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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 6068 (S.C. Ct. App. Filed July 3, 2024)

Appellate Case No. 2024-001729

East Cherry Grove Co., LLC and Ray & Nixon, LLC. ..... Respondent- Petitioners

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..... Petitioner-Respondent

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RESPONDENT-PETITIONERS' RETURN TO STATE'S PETITION FOR WRIT OF CERTIORARI

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COUNTER-QUESTIONS PRESENTED FOR REVIEW

I. The Court of Appeals did not err in determining that a preponderance of the evidence standard should apply to the evidence in this case.

II. The Court of Appeals did not err in failing to apply the Courtney Plat to determine the boundary of East Cherry Grove Realty's property.

III. The Court of Appeals did not err in finding the State failed to argue the Circuit Court improperly relied upon the title expert's opinion.

COUNTER-STATEMENT OF THE CASE

Respondent-Petitioners are owners of real property in Cherry Grove, South Carolina and were notified by the South Carolina Department of Health & Environmental Control that it was going to issue a dock permit to Matt Leonhard. Respondent-Petitioners brought a suit pursuant to S.C. Code Ann. § 48-39-220 which allows an aggrieved landowner a procedural vehicle to determine the existence of a right, title or interest of such person in and to such tidelands as against the State. (R. V. I, p. 31). Leonard was served with the Complaint but did not respond and was declared in default. East Cherry Grove Realty owns TMS #1450001001 which is land that encompasses approximately 120 acres of marsh, marsh islands and waterway. (R. V. I, p. 51) (Exhibit 3 to Complaint). During the course of the litigation, the parties sometimes referred to this tract as "Reverse Oklahoma" because it somewhat resembles that state. Respondent-Petitioner Ray & Nixon, LLC also was named in the lawsuit because it owns TMS #1450225004. However, the State has not appealed the circuit court's ruling that Ray & Nixon, LLC owns that parcel.

The case was tried before the Honorable Markley Dennis via WebEx on August 25, 2020. This is the only known case to Respondent-Petitioners which was tried solely by Webex during the pandemic. The trial court issued an order on October 28, 2020 granting judgment to both East Cherry Grove Realty and Ray & Nixon, LLC as to both tracts except the bottoms of any navigable waters on the properties which are in effect public highways in South Carolina. (R. V. I, p. 13). The State then

moved to alter or amend the judgment on November 6, 2020 (R. V. 1, p. 69) which was denied by the court on December 21, 2020, when it signed an amended order that was the same as the original order except it changed the reference to the waters being subject to the "Defendants" control. (R. V. I, p. 1).

The State timely appealed the orders. The Court of Appeals issued an opinion affirming in part and reversing in part the circuit court decision. See *East Cherry Grove Co., LLC v. State*, 905 S.E.2d 421 (S.C. Ct. App. 2024), reh'g denied (Sept. 16, 2024). The Court of Appeals held that the circuit court correctly applied the preponderance of the evidence standard and not the clear and convincing standard. The Court of Appeals further held that the circuit court properly concluded that the Respondents failed to present enough evidence to overcome the State's presumptive ownership of an area described during the trial as the "pig's ears and dome of the pig's head. Finally, the Court found that the circuit court did not err in declining to rely solely upon the Courtney Plat in reaching its decision. The Court of Appeals also held that the State did not address the argument that the circuit court relied upon the title examiner's opinion when he was not a surveyor.

Both the State and the Landowners petitioned for rehearing. Further, after denial of both petitions for rehearing, both the State and the Landowners have filed petitions for certiorari. Respondent-Petitioners' petition for certiorari argues the circuit court order should be affirmed in full based on the "any evidence" rule.

Factual Background

East Cherry Grove Realty and Ray & Nixon presented extensive evidence to the trial court. William DesChamps, an expert in real estate and tidelands real estate claims, testified that there were Kings Grants over the East Cherry Grove and Ray & Nixon property (R. p. 106, lines 24-25); that Plaintiff's Exhibit 4 (R. p. 246) is a map of Floyd, Powers and Culler, the three surveyors who got

together and reviewed the Kings Grants (R. p. 107, lines 11-12); that there is no doubt Ray & Nixon and East Cherry Grove Realty own property which are subject to Kings Grants (R. p. 107, lines 16-21); that it is clear (R. p. 108, lines 1-7); that it's amazing that they are very close and is what the three surveyors were talking about in their investigation (R. p. 108, lines 22-24); that the surveys of East Cherry Grove Realty's experts are over the subject property (R. p. 105, lines 15-17); and that the Circuit Court Order certifying the title in the *Teague* case has legal significance (R. p. 116, lines 18-19).

