THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court Of Common Pleas

The Honorable R. Markley Dennis, Jr, Circuit Court Judge
Trial Court Case No. 2018CP2600120

Appellate Case No. 2021-000078

East Cherry Grove Co., LLC and Ray & Nixon, LLC, ... Respondents,

v.

State of South Carolina, South Carolina Department of Health and Environmental Control, and Matt Leonhard, ……. Defendants,

Of whom The State of South Carolina is the Appellant

FINAL REPLY BRIEF OF APPELLANT STATE OF SOUTH CAROLINA

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ARGUMENT

This appeal is about ownership of more than 100 acres of marsh claimed by Respondents in two tracts. *See*, R. V. 1, pp. 219 and 223 (State's Exhibits 1 and 5). For one section of that marsh described as the pig's ears and the dome of the pig's head, no evidence supports the circuit court's conclusion that Plaintiff East Cherry Grove owns it. That section, as well as all others at issue, is important as a "precious resource of the State"[1] as is all marsh. The circuit court's ruling bars the State and the Department of Health and Environmental Control from issuing dock or other permits to wharf over that marsh. R. V. 1, p. 10; *see, Hoyler* ("the State would no longer have the authority to manage the disputed marsh for public use or to permit adjacent property owners to build in the marsh . . . .").

This decision of the circuit court judge finding title in Respondents is fundamentally flawed. Among the problems discussed below, the Order rests on the wrong burden of proof, misapplies the law of the case doctrine, and more importantly as to the pig's ears and dome of the pig's head, no evidence in the record reasonably supports the Respondents' claim of ownership of that area. The Order should be reversed with a ruling from this Court that Respondents failed to overcome the State's presumption of ownership.

1 *See Hoyler v. State*, 428 S.C. 279, 307, 833 S.E.2d 845, 860 (Ct. App. 2019), reh'g denied (Oct. 17, 2019), cert. dismissed (Jan. 29, 2020).

I

THE COURT SHOULD HAVE APPLIED A CLEAR AND CONVINCING EVIDENCE STANDARD TO THE EVIDENCE

The Court should have applied a clear and convincing standard of proof to the evidence in this case rather than the preponderance of the evidence, and the failure to do so is reversible error. *Hoyler, supra,* indicates that such a standard should be applied to tidelands cases such as the instant suit in stating that "one claiming an interest in tidelands pursuant to section 48-39-220(A) must convince the court that the State intended to include the tidelands within the boundaries expressed in the deed." (emphasis added)). Another tidelands case also indicated that such a standard applies. In *Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 104, 552 S.E.2d 778, 783 (Ct. App. 2001)("These facts convince us the master correctly ruled the grant from the State of South Carolina intended to convey fee simple title of the tidelands to Peronneau." (emphasis added)).

The clear and convincing standard is most certainly consistent with the strict standards governing tidelands cases. "Our State's tidelands are a precious public resource held in trust for the people of South Carolina." *Hoyler, supra.* "Because the law, as a zealous guardian of the public interest, bestows presumptive ownership of tidelands on the State for the benefit of the public, any deed from the State purporting to convey tidelands to a private individual must be strictly construed against the grantee and in favor of the public." *Id.* "[T]he party asserting a transfer of title bears the burden of proving its own good title . . . ." *Id.* "Necessarily, the claimant must show that the language of the conveyance is specific enough to determine a reasonably precise location of its boundaries so that members of the public will not be excluded

from property rightfully belonging to them." *Id.*

This well-developed body of case law demonstrates that the references to convincing evidence in *Hoyler* and *Lowcountry* were more than snippets or dicta. They set the standard of evidence that must be met under the strict guidelines for proof in tidelands cases. The failure of the circuit court to apply a clear and convincing standard is reversible error. *Chabek v. Nationwide Mut. Fire Ins. Co.,* 303 S.C. 26, 29, 397 S.E.2d 786, 788 (Ct. App. 1990)("Were we inclined to view the master as having subject matter jurisdiction, we would reverse and remand the matter for a new trial because the master failed to apply the correct burden of proof."); *Hill v. Jones*, 255 S.C. 219, 225, 178 S.E.2d 142, 145 (1970)(reversed former Workmen's Compensation Commission decision for reasons that included "a substantial question as to whether the Majority Commission applied the correct rule of law with reference to the burden of proof."). Moreover, as discussed below, in Argument III, the Respondents failed to meet the clear and convincing standard and or even the preponderance of the evidence standard.

