THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R Scarborough, Master-in-Equity

Trial Court Case No 2007-CP-10-2053
Court of Appeals Case No 2010199806

Yelsen Land Co , Inc , Appellant

v

The State of South Carolina and The State Ports Authority Respondent

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FINAL BRIEF OF APPELLANT

Lawrence E Richter, Jr
Alice Richter Lehrman
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464
(843) 849-6000

Donald B Clark
Donald B Clark, LLC
39 Broad Street, Suite 210
Charleston, SC 29401
(843)720-8866

Attorneys for Appellant

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STATEMENT OF THE CASE

In 1975 the Supreme Court issued its decision in State v Yelsen Land Co , Inc , 265 S C 78, 216 S E 2d 876 (1975) (hereinafter referred to as "the 1975 case" or "Yelsen I") That action was commenced by the State on January 9, 1969, and the scope of that litigation was summarized by the Supreme Court as follows

> This action was brought by the State of South Carolina against Yelsen Land Company, Inc , and Dajon Realty Company, Inc , to settle a dispute between the State and the defendant Corporations concerning title to certain tidelands adjacent to the highlands on Morris Island located near Charleston, South Carolina It is conceded that Yelsen and Dajon own the highlands comprising Morris Island, Yelsen claiming the southern portion and Dajon the northern part The line of demarcation between the respective areas claimed by each corporation cannot be ascertained, but both corporations are owned by the same party [1] This controversy involves only the respective claims of the parties to the adjacent tidelands

[1] On May 23 1985 Dajon conveyed all of its interest in Morris Island to Yelsen (Plaintiff's Exhibit 3 May 23 1985 Deed and Title Oversize Exhibit)

Id at 80, 216 S E 2d at 877 (Emphasis added)

That action was precipitated when a twenty-five year easement of approximately 700 acres of tidelands was granted to the United States Army Corps of Engineers to be used as a spoils deposit site in connection with its dredging operations in the Charleston harbor (R 434) Both Yelsen and Dajon claimed they owned the adjacent tidelands which were the subject of the easement, Yelsen claiming under a 1790 grant by the State of South Carolina, and Dajon claiming from a conveyance from the State to John M Maillard dated August 3, 1818 State v Yelsen Land Co , 257 S C 401, 185 S E 2d 897 (S C 1972) and Yelsen Land Co , Inc , at 82-83, 216 S E 2d at 879

The Court noted that, "The State is presumptively the owner of the tidelands and contends, in this case, that it has never parted with title to the area in question " Id at 81, 216 S E 2d at 877 It further noted "Since the State is presumptively the owner of the tidelands, the burden rested upon Yelsen and Dajon to prove that the State had granted title to such lands to their predecessors in title " Id The Court determined that neither Yelsen nor Dajon had successfully connected their title to the adjacent tidelands either to the 1790 grant or the 1818 conveyance Id

Over the succeeding years the U S Army Corps of Engineers deposited dredge spoils onto the easement site, eventually elevating all of the 700 acre easement area well above the mean high water mark and contiguous to the highland still owned by Yelsen (Pl 's Ex 8, Oversize Exhibit)

On May 16, 2007, Yelsen brought this action seeking a judicial determination that, by the process of accretion or otherwise, it is the owner of the newly created highland which is adjacent to and contiguous with its property (R 39) The matter was subsequently referred to the

Charleston County Master-in-Equity, the Hon Mikell R Scarborough (R 6)

The case developed an added dimension when on or about April 10, 2009, the State Ports Authority moved to intervene, alleging that pursuant to S C Code Ann § 54-3-170 it had in fact acquired title of the subject tidelands from the State on December 21, 1967, over a year before the State filed its action on January 9, 1969 (R 48)

Yelsen requested and was granted leave to amend its complaint to also allege its accretion claim against the Ports Authority In addition, Yelsen raised a claim of paramount title against the Ports Authority on the ground that the Ports Authority's 1967 title to the tidelands had not been decided in the 1975 decision and that newly discovered evidence demonstrated that Yelsen, claiming through Dajon, was able to connect its chain of title to the adjacent tidelands to the 1818 grant from the State to John M Maillard Further, Yelsen claimed paramount title to the State on the ground that the State had waived its right to rely on res judicata or collateral estoppel by introducing the Ports Authority's earlier 1967 claim into the proceedings (R 108)

