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**Oct 15 2024**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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Certiorari to the Court of Appeals  
Court of Appeals Case No. 2021-000078

Appeal from Horry County  
Court Of Common Pleas  
The Honorable R. Markley Dennis, Jr, Circuit Court Judge

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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 Petitioner

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**STATE'S PETITION FOR WRIT OF CERTIORARI**

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## **CERTIFICATION**

The Petitioner State of South Carolina filed a Petition for Rehearing on August 16, 2024, that was denied by the Court of Appeals on September 16, 2024.

## **QUESTIONS PRESENTED**

1. Whether the Court of Appeals erred in determining that a preponderance of the evidence standard should apply to the evidence in this case rather than a clear and convincing evidence standard?
2. Whether the Court of Appeals erred in failing to apply the Courtney Plat (State' Ex. 25) to determine the boundaries of the property when Respondents presented no evidence of the actual boundaries of the property that they claim?
3. Whether the Court of Appeals erred in finding that the State did not argue in its brief that the circuit court improperly relied upon the title expert's opinion?

## **STATEMENT OF THE CASE**

### **Procedural History**

Respondents brought suit pursuant to S. C. Code Ann. §48-39-220 which provides a means to determine the existence of a right, title or interest of such person in and to such tidelands as against the State. R. V. 1, p. 31 (Complaint). Respondent East Cherry Grove Realty claims to own TMS Tract 1450001001 which is a huge tract of land encompassing approximately 128 acres of what appears to be marsh and waterways. *Id.* & R. V. 1 p 51 (Ex. 3 to Complaint). The parties have referred to this tract as “the Oklahoma tract” because it somewhat resembles that state with the panhandle pointing in the opposite direction. Respondent Ray and Nixon, LLC also claims to

own the smaller tract, TMS 1450225004, but that tract is not at issue in this Petition.

The State's Answer included the defense throughout that Respondents had not clearly alleged what property they were claiming and provided sufficient information, including the location of its claims, from which the State could determine whether Respondents had title to any property at issue and, therefore, the State denied that Respondents had such title. R. V. 1, p. 60. The State asserted affirmative defenses that included that it had prima facie fee simple title to the property, that it owned the bottoms of any canals and other bodies of water, and that the public had the right to make use of navigable waters.

This matter was tried before the Honorable Markley Dennis via WebEx on August 25, 2020. The Court issued an Order on October 28, 2020, granting judgment to the Respondents as to both TMS tracts except for the bottoms of any navigable waters on the properties which are public highways subject to the "Plaintiffs'" control. R. V. 1, p. 13. The State moved to alter or amend on November 6, 2020 (R. V. 1, p. 69) which was denied by the Court on December 21, 2020, when it issued an amended order that was the same as the original except that it changed the reference to the waters being subject to the "Defendants'" control. R. V. 1, p. 1.

The State appealed the circuit court orders. The Court of Appeals issued an Opinion affirming in part and reversing in part the circuit court decision. *E. Cherry Grove Co., LLC v. State*, 905 S.E.2d 421 (S.C. Ct. App. 2024), reh'g denied (Sept. 16, 2024). The Court found that the circuit court did not err in applying a preponderance of evidence standard for the burden of proof rather than the clear and convincing standard that the State argued should apply. The Court found that the circuit court erred in concluding that the Respondents presented sufficient evidence to overcome the State's presumptive ownership of the area of TMS tract described as

the pig's ears and dome of the pig's head. The Court ruled that the circuit court did not err in declining to rely solely upon the Courtney plat in reaching its decision. The Court found that the State failed to address in its brief the argument that the circuit court improperly relied upon the title expert's opinion when he was not a surveyor.

The State petitioned for rehearing raising the issues set forth in this Petition. The State did not contest the Court of Appeals' 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. Respondents also petitioned for rehearing contesting the findings as to the dome of the pig's head and pig's ears. The Court of Appeals denied both petitions by its order of September 16, 2024.

### **Factual Background**

#### **Tax Map / TMS Tract 1450001001**

This tract, also known informally in these proceedings as the Oklahoma tract, is claimed by Respondent East Cherry Grove. Respondents' witness William Deschamps was qualified without objection as an expert in title examination and title opinions. R. V., p. 96, ll. 18-19; p. 97, ll. 9 & 10. 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.

Respondents' witness Joel Floyd was qualified as an expert in land surveying without objection. He testified that the 200 acre Morrall grant and plat applied to tract at issue. R. V.

1, p. 124, ll. 3-11 and p. 248 (Plaintiffs' Exhibit 6); however, Plaintiffs' exhibits 1, p 9 (R. V. 1, p. 243) and 4 (R. V. 1, p. 246) do not show the grant covering marsh in the northwest section of the tract in an area described as looking like the dome of a pig's head with ears, and Mr. Floyd's testimony acknowledged that omission except for a vague reference to grants not in evidence. R. V. 1, p. 132, ll. 12-21. The Court of Appeals correctly found that the no evidence supported East Cherry Grove's claim to the pig's head and ears area.

