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SC Court of Appeals

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

STATE'S PETITION FOR REHEARING

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Pursuant to Rule 221, SCACR, the Respondent Attorney General respectfully petitions for rehearing of this appeal because the Court overlooked or misapprehended the following points in its Opinion of July 3 (*E. Cherry Grove Co., LLC v. State*, No. 2021-000078, 2024 WL 3281205, at *5 (S.C. Ct. App. July 3, 2024)):

1. The Court should have applied a clear and convincing evidence standard
2. The Courtney Plat (State's Ex. 25) must be used because Respondents presented no evidence of the actual boundaries of the property they claim
3. The State did argue in its brief that the circuit court improperly relied upon the title expert's opinion.

The State does not contest this Court's Opinion as to other issues in this appeal including ownership of the area referenced as the pig's ears and dome of its head, the application of the law of the case doctrine and clarification of the State's control of navigable waterways.

ARGUMENT

I

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

The Court of Appeals did not analyze this issue other than stating the following:

None of the foregoing tidelands cases expressly sets forth a standard requiring clear and convincing evidence. The reviewing courts affirmed the trial court's rulings when the record contained evidence to support its finding as to whether the party seeking to establish title rebutted the State's presumption of title. Here, the circuit court applied the presumption and determined, based on a preponderance of the evidence, that the Grants and accompanying plats Respondents presented contained sufficient detail to establish Respondents' ownership of the tidelands. We hold the circuit court applied the correct analysis by requiring Respondents to provide sufficient evidence to overcome the State's presumption of title and did not err by failing to require Respondents to establish ownership by clear and convincing evidence.

E. Cherry Grove Co., supra, at *5. The Court did not address the indication in two cases that a stronger standard than preponderance of the evidence should apply. The Court quoted but did not discuss that part of *Hoyler v. State*, 428 S.C. 279, 292, 833 S.E.2d 845, 852 (Ct. App. 2019), reh'g denied (Oct. 17, 2019), cert. dismissed (Jan. 29, 2020) that said 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)). The Court cited *Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 104, 552 S.E.2d 778, 783 (Ct. App. 2001) but did not quote that part of the case that concluded that “[the] facts convince us the master correctly ruled the grant from the State of South Carolina intended to convey fee simple title of the tidelands. . . .” (emphasis added)).

A clear and convincing standard of proof is also consistent with the burdens placed on a plaintiff to rebut the State’s presumption of ownership. Title to lands lying between the mean high water mark and mean low water mark is held by the State in trust for public purposes absent a grant from the State or the King of England. See *Hobonny Club v. McEachern*, 272 S.C. 392, 252 S.E. 2d 133 (1979). The burden rests upon the claimants to prove that the State had granted title to the lands in question to them or their predecessors in title. *State v. Yelsen Land Co.*, 265 S.C. 78, 216 S.E. 2d 876 (1975). “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.* [emphasis added]. Further, a grant from the sovereign to a subject is construed strictly in favor of

the government and against the grantee. *Hobonny Club, supra*, 252 S.E.2d at 135-36, 272 S.C. at 396.

In connection with public trust property, Idaho requires clear and convincing evidence to overcome a presumption of ownership of public trust property. As stated in *Erickson v. State*, 132 Idaho 208, 211, 970 P.2d 1, 4 (1998) regarding property associated with a lake, “it is presumed that the State is holding the title to these lands in trust for the public. In order to prove otherwise, the *Ericksons* have the burden of proving their title by clear and convincing evidence.”

Although South Carolina appellate decisions have not expressly addressed the clear and convincing standard in tidelands contexts, it has applied it or similar standards in other cases. For example, “[w]here there is enough to create a foundation for the presumption of [a common law] marriage, it can be repelled only by the most cogent and satisfactory evidence. *Jeanes v. Jeanes*, 255 S.C. 161, 167, 177 S.E.2d 537, 539 (1970), abrogated by *Stone v. Thompson*, 428 S.C. 79, 833 S.E.2d 266 (2019)¹. In addition, a person asserting that an original will was, in fact, valid but mistakenly lost or destroyed by another, bears the burden of presenting clear and convincing evidence to rebut the presumption the testator destroyed the will with an intent to revoke it. *Golini v. Bolton*, 326 S.C. 333, 340, 482 S.E.2d 784, 788 (Ct. App. 1997).

Requiring clear and convincing evidence to overcome the State’s presumption of ownership is consistent with the importance that the courts of this State attach to public trust property and with the other authority set forth above including the references in *Hoyler* and *Lowcountry*. This evidentiary standard should have been applied in this case.

¹ *Stone* abolished presumptions of a common law marriage based upon cohabitation and abolished the entry into such marriages prospectively.

II

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

Although the State agrees with this Court that Respondents did not establish ownership of the section of TMS 145000100 described as the pig's ears and the dome of the pig's head, Respondents produced no evidence showing precise boundaries of the other land they claimed in that area. It is not enough for them to show grants in the general area.