Joel Floyd, a surveyor with thirty-two years of experience also testified. (R. p. 118, line 15-16). Floyd testified that he had determined Kings Grants existed over the Plaintiff's property (R. p. 121, line 4); that Plaintiff's Exhibit 1 (R. p. 236) is an accurate survey of all four Kings Grants together (R. p. 124, lines 5-7); that the plat described as reverse Oklahoma and the Ray & Nixon, LLC property are well within the Kings Grants. (R. p. 124, lines 11-12).

Floyd, on cross examination, when asked about the area described as the pig's ears on the plat stated they fall under another Kings Grant (R. p. 130, lines 22-23); that Exhibit 7 (R. pp. 250-251) shows a 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).

Other evidence in the trial included the Order of Circuit Judge Larry Hyman filed June 25, 2015 (which was in regard to a dock permit requested by Teague). The trial judge in this case commented while hearing the evidence that the Teague property is actually at the base of the area described as the pig's ears. (R. p. 135, lines 3-4). The trial court was referring to *East Cherry Grove Realty Co., LLC v. State of South Carolina and South Carolina Department of Health and Environmental Control*, 2014-CP-26-1412) (Ex. 18) (R. 466). In the Order decided by Judge Hyman

he held that the base of the pig's ears was an area that was subject to a Kings Grant and the Order was not appealed by the State.

The State's expert, Russ Courtney, a licensed surveyor, also testified in this case that he was seventy percent sure that the East Cherry Grove Realty property is in the Kings Grant. (R. p. 151, lines 10-12). Courtney further stated he was one hundred percent sure that the property within the red lines as shown on his map is within the Kings Grant. (R. p. 151, line 23). Courtney's opinions were based on the grants in question and found as Exhibit 25 in the record. (R. p. 233) (R. p. 152, line 17). Courtney also testified that he was seventy percent sure that the pig's ears were part of a Kings Grant. Courney's testimony thus meets the "any evidence" in the record which supports the trial court's ruling. Further, his testimony is consistent with the preponderance of the evidence standard. *Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 552 S.E.2d 778 (Ct. App. 2001)

ARGUMENT

I. THIS COURT HAS NEVER APPLIED A CLEAR AND CONVINCING STANDARD IN TIDELANDS CASES.

The State in its Petition argues for a new rule in tidelands cases which would require an owner of tidelands property to prove his or her case by clear and convincing evidence. Not a single case of this Court nor of the Court of Appeals applies that standard to a tidelands case and to do that now would upset precedent going back over one hundred years. The State cites *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), for the proposition that the burden of proof in a tidelands case is clear and convincing evidence. In fact, the *Hoyler* case does not hold that the clear and convincing evidence standard should be used

in a tidelands case.[1] *Hoyler* only uses the word "convince" but not in reference to the burden of proof, nor does it specifically require the burden of proof to be clear and convincing. The word "convince" in *Hoyler* and in *Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 104, 552 S.E.2d 778 (Ct. App. 2001) is dicta and does not mean that the trial court or this Court now requires clear and convincing evidence in all tidelands cases. In *Nash v. Tindall Corp.*, 375 S.C. 36, 650 S.E.2d 81 (S.C. App. 2007), this Court described and defined the term dicta. In that case, the 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 necessarily 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). Accordingly, the word "convince" as found in *Hoyler* and *Low Country* is mere dictum and does not mean this Court has adopted a clear and convincing standard of proof in tidelands cases.

Respondent notes that the word "convince" has been used in a number of cases in this state which discuss the preponderance of the evidence standard. None of those cases have construed the word "convince" to mean the burden of proof in a civil case has changed to "clear and convincing." See *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992) (findings of fact based upon a preponderance of the evidence are those supported by the greatest weight, amount, credibility or truth, as reflected by the whole of the evidence before the court, or evidence which convinces as to its truth); *Frazier v. Frazier*, 228 S.C. 149, 89 S. E. 2d 225 (1955) (the preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in the mind the belief that what is sought to be

[1] Even if the clear and convincing standard applies, this burden of proof is easily met by the testimony of the State's expert, Russ Courtney, who stated he was 100% certain that the property was subject to a Kings Grant (R. p. 151, line 23).

proved is more likely true than not true); ("A preponderance of the evidence" stated in simple language is that evidence which convinces as to its truth) (*Frazier*, 89 S.E.2d, 235). Findings of fact based upon a "preponderance" of the evidence are those supported by the greatest "weight, amount, credibility or truth" as reflected by the whole of the evidence before the court, or "evidence which convinces as to its truth." *Frazier v. Frazier*, 228 S.C. 149, 89 S.E.2d 225, 235 (1955); *Nettles v. Nettles*, 138 S.C.318, 136 S.E.297 (1937).

The State admits, as it must, that no appellate decisions in South Carolina have applied the clear and convincing standard of proof in a tidelands case. Thus, the State argues for a significant change in the burden of proof which has been applied to tidelands cases.