On March 9, 2010, the Master granted summary judgment to the Defendants on all causes of action and an Order was entered on April 16, 2010 (R 13) Yelsen timely filed a motion to alter or amend pursuant to Rule 59(e), SCRCP (R 83) On June 24, 2010, after allowing Yelsen to proffer its witnesses and documentary evidence, the Master entered an order denying this motion, although Yelsen did not receive notice of the entry of the motion until July 6, 2010 (R 36) Yelsen served its Notice of Appeal on July 15, 2010, and it was filed by the Clerk of the Court of Appeals on July 20, 2010

FACTS

Morris Island is an uninhabited island in the Charleston Harbor Two sovereign grants dated 1790 and 1818, and the doctrine of accretion, are at the heart of the controversy as to the

ownership of the approximately 700 acres of former tidelands that are involved in this action As previously noted, the Supreme Court determined in 1975 that Dajon and Yelsen owned all the highland of Morris Island, but not the tidelands Discovery in this case revealed additional important information which was not available when this case was first tried in 1969, including the following sequence of events

On December 21, 1967, the State Ports Authority sent a letter to the South Carolina Secretary of State advising that it had taken and was occupying 703 5 acres of "marsh land" on Morris Island owned by the State pursuant to Section 54-17 of the Code of Laws of South Carolina, 1962, now S C Code Ann § 54-3-170 (R 432)

On December 27, 1967, the Secretary of State sent a letter back to the South Carolina Ports Authority acknowledging receipt of its letter (R 433)

On December 21, 1967, the State Ports Authority granted a 25 year easement to the United States Army Corps of Engineers for 703 5 acres of land on Morris Island for use as a disposal site for dredge spoils produced by the Corps in its operations to deepen Charleston Harbor (R 434)

On February 21, 1968, Capers G Barr, Jr , the General Manager of the State Ports Authority, sent a letter to Col Robert E Rich, District Engineer for the Corps of Engineers, informing Col Rich that Ed Latimer of the South Carolina Attorney General's office had requested that the Corps undertake a survey of the proposed spoil disposal site to determine its elevations

> He wanted to make sure that the Engineers would make a survey of the Morris Island Spoil Area to determine what, if any, of it is above mean high water and that this survey would be preserved for use in the event the State was later

sued by Mr Felkel[2] or someone else on a claim that a portion of this property was in fact high land

(R 427)

On February 29, 1968, Col Robert Rich responded by letter to Mr Barr's request, stating

> Reference is made to your letter of 21 February 1968 in which you request copies of plats or tracings showing surveys of the spoil disposal easement area adjacent to Morris Island
>
> A plane table survey of this area was made during the latter part of January and early part of February 1968, and results thereof are shown on the enclosed map Representative elevations were not obtained for much of the easement area because materials under-foot had insufficient strength to support rodmen and because such data is not essential for dike design The area enclosed within boundaries shown is approximately 711 acres
>
> Dike alignment shown is that currently being considered The front dike is set back where the toe follows roughly the projected shoreline position at the beginning of 1988 Dike locations are subject to revision within the easement boundaries shown on the map The diked area, including dikes as shown, is approximately 650 acres

(R 428)

Although the plane table survey shows that large portions of the proposed spoil area were in fact above the mean high water mark even at the time the survey was made in January and early February, 1968, the project went forward (Pl 's Ex 7, Oversize Exhibit)

In its May 23, 1969 action against Yelsen and Dajon, the State alleged in its Complaint that it owned the same 700 acres of tidelands now claimed by the Ports Authority There was no mention that the State had already conveyed these 700 acres away to the Ports Authority over a year earlier (R 450)

The State conceded that Dajon and Yelsen owned all of the highland of Morris Island and

[2] Mr Felkel owned both Dajon and Yelsen at that time (Pl Ex 3 Oversize Exhibit)

the Supreme Court determined in the 1975 decision that this was the case Yelsen Land Co , Inc , at 80, 216 S E 2d at 879 Although the exact boundaries of each company's highland was not determined, the Supreme Court noted that this was immaterial since both companies were owned by the same person Id

In the present case, Yelsen traces its ownership of the 700 acre parcel in quest through Dajon, which the Supreme Court held title to all the highland on Morris Island pursuant to an 1884 conveyance from J A Leland, Master in Equity However, the Court concluded that the stated boundaries of this conveyance failed to also convey the tidelands of Morris Island

