years. R. 45-48. Seeney and Frank's affidavits are not limited to any particular segment of the Kitford Road line. As determined by the Master and confirmed by this Court, their sworn statements provide sufficient evidence to establish of a prescriptive easement across both -048 and -135.

for that part of the line extending over -498 because it had an express easement covering that property.

⁵ 3507 Kitford Road is the physical address for the "Turner residence" identified in Simmons' Supplemental Affidavit. R. 119.

Furthermore, Simmons' own statements support the finding of a prescriptive easement across -135. As stated in his supplemental affidavit:

The revised plat which [Lacy] prepared dated September 22, 2010 shows another line running from the power distribution line where it crosses TMS 282-00-00-135 over my driveway out to Kitford Road and ending at the pole in front of the Turner Residence on the south side of Kitford Road. The line running over my driveway has been used by Berkeley Electric to my knowledge for many years to service its customers on the south side of Kitford Road. There have even been cable TV lines running along the same route. I question why Berkeley Electric had to add another power line across TMS 283-00-00-498 which is connected to the same pole on the south side of Kitford Road when it already had a route to service the same customers.

R. 119. Based on these statements, Simmons argued that the section of line over his driveway (and allegedly -135) predated the section extending over -498. *See e.g., Appellant's Reply Brief, p. 17, 18.* As discussed above, Seeney and Frank established that line at 3507 Kitford Road has been continuously operated on or above Simmons' property since at least 1980. R. 46, 48. If the line running over Simmons' driveway predated the section of line extending from Kitford Road across -498 as argued by Simmons, then the line over his driveway was necessarily in existence for well in excess of twenty years as required to establish a prescriptive easement. R. 45-48, 119.

The Court did not overlook or misapprehend the record regarding BEC's claim for a prescriptive easement over -135. The Court considered the record and disagreed with Simmons' claims. *Simmons v. Berkeley Electric Cooperative, Inc.* p. 7. Simmons' petition for rehearing should be denied.

C. The Bradley Affidavit Establishes that BEC's Lines Do Not Encroach on -137 Outside its Easement.

Simmons has repeatedly argued that the Bradley affidavit establishes that BEC's lines *do not* encroach on -135:

Furthermore, if the Seeney and Frank affidavits supported Berkeley Electric's claim to a prescriptive easement, why did Berkeley Electric need to file the Bradley Affidavit, which contends that the power line is not even on TMS 135.

Appellant's Reply Brief, p. 28.

[BEC's] evidence "consisted only of the last minute Bradley affidavit that there was no encroachment on TMS 135."

Appellant's Reply Brief, p. 29.

Since Simmons' testimony "contradicts Bradley's opinion that the line does not encroach TMS 135, there is a disputed issue of fact.

Id.

Despite all that, Simmons now argues he is entitled to a rehearing because that the Bradley affidavit "does not address the encroachment of the power line "to the west" of the Berkeley Electric transmission line." Petition, p. 6. Simmons previously raised this contradictory point in his briefs.⁶ Reply Brief, pp.13-14. It is not the purpose of a rehearing to have the case tried in the appellate court a second time. Toal, *et. al.*, *Appellate Practice in South Carolina*, at 293.

Simmons' claim that Bradley's affidavit does not address BEC's line running to the west of BEC's transmission line is incorrect. Bradley stated that

⁶ This argument was never raised before the Master and has not been preserved.

BEC's service does not encroach on Simmons property outside the seventy-five foot easement. R. 154. The line shown running to the *west* of BEC's transmission line on Simmons' revised plat runs outside that seventy-five foot wide transmission easement. R. 130. As indicated by Bradley, any portion of BEC's line shown outside of that easement does not encroach on Simmons' property. R. 130, 154.

In his affidavit, Simmons states that the *revised plat shows* BEC's line "running from the power distribution line where it *crosses TMS 282-00-00-135 over my driveway out to Kitford Road* and ending in a pole in front of the Turner residence on the south side of Kitford Road."⁷ R. 119, emphasis added. Simmons then reiterates: "The line running over my driveway has been used by Berkeley Electric to my knowledge for many years to service its customers on the south side of Kitford Road." *Id.* However, as shown on Simmons' revised plat, the line *over his driveway* out to Kitford Road is located in the Seaboard Coastline Railroad right-of-way. R. 130. That property is not -135.⁸

As discussed above, Seeney and Frank's affidavits established that BEC's continuous and uninterrupted use of the Kitford Road line, as configured, for 20 years. R. 45-48, 52, 130. The line is open and obvious. R. 45, 47. As noted by this Court, Simmons has never stated that, based on his own personal knowledge, BEC's lines were not located on or over his property for the requisite period.