II

THE COURT IMPROPERLY RELIED ON THE LAW OF THE CASE DOCTRINE

Respondents fail to show that this doctrine applies here to the Order of Judge Hyman in *East Cherry Grove Realty Co., LLC v. State of South Carolina and South Carolina Department of Health and Environmental Control*; C/A No.2014-CP-26-1412 [the *Teague* case] R. V. 2, p. 466 (Pl. Ex. 18). The Hyman Order is not the law of the case for the instant case because *Teague* is a different case. Application of the law of the case to the instant case conflicts with the clear Supreme Court precedent applying the doctrine only to the case in which the law was made. As stated in *Builders Mut. Ins. Co. v. Bob Wire Elec., Inc*., 424 S.C. 161, 165, 817 S.E.2d 807, 809

(Ct. App. 2018), "the doctrine of "law of the case" is just that—the law of the case in which it was made, not the law of future cases." (emphasis added) s*ee also* cases in Brief of Appellant at p. 8. [2]

Moreover, that Order was limited to a narrow section of marsh under a proposed dock. Order at page 8 ("this Court finds that the part of the marsh area over which the proposed dock is to be built is owned by East Cherry Grove Realty under a sovereign grant.") In fact, Judge Hyman specifically stated that he could not make a determination of ownership of any land other than the part under the marsh:

> Mr. Connell, I'm going to find as a matter of fact that the property upon which the dock was to encroach was property of East Cherry Grove Realty. I have not heard enough concerning the metes, the bounds, the size of the subject to make a determination that all of the subject tract --when I say subject, I mean that hundred-and-how-ever-many acres belongs to East Coast -- I mean, East Cherry Grove Realty. I don't know. I haven't -- the approach has not been such that I've been able to determine how big it is, what it's metes and bounds are. I don't have a description. I can say comfortably though that I believe that the dock will encroach on East Cherry Grove Realty's property.

R. V. 1 p. 232, ll. 8 – 19. Therefore, Judge Hyman did not rule that East Cherry Grove owned any property other than marsh immediately under the Teague dock, and his Order does not apply to the instant case except as to that sliver under the Teague dock.

Respondents try to avoid this result by arguing collateral estoppel and res judicata, but they cannot raise these grounds now because they failed to raise them below. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497

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2 Plaintiffs rely on only one case, *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) but in that case the Appellant sought relief from a prior unappealed order. *Judy* does not apply to this case because no party seeks to overturn *Teague*. As discussed below, *Teague* involved only a sliver of land under a dock and made no findings about the vastly larger area at issue in the instant case.

S.E.2d 731, 733 (1998). Moreover, Judge Hyman made no determination of ownership other than the sliver of land immediately under the dock at issue in the *Teague* case so his order would have no collateral estoppel or res judicata effect on the instant case. *See, McKnight v. Porcher*, No. 2017-002523, 2020 WL 6955602, at *1 (S.C. Ct. App. Nov. 25, 2020) re grounds for collateral estoppel and res judicata.