> Appellant Dajon has likewise failed to prove its claim It traced its title to a conveyance from J A Leland, Master in Equity, to G W McCormick, dated February 6, 1884, for a tract of 820 acres, described as follows
>
> > All that lot, piece or parcel of land on Morris Island in Charleston County, and State aforesaid, measuring and containing eight hundred twenty acres, more or less, being the whole of Morris Island, excepting that portion belonging to the United States Government, the said Island being bounded by the Atlantic Ocean and the waters of Charleston Harbor
>
> The boundaries given of the "Atlantic Ocean and the waters of Charleston Harbor" did not convey title to low water mark, and the foregoing deed, therefore, did not convey title to tidelands State v Griffith, supra

Yelsen Land Co , Inc , at 82, 216 S E 2d at 878-79 (Emphasis added)

The Supreme Court further determined that Dajon had failed to prove its title to the tidelands by means of the August 3, 1818 grant from the State to John M Maillard because Dajon was unable to connect its 1884 title to the 1818 grant

> In further support of its claim of title to tidelands, Dajon introduced into evidence a deed from the State to John M Maillard, dated August 3, 1818, covering a tract on Morris Island, consisting of 236 acres of highland and 102 acres of "marsh land "
>
> It is conceded that Dajon could not connect its title to the above

> conveyance from the State to Maillard Since Dajon was unable to connect its title to a grant from the State, it failed to establish its claim to the tidelands

Id at 83, 216 S E 2d at 879

At trial in the present case Yelsen (now owning Dajon's interest) was able to connect the 1884 title to the 1818 grant from the State This was explained in both a letter dated January 13, 2009, and book of deeds prepared by Yelsen's expert, Theodore L Hostetter, Esq (Pl 's Ex 3, Oversize Exhibit) It was also explained by Mr Hostetter in his trial testimony (R 266-284)

In short, the State conceded, and the Supreme Court held in its 1975 decision, that Dajon and Yelsen owned all the highland on Morris Island Dajon later conveyed away a portion of what it owned, which is now owned by the City of Charleston (Pl Ex 1 and 3, Oversize Exhibit), and then conveyed all of its remaining interest in Morris Island to Yelsen in 1985, including all highland contiguous with the spoil area and any highland within the spoil area (Pl Ex 3, Oversize Exhibit)

On or about April 10, 2009, the Ports Authority moved to intervene in this action, alleging that it owned the 703 acre spoil pursuant to its December 21, 1967 letter to the South Carolina Secretary of State and S C Code Ann § 54-3-170 The State did not object and assert its title as res judicata or collateral estoppel pursuant to the 1975 decision (R 48) To the contrary, the State acquiesced in the Ports Authority's motion and indeed the Attorney General's office represented both parties even though their claims to title were entirely at odds with each other The State was asking the Circuit Court to determine that it owned the area in question pursuant to the 1975 decision and at the same time asking it to determine that the Ports Authority owned the same property pursuant to S C Code Ann § 54-3-170 and the December 21, 1967 letter

In response to the State and the Ports Authority taking these new and inconsistent positions, Yelsen moved and was granted leave to file an amended complaint against both the State and the State Ports Authority Yelsen alleged in its Amended Complaint that, contrary to the State's statement in its May 23, 1969 complaint, the facts asserted by the State now show that it in fact did not own any portion of the spoils area in question in 1969 because it had already parted with title to the spoils area by the December 21, 1967 conveyance to the Ports Authority (R 107) As explained hereafter, because the State and the Ports Authority took these inconsistent and mutually exclusive positions, both of them waived their right to rely on res judicata or collateral estoppel Yelsen therefore sought in its Amended Complaint to assert its paramount title against both defendants in addition to its claim based on accretion

ARGUMENTS

I THE TRIAL COURT ERRED IN FINDING RES JUDICATA, OR CLAIM PRECLUSION, AND COLLATERAL ESTOPPEL, OR ISSUE PRECLUSION, ARE APPLICABLE IN THIS MATTER

Both the State and the Ports Authority relied on res judicata and collateral estoppel as the principal basis for their motion for summary judgment Neither applies here for several reasons

A The only issue established in the 1975 decision was ownership of the tidelands of Morris Island