⁷ Simmons refers to a "power distribution line." R. 119. For the purposes of argument BEC will assume Simmons meant BEC's transmission line.

⁸ The property is still owned by a railroad company.

Simmons v. Berkeley Electric Cooperative, Inc. Op. No.5099, p. 7. BEC enjoys a prescriptive easement for the entire Kitford Road line, as configured, including any portion that extends into the Seaboard Coastline Railroad right-of-way and regardless of whether the line crosses -135. R. 45-48, 119, 130.

Simmons' claims on this point are contracted by his own statements and arguments and by his revised plat. Therefore, the Court should deny Simmons' petition for rehearing.

D. The Court Applied the Proper Standard of Review.

Simmons argues that the Court did not apply the correct standard of review in affirming the Master's grant of summary judgment to BEC. Petition, p. 7. Simmons contends that the Court failed to properly consider the inferences which could reasonably be drawn from the evidence or "whether there was disagreement concerning the conclusion to be drawn from the facts. Petition, p. 7. Simmons then proceeds to misstate the record in support of the same series of unreasonable inferences and conclusions previously argued in his opening and reply briefs.

Relying on statements in his supplemental affidavit and the revised plat, Simmons argues that there is a scintilla of evidence creating an issue of fact regarding whether there was any prescriptive easement across -135 and -498.⁹ Simmons claims that the revised plat "indicates two [of] the power lines running

⁹ As previously stated, this Court upheld the Master's finding that BEC's lines extending across -498 were authorized by express easements. Petitioner has not sought rehearing on this issue. Simmons' claim that factual issues preclude summary judgment on whether BEC has a prescriptive easement for its line extending across -498 is therefore moot.

across TMS 135.” Petition, p. 8. Simmons’ revised plat does not show -135 at all. R. 130. Simmons further contends that he “objected to the two lines on TMS 135 running to the north and to the South from the transmission line as being outside the grant of any easement to Berkeley Electric.” Petition, p. 8. Actually, Simmons objected to BEC’s allegedly unreasonable use of his property under the express easements granted by Heyward and Brown. R. 119. That Simmons objects to BEC’s use is obvious from his complaint. R. 24-35. Simmons’ bare claim of objection does not create a genuine issue of fact over whether BEC’s use establishes a prescriptive easement.

Moreover, Simmons’ supplemental affidavit does not, as he now claims, identify “power lines running to the north and to the south *from the* transmission line.” Petition, p. 8, emphasis added. Simmons’ asserts that BEC uses the Brown and Heyward easements “to justify crossing my property four times, twice across TMS 283-00-00-498 on the east and west and twice across TMS 282-00-00-135 on the north and on the south.” R. 119. BEC’s distribution line (under the Brown easement) runs over the west side of -498 and, according to Simmons, extends over his driveway out to Kitford Road. *Id.* Simmons’ revised plat shows the Kitford Road line crossing Simmons driveway in the Seaboard Coastline Railroad right-of-way, which lies adjacent to the north corner of -135. R. 130, 156-157. BEC’s transmission line (under the Heyward easement) crosses the east corner of -498 and is the only power line that crosses *on the south* of -135 as described by Simmons in his affidavit. R. 130, 156-157. Simmons’ affidavit does not state, as

he now claims, that the lines which allegedly cross -135 *run from* the transmission line.

Citing paragraph 2 of his supplemental affidavit, Simmons contends that he presented sufficient evidence to overcome summary judgment because he denied that the power line crossing -498 has been there since 1980. Petition, p. 8. The asserted factual basis for Simmons denial is the Gaillard plat. R. 50, 118. Simmons provides no testimony from Gaillard or any other surveyor regarding the details of the plat. He provides no facts showing any personal recollection, understanding, or knowledge establishing any other factual basis for his claim regarding the plat. *Id.* Simmons must show affirmatively that he is competent to testify to the matters stated in his affidavit. Rule 56(e) SCRCP. Simmons' denial is based on speculation as to what he thinks the plat should show. That is insufficient under Rule 56(e).