Mr. Floyd also did not relate his testimony to any precise boundaries claimed by Respondents as to the Oklahoma tract stating only generally that an unspecified map attached to Plaintiffs' Ex. 1 accurately depicted the grants and that the Ray and Nixon and reverse Oklahoma properties are within those boundaries. As testified by the State's expert, Russ Courtney, *infra*, TMS boundaries are not survey grade.

Respondents' witness William Fairey was qualified as an expert in surveying; however, he did not do any survey maps on the area except for the Teague tract that was at issue in a 2014 case nor did he identify any exhibit identifying the property claimed within TMS 1450001001. R. V.I, p. 144, ll. 15-20; R. V. II, p. 466 (Order of the Honorable Larry B. Hyman in the action East Cherry Grove Realty, LLC v. State and Teague, 2014CP2601412, July 8, 2015). The Teague tract, therefore, is only a small fragment of the larger Oklahoma tract, and the order in that case and does not apply anywhere else within the larger tract.

The State's witness Russ Courtney was qualified as an expert in land surveying and also testified about coastal tidal datum including location of mean high water mark. R. V. 1, p. 153, l. 5 – p. 154, l. 7. He testified about his Exhibit 25 R. V. 1, p. 233 and enlarged) showing his alignment of the grants. According to his map and testimony, the 200 acre Morrall grant

applied to a portion of TMS 1450001001 running diagonally from the left lower corner of the tract to the upper right panhandle area of the Oklahoma tract and therefore excluded areas to the upper left and lower right within the Oklahoma tract. His application of the Morrall grant excluded the pig's ear's area and adjacent strip, and he found no grant that did apply. R. V. 1, p. 161, ll. 16-17; p. 162, ll. 2- 4) .

Mr. Courtney's narrow depiction of the 200 acre tract as it stretches across the Oklahoma tract is much more similar to the original 200 acre Morrall plat than is Mr. Floyd's wider application. (Compare V. 1, pp. 240, 246, and 248 (Pl. Exs. 1, p. 6, 4, & 6); R. V. 1, p. 233 (Sts. Ex. 25), R. V. 1 p 167, l. 22 – p. 168, l. 1). As noted above, his Exhibit 25, unlike Plaintiffs' exhibits, plots the outlines of the property deeded to Plaintiff East Cherry Grove and then overlays it with the grant. His survey did not include the dome of the pig's head and ears that is also excluded by Mr. Floyd's survey. See above. Mr. Courtney also testified that a significant portion of the panhandle within the grant and the Oklahoma tract was owned by the City of North Myrtle Beach. R. V. 1, p. 233 and oversized x. 25 (curved line running between the words "Salt" and "Marsh" and the land within the panhandle below it); R. V. 1, p. 157, l. 15 – p. 159. l. 3.

As noted above, Tax Map / TMS parcel 1450225004 is not at issue in this Petition.

## **ARGUMENT**

This Petition presents a novel question in the standard of proof to be applied in tidelands case which is set forth below. Rule 242(b), SCACR. Therefore, if this Court addresses that issue, the decision would be of guidance in future cases as well as this one. As to another issue, the Court of Appeals decision finding sufficient evidence of the boundaries of the property at

issue conflicts with decisions of this Court requiring precision in property descriptions in tidelands cases. The Court of Appeals also erred in concluding that an issue was not argued in Appellant's brief.

## I

### **THE COURT SHOULD HAVE APPLIED A CLEAR AND CONVINCING 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)<sup>1</sup>. 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.

## II

### **THE COURTNEY PLAT (STATE'S EX. 25) MUST BE APPLIED 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

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

rather clear boundaries.<sup>2</sup> Their exhibits merely showed superimpositions of 18<sup>th</sup> 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 aerials and 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); R. V. 1, p. 169, ll. 2 - 18)<sup>3</sup>. 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 under *Hoyler* to avoid confusion with ownership of adjoining landowners.

There is no evidence in the record showing accurate deed based renderings of the

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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.

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

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 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. The Court of Appeals failure to rely solely on that survey has resulted in an ownership determination for East Cherry Grove that is based upon loosely described boundaries lacking the specificity required by law and needed by adjoining landowners.

### 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.” 905 S.E.2d 421, 431. 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

For the foregoing reasons the State respectfully requests that this Court grant its Petition.

Respectfully submitted,

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October 15, 2024

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STATE OF SOUTH CAROLINA

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Matt Leonhard, ..... Defendants,

Of whom The State of South Carolina is the Petitioner

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**CERTIFICATE OF SERVICE**

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I hereby certify that I have this October 15, 2024, served the State's Petition for Writ of  
Certiorari 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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October 15, 2024

## Emory Smith

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**From:** Emory Smith  
**Sent:** Tuesday, October 15, 2024 9:22 AM  
**To:** Gene Connell  
**Subject:** RE: Appellate Case No. 2021-000078 East Cherry Grove v. State of South Carolina  
**Attachments:** State's Petition for Cert - ECG.pdf

Good morning, Gene. Hope all is well.

Attached is the State's Petition for Writ of Cert.

Emory

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