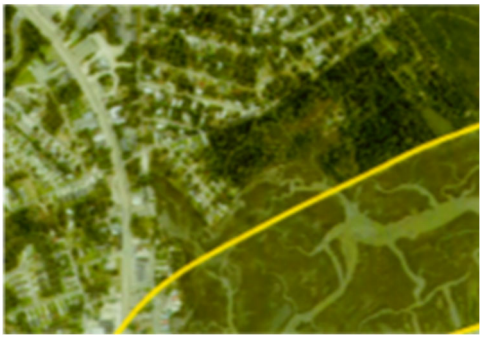
III

NO EVIDENCE REASONABLY SUPPORTS THE CIRCUIT COURT'S FINDING THAT RESPONDENTS OWN THE ENTIRETY OF TMS 1450001001

"In an action at law, '[the appellate court] will affirm the master's factual findings if there is any evidence in the record [that] reasonably supports them.'" *Hoyler,* 428 S.C. at 290, 833 S.E.2d at 851. No evidence reasonably supports the circuit court's determination of ownership of the area described as the pig's ears and the dome of the pig's head.

This area depicted on the Courtney Plat at State's Exhibit 25 (R. V. 1, p. 233 and enlarged) and described as the "pig's ears" and "dome of the pig's head" and an adjacent strip are outside the boundaries of the 200 acre 1786 Morrall grant to that area as depicted on the State's plat below and more fully described in the State's opening brief.

State's Ex. 25 (R. V. 1, p. 233 and enlarged).



Respondent's exhibits also exclude at least the pig's ears and dome area[3]. R. V. 1, pp. 243 and 246 (Plaintiff's Ex. 1, p. 9 and Ex. 4).

Respondents point to no evidence that reasonably supports the circuit court's conclusion that they own the pig's ears and dome. They refer repeatedly to statements by the State's surveyor that he was 70% sure that they own the area, but Mr. Courtney's testimony does not support ownership because he explained that the "seventy percent is because I don't have a Kings Grant to the pig's ear section . . . ." R. V. 1, p. 165, ll. 5-7); see also, R. V. 1, p. 151, ll. 7-14). Without a grant to that section, Respondents do not own it. *Grant v. State*, 395 S.C. 225, 228, 717 S.E.2d 96, 98 (Ct. App. 2011). ("To rebut the State's presumptive title, a claimant must show (1) its predecessor in title possessed a valid grant, and (2) the grant's language was sufficient to convey land below the high water mark."). Respondents' own witness, Joel Floyd acknowledged that his map did not include the pig's ears area except for his vague reference to grants not in evidence. R. V.1, p. 132, ll. 12-21. Grants not in evidence cannot support a claim to tidelands.

Respondents also point to testimony by their title opinion expert, William Deschamps, but

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3 Plaintiffs' exhibits are unclear as to whether the adjacent strip is outside their overlay of the grants but the overlays clearly exclude the ears and dome of the pig's head. *See*, above. As for the strip, the Courtney plat should be followed to exclude it as discussed in Argument IV, *infra*.

his remarks about the general area of TMS 1450001001 are insufficient as he is not a surveyor and did not render a surveying opinion. R. V. 1, p. 151, ll. 2 – 16). He simply relied on the maps provided by the State's surveyor Russ Courtney and the Plaintiff's surveyor Joel Floyd, which did not show ownership of this area. R. V.1, p. 107, ll. 2 – 11). Mr. Deschamps did not address the pig's ears area at issue nor did he refute the accuracy of the Courtney map. Therefore, he provides no support for ownership of the pig's ears, dome and strip area. Respondents also point to the ownership of the sliver under the Teague dock, but that sliver is below the left pig's ear and does cover any other areas. R. V. 1, p. 295 Plaintiff's Ex. 15.[4]

With no evidence reasonably supporting the circuit court's conclusion showing that the pig's ears and dome are owned by East Cherry Grove, this Order may be reversed as to that area, under the above standard of review. *See* also note 3, *supra*. East Cherry Grove failed to satisfy the standards of proof and strict scrutiny applied to grants of tidelands property.