The Master dispensed with Simmons' argument that the Gaillard plat precluded summary judgment:

Plaintiff's reliance on this plat is misplaced because it is not a plat of his property and it does not purport to depict all of the features on his property. The plat is merely intended to show the placement of a fifty foot right-of-way easement and drainage easement for a neighboring property. The Gaillard plat does not contradict the statements of BEC's district supervisors.

R. 19. This Court agreed with the Master and affirmed his ruling. *Simmons v. Berkeley Electric Cooperative, Inc.* Op. No.5099, p. 7. As discussed at length in BEC's brief, the absence of a feature in a plat is not proof that the feature is

absent. *See* Brief of Berkeley Electric Cooperative, Inc., pp. 30-34, incorporated by reference herein. The features depicted in a plat are determined by the surveyor and his client. *See, e.g.*, Simmons original plat as compared to his revised plat, R. 52, 130; St. John's Water Company plat dated May 13, 2008, showing *no* BEC power lines over -498 or along Kitford Road. R. 78.

Simmons' affidavits fail to provide any facts, based on his personal knowledge, which support his contention that BEC's lines have not been in place since at least 1980. Simmons failed to provide any testimony from any qualified witness regarding the features on neighboring properties that were depicted—or not depicted—in the Gaillard plat. There is no evidence whatsoever, from which one could conclude that the Gaillard plat is a reliable record of the non-existence of features that are not shown. Simmons' conjecture is not a substitute for fact. The inference that Simmons attempts to draw from the Gaillard plat is *not a reasonable inference* based on facts as required to overcome summary judgment. It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine. *Thompkins v. Festival Centre Group*, 306 S.C. 193, 194, 410 S.E. 3d 593, 593-94 (Ct. App. 1991).

The Court considered these arguments and ruled against Simmons. *Simmons v. Berkeley Electric Cooperative, Inc.* Op. No.5099, pp. 6-7. It is not the purpose of the petition for rehearing to have the case tried in the appellate court a second time. *Toal, et. al., Appellate Practice in South Carolina*, 293 (2002). For all of these reasons, Simmons' petition should be denied.

Simmons also attempts to rehash his previous arguments about “system maps.” According to Simmons, BEC and Comcast produced maps

which indicated that the line across TMS 498 had been moved, R. p. 135, 136, 153 or Simmons statements that the line down Kitford Road had previously been moved across TMS 498. R. p. 119.

Petition, p. 9. BEC has previously addressed this issue in detail. *See* Brief of Berkeley Electric Cooperative, Inc., pp. 34-37, incorporated by reference herein.

The system maps were submitted on the eve of the hearing as exhibits to the affidavit of Simmons’ attorney. The only testimony provided regarding these drawings was counsel’s representation that they were “true copies.” R. 120-121. The Master ruled Simmons failed to produce any facts supporting his claims regarding these drawings.

Plaintiff failed to provide any affidavits or reference any testimony explaining what these maps depict, how accurate they are, or how they are to be properly interpreted. Plaintiff’s theory that some of the power lines might not have been there for at least twenty years remains that—just a theory. Reasonable inferences must be based on facts before the Court and not based on argument and speculation.

(R. 20.) The Court of Appeal affirmed the Master’s decision. *Simmons v. Berkeley Electric Cooperative, Inc.* Op. No.5099, p. 7.

These maps, submitted without any foundation and without any substantive testimony supporting Simmons’ arguments, are not evidence of anything and fail to create a genuine issue of fact regarding whether BEC has established the

existence of a prescriptive easement for its lines over -489.¹⁰ Simmons failed to provide *any* competent testimony, based on personal knowledge, affirmatively stating facts establishing what these drawings depict, their level of accuracy and reliability, and how they rebut BEC's claim of a prescriptive easement. Simmons' bare argument in his brief that the maps supposedly show the lines over -498 in "substantially different" locations is not evidence.¹¹ See *Trivelas v. South Carolina Department of Transportation*, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001). Simmons' contentions regarding the maps are not fact-based and his inferences are not reasonable. His petition on these grounds should be denied.