The 1975 decision dealt solely with the issue of the ownership of tidelands (R 450, 500, 520) As set forth above, the Supreme Court held that the State owned the tidelands adjacent to and surrounding Morris Island Yelsen Land Co , Inc , 265 S C 78, 216 S E 2d 876 Additionally, Yelsen's ownership of all the highland on Morris Island was conceded by the State as evidenced by the Supreme Court's holding "It is conceded that Yelsen and Dajon own the highlands comprising Morris Island, Yelsen claiming the southern portion and Dajon the northern part " Id at 80, 216 S E 2d at 877 (Emphasis added) Nothing in the 1975 decision holds that the State owns any highland on Morris Island No claims of ownership by the Ports Authority to the 700 odd acres of former tidelands involved in the present litigation were asserted in the prior litigation Indeed, the Ports Authority was not even a party in that litigation

Moreover, regardless of whether the State or the Ports Authority owned the tidelands in 1969 which were the subject of the 703 5 acre easement involved in this case, those 703 5 acres indisputably ceased to be tidelands and became 703 5 acres of highland over a period of many years of dredging, and those 703 5 acres of highland are contiguous with the highland owned by Yelsen, and are not contiguous with any other

highland on Morris Island (Pl 's Ex 8 and 8A, Oversize Exhibit)

B Neither res judicata nor collateral estoppel could apply to the Ports Authority because it bases its claim of ownership on a 1967 grant, not the 1975 Supreme Court decision

In numbered paragraphs 4 and 5 of the Ports Authority's Motion to Intervene, it plainly claims that "Under this legislation [S C Code Ann § 54-3-170], the Ports Authority filed notice with the Secretary of State on December 21, 1967, that it had taken 703 5 acres of State owned marsh for a spoil disposal site for dredging in Charleston Harbor" and that "Pursuant to §54-3-170, the land in question is the property of the Ports Authority " (R 49) (Emphasis added)

This claim could not be any clearer The State owned the 703 5 acres of marsh, the Ports Authority took possession of it, the Ports Authority filed the requisite notice with the Secretary of State on December 21, 1967, and the Ports Authority then owned the 703 5 acres Although it could have done so, the State in this case never contested the Ports Authority's 1967 claim to the 703 5 acres by asserting res judicata or issue preclusion based on the 1975 decision Thus, the issue of the Ports Authority's 1967 claim of ownership to the 703 5 acre tract entered the case because the State allowed it to and, in fact, advocated that claim

As explained more fully hereafter, such action by the State constituted a waiver of its right to rely on res judicata or issue preclusion Moreover, neither res judicata nor collateral estoppel would bar Yelsen from litigating ownership of the 703 5 acre area with the Ports Authority even if these acres were still tidelands, which they are not, because the Ports Authority was not even a party to the earlier action and claims title by means of the 1967 conveyance, not the 1975 decision of the Supreme Court

C The State waived its right to rely on res judicata or collateral estoppel by injecting the Ports Authority's ownership of the property in question into the proceedings

The State waived its right to assert the Supreme Court's 1975 decision (which determined that the State was the presumptive owner of the 703 5 acre parcel of land in question) by itself introducing into this litigation the Ports Authority's prior 1967 claim of ownership of the same parcel Once Yelsen pointed out its waiver in the Circuit Court, that the State contended that it could not have waived that right inadvertently because "Waiver is a voluntary and intentional abandonment or relinquishment of a known right" and "waiver requires a party to have known of the right and known he was abandoning that right " (R 155)

However, Yelsen correctly pointed out to the Circuit Court that inadvertent waivers of this type happen routinely in multiple ways during the course of litigation Inadmissible evidence comes into trials and can properly be considered because a party fails to make a proper and timely objection and thereby waives the objection Hearsay comes into trials because a party opens the door by asking a hostile witness a question that calls for hearsay and thereby waives the objection In these and countless other situations litigants are not knowingly and voluntarily deciding to give up their rights but they waive them just the same

The specific waiver the State made in this case is based on the principle discussed in Kelly v Para-Chem Southern, Inc , 311 S C 223, 428 S E 2d 703 (1993) Kelly sued Para-Chem in Federal Court in 1988 alleging negligence, trespass through groundwater contamination, and nuisance Id Para-Chem's expert testified that the groundwater beneath Kelly's property was not contaminated and the jury returned a verdict of