IV

THE COURTNEY PLAT (STATE'S EX. 25) MUST BE USED BECAUSE RESPONDENTS PRESENTED NO EVIDENCE OF THE ACTUAL BOUNDARIES OF THE PROPERTY THEY CLAIM

The Order improperly relied on the vague outlines of the TMS plats on the Horry County GIS system and similar plats. R. V. 1, p. 3. Those plats lack specificity and are disclaimed by Horry County as to accuracy. R. V. 1, pp. 51 and 285 (Pl. Ex. 3 to Complaint; Pl. Ex. 12). See also, R. V. 1, p. 219 (States Ex. 1); R. V. 1, p. 169, ll 2 - 18) [5]. Mr. Courtney testified that the TMS depictions on the Horry system were "a close rendition" but "not survey grade." *Id*. Such

4 The circuit court referred to the proposed Teague dock as being at the base of the ear. R. V. 1, p. 135, ll. 3-4). Exhibit 15 (R. V. 1, p. 295) shows it slightly below the ear.

5 https://www.horrycounty.org/Online-Services/Land-Records.

TMS depictions, therefore, are insufficient to determine the extent of property claimed by Plaintiff in this case. Plaintiffs have introduced no exhibits with a metes and bounds or other description of the property they claim.

Respondents apparently refer to *Brownlee v. Miller*, 208 S.C 252, 37 S.E.2d 658, 661-662 (1946) in an effort to bolster their reliance on the Horry County GIS map as good enough, but they misunderstand the decision. They quote it as saying that "boundaries govern acreage and inaccuracies relating to the area of a tract are generally immaterial," but the quote is about the accuracy of acreage rather than the accuracy of the boundary. *Hobonny Club v. McEachern,* 272 S.C. 393, 398, 252 S.E.2d 133, 136 (1979), emphasized the importance of the accuracy of boundaries in stating that "[i]t is difficult to imagine how more precisely to express intent as to the location of boundaries than to incorporate an accurate plat in the description . . . . It is undisputed that the boundaries are accurately relocatable on the ground by contemporary engineering methods. The specificity of the attached plats outweigh, in our judgment, the general terms of the descriptions in the grants in determining the intent of the grantor." "While a property description need not be perfect, it must allow one examining it to identify the property conveyed . . . ." *Hoyler*, 428 S.C. at 295, 833 S.E.2d at 853. Only the Courtney plat supplies that degree of accuracy, and only that plat should be followed.

V

THE CIRCUIT COURT SHOULD HAVE CLARIFIED THAT ONLY THE STATE CONTROLS THE NAVIGABLE WATERWAYS

As noted above, the circuit court found that Respondents "own the tidelands to the low water mark in all navigable creeks and own all the tidelands below the low water mark in all

non-navigable creeks but that does not include the bottoms of any navigable waters on these properties, and under our Constitution, those waters are public highways subject to Defendant's control." R. V. 1, p. 10. The circuit court should have specified that the waters are public highways subject to the State's control rather than the more general "Defendant's," but given the context and the lack of participation of the Defendant Leonhard, the Court obviously intended to refer to State ownership. Respondents agree that they do not own the land below mean low water on navigable waterways. Therefore, although clarification would be desirable, no dispute appears to exist that the State owns the tidelands below low water on navigable waterways and controls such waterways.

CONCLUSION

The State respectfully requests that this Court reverse the circuit court's order as set forth above and conclude that the law of the case doctrine does not apply the *Teague* Order to the instant case, that the Courtney plat (R. V. 1, p. 233 and enlarged - State's Ex. 25) is controlling as to this case, that Respondents do not own the pig's ears and the dome of the pig's head sections and no other property outside the boundaries of the grants as depicted on the Courtney plat.

Respectfully submitted,

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October 5, 2021

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CERTIFICATE OF COMPLIANCE WITH RULE 211 (b)

I hereby certify that the Final Brief and Final Reply Brief of the Appellant State of South Carolina complies with Rule 211(b), SCACR. I do note that in the first paragraph at the top of page 3 of the Final Brief, I deleted an erroneous reference to the Record regarding the Order of Default. That Order was not designated for the Record nor is it in the filed Record on Appeal. Counsel for Respondents consents to this deletion. This correction appears to be consistent with provisions for references to the Record in Rule 211(b)(1), SCACR. If the Court desires further action, please let me know.

s/J. EMORY SMITH, JR.
Deputy Solicitor General
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October 6, 2021