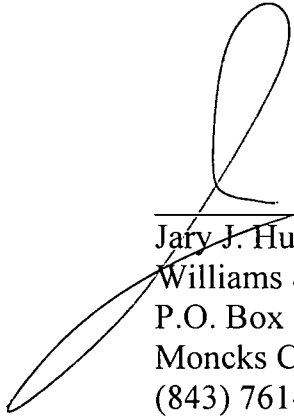
CONCLUSION

Simmons failed to produce a scintilla of evidence to rebut BEC claim of a prescriptive easement across -498 and -135. Argument, conjecture, and speculation do not constitute evidence. Simmons' obscure statements and the documents submitted by his attorney failed to create a genuinely disputed issue of fact regarding BEC claims of express and prescriptive easements. Simmons' inferences are based on conjecture, not fact, and are unreasonable. The Court did

¹⁰ As stated above, this issue is moot—the Court found that BEC has an express easement for that portion of its distribution line extending over -498.

¹¹ Simmons' claim on of a "substantial difference" is a gross mischaracterization of the maps and fails to raise genuine issue of fact. Both of the maps attributed to BEC show the line extending from BEC's transmission line to a point located across Kitford Road. R. 135, 136. There is no substantial difference in the location and configuration of the line. A disputed issue of fact must be genuine. Rule 56, SCRPC.

not overlook or misapprehend the points raised by Simmons in his petition for rehearing and it correctly affirmed the Master's grant of summary judgment to BEC. Based on the foregoing, BEC respectfully requests that the Court deny Simmons' motion for rehearing.



Jary J. Hulst
Williams & Hulst, LLC
P.O. Box 1288
Moncks Corner, SC 29461
(843) 761-8232
jbw@williamsandhulst.com
Attorneys for the Respondent,
Berkeley Electric Cooperative,
Inc.

April 22, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Mikell Scarborough, Master-In-Equity

Case No.: 2008-CP-10-1983

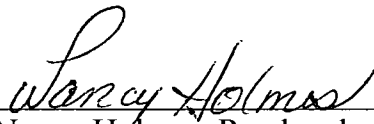
Roosevelt Simmons.....Appellant

v.

Berkeley Electric Cooperative, Inc.
& St. John's Water Company, Inc.....Respondents

PROOF OF SERVICE

I certify that I have served a copy of Respondent Berkeley Electric Cooperative Inc.'s Return to Appellant's Motion for Rehearing, with regard to the above cited matter on all parties by depositing a copy of said Return in the United States Mail, postage prepaid, on April 22, 2013, addressed to the attorney for the Appellant, Edward A. Bertele, 1812 Pierce Street, Charleston, South Carolina, 29492 and to the attorney for St. John's Water Company, Inc., Gaines Smith, 720 St. Andrews Boulevard, Charleston, South Carolina, 29407.



Nancy Holmes, Paralegal
Williams and Hulst, LLC
209 East Main Street
Moncks Corner, SC 29461
(843) 761-8232 / 899-5834 FAX

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SC Court of Appeals

John B. Williams
Jary J. Hulst
John O. Williams

209 E. Main Street
Moncks Comer, SC 29461

Phone 843.761.8232
Fax 843.899.5834

WILLIAMS AND HULST, LLC.

ATTORNEYS AT LAW



April 22, 2013

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The Honorable Jeanette Barber
Clerk of Court SC Court of Appeals
Post Office Box 11629
Columbia, SC 29201

RE: Simmons v. Berkeley Electric Cooperative, Inc., et al.
Case Tracking No.: 192409

Dear Ms. Barber:

Enclosed is an original and seven (7) copies of Respondent Berkeley Electric Cooperative Inc.'s Return to Appellant's Motion for Rehearing. I have also enclosed an original and one copy of a Proof of Service.

Please return a filed copy of the Return and Proof of Service to me in the self-addressed stamped envelope provided.

Thank you for your assistance. Please do not hesitate to contact me should you have any questions.

With kindest regards, I remain

Sincerely,

WILLIAMS AND HULST, LLC

Jary J. Hulst

JJH:shs

Enclosures as stated

cc: Edward A. Bertele, Esq.
Gaines Smith, Esq.
(via U.S. mail w/ enclosures)

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