This Court overlooked that Respondents presented no evidence or testimony establishing the precise boundaries of their property. Their witnesses' testimony offered only generalities rather clear boundaries.² Their exhibits merely showed superimpositions of 18th century plat outlines on aerials and general maps but they do not depict any metes and bounds description of the property they claimed in relation to the East Cherry Grove tract TMS 145000100. R. V. 1, pp. 240, 243, 246 (Pl. Exs. 1 and 4). No one reviewing those and aerials maps would be able to discern a precise location of those lines on the ground including the lot owners adjoining this tract. The circuit court judge described ownership in terms of the TMS depiction, R. V. 1, p. 3 (Amended Order at p. 3), but TMS 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);

² Testimony of the Mr. Deschamps, Respondents' title opinion expert, about the general area of TMS 1450001001 is insufficient as he is not a surveyor and cannot override the testimony of the two surveyors that exclude that area. He testified that the property claimed by Respondents was in a chain of title originating with the Morrall and Alston sovereign grants, but he never identified a deed into the Respondents or referenced a description of properties claimed by them. (R. p. 107, ll. 16 – 20. He identified no deed in evidence with a description of the property at issue.

R. V. 1, p. 169, ll. 2 - 18)³. The result of this confusion could be that many adjacent lot owners will be left with uncertainty as to whether their properties overlap with East Cherry Grove property leading to disputes over dock permits or further litigation. As stated in *Hoyler*, a “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.” 428 S.C. at 293, 833 S.E.2d at 852. East Cherry Grove failed to establish a reasonably precise location of its boundaries to avoid confusion with ownership of adjoining landowners.

There is no evidence in the record showing accurate deed based renderings of the boundaries of Respondent’s property other than the Courtney plat, State’s Ex. 25 (R. V. 1, p.233). On that plat, the State’s surveyor Courtney plotted a green outline of the properties claimed by the Respondents in this action based upon deed books. See notations on exhibit at R. V. 1, p. 233 and large version separately filed. Furthermore, the Courtney overlay in Exhibit 25 is much more similar to the original 200 acre Morrall plat than is Mr. Floyd’s wider application. (Compare R. V. 1, pp. 240, 243, 246 (Pl. Exs. 1 and 4) and R. V. 1, p.233)(Sts. Ex. 25 and enlarged version) and R. V. 1, p. 167, l. 22 – p. 168, l.1). Therefore, that Courtney survey is the only reliable basis for determining the boundaries of the claimed property.

³ <https://www.horrycounty.org/Online-Services/Land-Records>.

III

THE STATE DID ARGUE IN ITS BRIEF THAT THE CIRCUIT COURT IMPROPERLY RELIED UPON THE TITLE EXPERT'S OPINION

This Court found that, as “to the State's remaining argument that the circuit court improperly relied upon the title expert's opinion when he was not a surveyor and his opinion could not override the testimony of the two surveyors, the State has failed to address this issue in the body of its brief.” *E. Cherry Grove Co., supra*, No. 2021-000078, 2024 WL 3281205, at *7 (S.C. Ct. App. July 3, 2024). The Court overlooked that the State did make this argument in its brief. See Final Brief of State at page 13 (“Testimony of the Mr. Deschamps, Respondents’ title opinion expert, about the general area of TMS 1450001001 is insufficient as he is not a surveyor and cannot override the testimony of the two surveyors that exclude that area. No evidence supports the circuit court’s reliance on the TMS and Floyd plats or maps for the boundaries of the property.”); *see also*, Reply Brief of State at pp.6 & 7 (“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.”).

CONCLUSION

The State respectfully requests that this Court rehear and amend its Opinion in accordance with the above arguments. The Court should rule that clear and convincing evidence should have been produced to rebut the presumption of State ownership of tidelands property. It should also rule that only the Courteney plat sets forth accurate boundaries of the property that Respondent owns within TMS 14500001001. Finally, this Court should correct its order and delete the part that says that the State did not argue that the Court improperly relied upon the title expert’s opinion

about the general area of TMS 14500001001. The State agrees with the remainder of the Opinion and does not request rehearing as those parts.

Respectfully submitted,

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August 2, 2024

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The State of South Carolina is Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this August 2, 2024, served the State's Petition for Rehearing
by emailing it to counsel for Respondents at the address below (copy of email attached).

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/s J. EMORY SMITH, JR.

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August 2, 2024

From: [Emory Smith](#)
To: [Gene Connell](#)
Subject: RE: Appellate Case No. 2021-000078 East Cherry Grove v. State of South Carolina
Date: Friday, August 2, 2024 2:39:00 PM
Attachments: [State's Petition for Rehearing \(03655210xD2C78\).PDF](#)
[image001.png](#)

Good afternoon, Gene. Hope all is well.

Attached is our Petition. COS to follow.

Emory

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