$200,000 solely on Kelly's nuisance claim Id

Thereafter, Kelly discovered contamination on his property and brought a second action in 1990 in Circuit Court against Para-Chem, alleging negligence, strict liability, and a trespass occurring after the conclusion of the 1988 federal court action Id At the second trial, notwithstanding the prior judicial determination that no contamination existed as of 1988, Kelly himself introduced evidence that the property had in fact been contaminated prior to 1988 Id Nevertheless, Kelly then requested a jury charge that, as a matter of law, no contamination existed prior to 1988 based on the 1988 judgment The trial court denied that request and the Supreme Court affirmed, explaining

> Where a party voluntarily opens an investigation of matters which he might claim to be precluded by a prior judgment, he is held to have waived his right to assert the benefit of the former adjudication and the case will be determined without regard therefore

Id at 226, 428 S E 2d at 704

This is precisely what happened in this case The State might have claimed that Yelsen's action seeking title to the 700 acre parcel was precluded by the prior 1975 judgment, and in fact it did so originally However, the State subsequently voluntarily opened an investigation of that matter by introducing the Ports Authority's prior ownership of the very same property By doing so, like Mr Kelly, the State waived its right to assert the benefit of the prior adjudication by introducing evidence inconsistent with the prior adjudication That is a basic rule followed not only in South Carolina but around the country In the Kelly case the Supreme Court cited as authority 50 C J S Judgments § 597, now C J S Judgments § 930 According to that section, waiver of the affirmative defenses of res judicata and collateral estoppel can occur in many different ways and contexts besides the one which occurred in Kelly, all of them without

voluntarily and knowingly giving up the defenses of res judicata and collateral estoppel

> Although it has been said that, when a case has been once fairly tried, it ought not to be tried again, even if the parties are willing, it is nevertheless a general rule that a party entitled to claim the benefit of a former judgment may waive or estop itself to assert such right So, where a party is guilty of laches in setting up the defense of res judicata, or joins issue on the very questions settled by the judgment, or voluntarily opens an investigation of the matters which he or she might claim to be concluded by it, or makes an admission of record inconsistent with the former judgment, the party will be held to have waived the benefit of the estoppel, and the case may be determined as though no such former judgment had been rendered Moreover, a party's conduct in a prior proceeding, such as a failure to raise the preclusion argument when it was first available, or an insistence on excluding the subject matter of the second suit from the scope of the first litigation, may estop or preclude the party from asserting res judicata or collateral estoppel A party who takes a position in a lawsuit, which is inconsistent with the position which that party took in prior litigation, and which works to the disadvantage of the opposing party, is equitably estopped from asserting res judicata based upon the inconsistent position taken Moreover, a tort-feasor waives his or her right to assert the protection of res judicata against an insurer's assertion of a subrogation right by entering into a release with insured after notice

50 C J S Judgments § 930 (2010) *See also* Kelly, 311 S C at 223, 428 S E 2d at 703

In this case, the State, just like Mr Kelly, voluntarily opened an investigation into a matter which it might have claimed was precluded by the prior judgment, namely, who owns the 703 5 acres, and just like Mr Kelly the State thereby waived its right to assert the benefit of the prior adjudication

The Respondents also contended that Yelsen was barred from attempting to prove that its Sovereign Grant was superior to whatever title to the 703 5 acres the Ports Authority received from the State on December 21, 1967 on the theory that Yelsen failed to prove a Sovereign Grant of the 700 acres of tidelands in question in the original action with the State and should therefore not be allowed to prove its Sovereign Grant against

the Ports Authority because the Ports Authority is in privity with the State (R 159)

The privity argument, however, would be available only if the State and the Ports Authority were basing their respective claims of ownership on the same set of facts Richburg v Baughman, 290 S C 431, 351 S E 2d 164 (S C 1993) They are not The State claims it has always owned the area in question and the Ports Authority claims it acquired ownership of the area in question in 1967 Because it is undisputed that whatever interest the Ports Authority has in the 703 5 acres was established in 1967, prior to the original 1969 action brought by the State, and because the Defendants themselves now assert that the Ports Authority has owned the 703 5 acres since December 21, 1967 pursuant to S C Code Ann § 54-3-170, despite the contrary holding in the prior litigation, both the State and the Ports Authority waived the right to argue that Yelsen is barred by the prior litigation from establishing its paramount title to the 703 5 acre tract The State and the Ports Authority chose to forego reliance on the holding of the 1975 decision and have chosen instead to claim that the Ports Authority has owned the 703 5 acres since December 21, 1967 Yelsen is therefore not bound by the holding of the 1975 decision, and it was error for the Master to determine that Yelsen's claim to the 703 5 acres was barred by either res judicata or collateral estoppel