The standard of proof in all civil cases (except fraud and a few exceptions) in South Carolina has always been the preponderance of the evidence since at least *Salley, Rec'r. v. Globe Indemnity Co.*, 133 S.C. 342, 131 S.E. 616 (1925). In *Salley*, the Court 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."[2]

In sum, the clear and convincing standard has never been used in any tidelands case in this state and this Court should adhere to its prior decisions and deny certiorari.

II. THE COURTNEY PLAT IS NOT THE ONLY EVIDENCE OF THE BOUNDARIES OF RESPONDENT-PETITIONERS' PROPERTY.

The State in its brief fails to point out or consider the testimony and evidence of DesChamps, Floyd and their expert, Courtney. DesChamps in his testimony stated "it's amazing that they are very

[2] The preponderance of the evidence is commonly referred to as anything over 50 percent. Some courts have also referenced 50.1 percent as the least amount of evidence requested to sustain a verdict under the preponderance of the evidence standard. See *Brown v. Green*, 577 F.3d 107, 109 N.2 (2d Cir. 2009). In this case, all the expert testimony on both sides clearly meets this standard.

close and is what the three surveyors were talking about in their investigation" (R. p. 108, lines 22-24) and that the surveys of East Cherry Grove Realty's experts are over the subject property (R. p. 105, lines 15-17); that the Circuit Court Order certifying the title in the *Teague* case has significance (R. p. 116, lines 18-19); and that Plaintiffs' Exhibit 4 (R. p. 246) is a map of Floyd, Powers and Culler that the three surveyors got together and reviewed the Kings Grants. (R. p. 107, lines 11-12).

Other testimony came from Joel Floyd, a surveyor with thirty-two years of experience. Floyd testified that he determined Kings Grants existed over the Plaintiff's property (R. p. 121, line 4); that Plaintiff's Exhibit 1 (R. p. 236) is an accurate survey of all four Kings Grants together (R. p. 124, lines 5-7); and that the plat described as reverse Oklahoma and the Ray & Nixon, LLC property are well within the Kings Grant. (R. p. 124, lines 11-12).

Finally, Floyd on cross examination, stated that Exhibit 7 (R. pp. 250-251 shows a specific mathematical reference of 36 degrees south 6 degrees and 30 minutes and that the pig's ears on the plat which are described is actually part of the *Teague* case (R. p. 134, lines 10-20).

In conclusion, the testimony from DesChamps, Floyd and Courtney clearly met the standard of proof which is the any evidence rule and thus the Court of Appeals correctly found for Respondent-Petitioners on the issue.

III. THE STATE NEVER PRESERVED THE ARGUMENT THAT THE TRIAL COURT IMPROPERLY RELIED ON THE TITLE EXPERT'S OPINION.

The State argues the trial court improperly relied on DesChamps' opinions on whether the subject property was owned pursuant to a Kings Grant. DesChamps testified without objection in great specificity in rendering his opinion that the East Cherry Grove property was subject to a Kings Grant. Testimony which is not objected to at the trial results in a waiver by the State. All errors must be preserved to be presented to this Court. See *Whaley v. CSX Transportation*, 362 S.C. 456, 609 S.E.2d 286 (2005). In *Whaley*, the appellant raised an evidentiary objection on appeal. At trial, that

evidentiary issue had been ruled upon at sidebar; however, the contents of the sidebar was not made part of the record. This Court held it would not consider the issue. The facts are more favorable to Respondent-Petitioners in this case since the State made no objection to the testimony of DesChamps at the trial or post-trial and thus under the error preservation rule cannot do so now. In order to preserve the introduction of improper evidence, counsel must make an immediate contemporaneous objection and state all bases upon which the matter is objectionable. *Roberts v. Roberts*, 299 S.C. 315, 384 S.E.2d 719 (1989) (an objection must be made at the stage of admission of the evidence.)

In sum, the State made no objection to the testimony of DesChamps at trial, and made no motion to exclude the evidence under SCRCP 52 (b) or SCRCP 59(e) to preserve the issue. Thus, the Court of Appeals properly declined to consider the argument that the title expert's opinion was improperly relied upon by the trial court.

CONCLUSION

East Cherry Grove Realty requests the Court deny the Petition of the State and grant its Petition to review the Court of Appeals decision.

Respectfully submitted,

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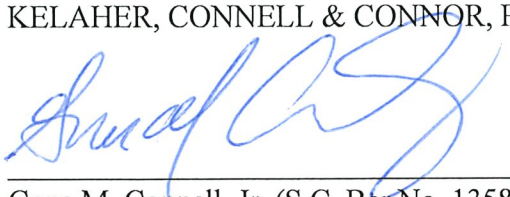

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