THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge
Case No. 2018-CP-26-00120

Appellate Case No. 2021-000078

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

vs.

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

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RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING

The Respondents offer the following additional argument in response to the Petition for Rehearing filed by Appellant on August 2, 2024.

I. SOUTH CAROLINA HAS NEVER ADOPTED THE CLEAR AND CONVINCING STANDARD OF EVIDENCE IN TIDELANDS CASES.

The State, in its argument on petition for rehearing, presents that the standard of proof should be clear and convincing evidence in a tidelands case. Counsel has reviewed all of the tidelands cases from the Court of Appeals and the Supreme Court and has been unable to find any case in which the Supreme Court or this Court has held that a landowner who argues that he has title to tidelands must

prove that position by clear and convincing evidence. In fact, not one opinion of this Court or any court in the southeast references the clear and convincing standard. It is well known in South Carolina that in civil cases the burden of proof is by a preponderance of the evidence.

In 1925, the Supreme Court said "… that the rule is so well established that a plaintiff in the Court of Common Pleas is only required to prove his case by the greater weight of the evidence as not to require even citation of authority. Any other rule would only produce 'confusion worse confounded.'" *Salley, Rec'r. v. Globe Indemnity Co.*, 133 S.C. 342, 131 S.E. 616 (1925). In *Salley*, the court further stated, "If there be any statements in any of the cases to the effect that the 'preponderance of evidence' rule is not universal in the Court of Common Pleas, such statement and such case is so glaringly and utterly in opposition to the law and practice of the Courts as to be utterly disregarded." The preponderance of the evidence standard has been used ever since in civil cases with few exceptions such as fraud and breach of trust. In fact, the Administrative Law Court which hears many tidelands type disputes has stated repeatedly that the proper standard of proof to be applied in a contested case before the ALC is a preponderance of the evidence standard. See *Anonymous (M-156-90) v. State Bd. of Medical Examiners*, 329 S.C. 371, 375-76, 496 S.E.2d 17 (1998).

The State then argues the word "convince" in some of the appellate court opinions means that the trial court must apply the clear and convincing evidentiary standard in trying tidelands cases. East Cherry Grove believes that the word "convince" found in the opinions is *dicta* and does not mean that the trial court must apply the clear and convincing standard. This Court in *Nash v. Tindall Corp.*, 375 S.C. 36, 650 S.E.2d 81 (S.C. App. 2007) had an opportunity to describe and define dicta. In that case, this court said Judicial dicta is " not essential to the decision." Black's Law Dictionary 465 (7th ed.999). Dicta or, as it is also known, dictum, "is a statement on a matter not necessary involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not

being necessarily involved in the case, is not the court's decision." 21 C.J.S. *Courts*, § 227 (2006). Thus, the word "convince" as found in various opinions is mere dictum and has no binding authority on this Court.

Finally, the State in its petition argues a case from Idaho which presumably is the only case the State was able to find involving riparian rights and the application of the clear and convincing standard. The fact that the State cannot cite to one case from South Carolina makes it clear that South Carolina has never adopted the clear and convincing standard. A brief review revealed that other cases have used the preponderance of the evidence in riparian rights claims. See *Provo City v. Jacobsen*, 111 Utah 39, 176 P.2d 130 (1947) (these facts point unmistakably to the fact that this land was not made useless for agriculture purposes even though the high water did for a short period most years cover the land, and they support by a preponderance of the evidence the finding that these lands were above the high water mark. One opinion of this Court, *White Mill Colony v. Williams*, 363 S.C. 117, 609 S.E.2d 811 (Ct. App. 2005), addresses a similar issue regarding the right to use a non-navigable lake. In that case, the Court used the preponderance of the evidence rule.

II. IF THIS COURT ACCEPTS THE CLEAR AND CONVINCING EVIDENCE STANDARD IN TIDELANDS CASES, THE PLAINTIFFS HAVE STILL PROVEN THEIR CASE.

If this Court were to find that the clear and convincing standard is the proper standard of proof in tidelands cases, the Respondents would assert that the evidence presented clearly meets that standard and would refer to Respondents' Memorandum of Law in Support of Respondents' Petition for Rehearing (pages 2-6). Further, Respondents would refer this Court to the plethora of cases from this Court and the Supreme Court which hold that this court "will affirm that masters' factual findings if there is any evidence in the record that reasonably supports them." See *Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 101-02, 552 S.E.2d 778, 770, 781 (Ct. App. 2001).

East Cherry Grove Realty's experts, Bill DesChamps, Joel Floyd, Will Fairey, all agreed, as did the State's expert, Russ Courtney, that the property in question had come directly from a Kings Grant. Joel Floyd said he was one hundred percent certain. (R. p. 121, line 4; p. 124, lines 5-7). Russ Courtney said he was seventy percent certain (R. p. 151, lines 10-12; p. 165, lines 4-5); and Joel Floyd even testified that Plaintiff's Exhibit No. 8 (R. pp. 252-253) had specific markings of a surveyor which were 33 degrees 20 minutes and 16.13 chains, and that it along with Exhibit 7 (R. pp. 250-251) was the baseline that was established between the Tilghman and Nixon properties. (R. p. 134, lines 3-4). Floyd further stated Exhibit 7 showed specific mathematical reference of 36 degrees south 6 degrees and 30 minutes and that the pig's ears which are described by the Attorney General's argument is actually part of the *Teague* case. (R. p. 134, lines 10-20).

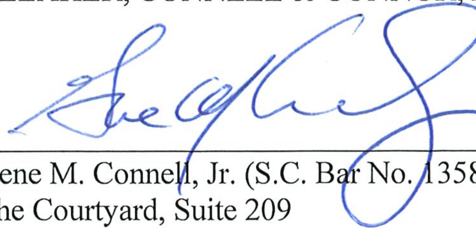
In sum, Respondents urge the court to deny the State's Petition and to also find under the standard of review that there is sufficient evidence to support the findings of the trial court and thus the trial court's decision should be affirmed in total.

CONCLUSION

The Respondents urge the Court to affirm the trial court in total. This request is based on the standard of review which requires this Court to affirm the master's factual findings if there is any evidence in the record that reasonably supports them. See *Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 101-02, 552 S.E.2d 778, 770 (Ct. App. 2001) (*Lowcountry Open Land Trust* establishes the time honored rule that if there is any evidence to support the trial court's ruling, it must be affirmed.)

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.A.



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