D The Respondents claim that they did not waive the right to res judicata and collateral estoppel because they are the same entity is erroneous

Once the waiver argument was raised in the circuit court by Yelsen, the Respondents tried to sidestep it by arguing that their contradictory claims of ownership of the 703 5 acres were really not contradictory at all Their explanation "The Ports Authority's legal interest in the property does not conflict with the State's interest

because the Ports Authority is an arm of the State" (R 159) In other words, the Respondents contended that there was nothing inconsistent with claiming that State owned the 703 5 acres pursuant to the prior 1975 decision while at the same time claiming that the Ports Authority owns the same 703 5 acres pursuant to a conveyance made to it by the State in 1967 because the State owns all of the Ports Authority's property However, neither The State nor the Ports Authority could cite any authority for that extraordinary claim, and that argument, if upheld, would render S C Code Ann § 54-3-170 meaningless That statute provides

> The Authority may take, exclusively occupy, use and possess, in so far as may be necessary for carrying out the provisions of this chapter, any areas of land owned by the State and within the counties of Beaufort, Charleston and Georgetown, not in use for State purposes, including swamps and overflowed lands, bottoms of streams, lakes, rivers, bays, the sea and arms thereof and other waters of the State and the riparian rights thereto pertaining When so taken and occupied, due notice of such taking and occupancy having been filed with the Secretary of State, such areas of land are hereby granted to and shall be the property of the Authority For the purposes of this section, the meaning of the term "use" shall include the removal of material from and the placing of material on any such land In case it shall be held by any court of competent jurisdiction that there are any lands owned by the State which may not be so granted, then the provisions of this section shall continue in full force and effect as to all other lands owned by the State The provisions of this section are subject to all laws and regulations of the United States with respect to navigable waters

S C Code Ann § 54-3-170

It is obvious that the whole point of the statute is to transfer the State's ownership interest to the Ports Authority and that S C Code Ann § 54-3-170 would be rendered meaningless if it is held otherwise It is well settled that courts must presume that the Legislature intended to accomplish something in a statute and that it did not intend a futile act Duvall v South Carolina Budget and Control Bd , 377 S C 36, 659 S E 2d 125

(2008) The Ports Authority does not need title to State property simply to possess and use it because the statute plainly states that the Ports Authority can take possession and make use of any of the State's property in Beaufort, Charleston, or Georgetown Counties not already in use for other State purposes whether or not the Ports Authority already owns it S C Code Ann § 54-3-170

In fact, the Ports Authority must have already taken possession and use of such property before it can take advantage of the title passing mechanism of S C Code Ann § 54-3-170 Once the Ports Authority takes possession of the property, and then files the notice with the Secretary of State, whatever interest the State has in the property as of that time is "hereby granted to and shall be the property of the Authority" S C Code Ann § 54-3-170

II THE TRIAL COURT ERRED IN FINDING THAT SECTION 54-3-170 AND THE THEORY OF AID TO NAVIGATION BAR THE APPELLANTS CLAIM TO THE PROPERTY ON THE BASIS OF ACCRETION

The circuit court ruled that Yelsen's Third Cause of Action, based on accretion, was barred under S C Code Ann § 54-3-170 and the use of the property as an aid to navigation (R 13) As stated by the Master, "Moreover, the Defendants cannot lose title to this land when it is being used in aid of navigation" (R 13) The Master relied on Horry County v Tilghman, 283 S C 475, 481, 322 S E 2d 831, 834 (Ct App 1984) in holding the State and the Ports Authority may not lose their title because the dredge spoils by the process of accretion where they were deposited "in aid of navigation 'as a necessary part of the dredging operation in Charleston Harbor '" (R 13)

However, the Master erred in assuming that because the dredging operation itself was taken in aid of navigation that the resultant accreted land is also in aid of navigation

the 700 acres of new highland does not aid navigation, and neither the State nor the Ports Authority provided any evidence that any new dredge spoils will ever been added to the 700 acre area in the future in aid of navigation as contemplated by statute or otherwise

As explained in Tilghman, "If a project is undertaken by the State or any governmental agency in aid of navigation, and it is essential that the State or agency thereof have the benefit of the alluvion formed by the accretion in order to realize the goal undertaken by the project, it must be held that the private rights yield to the interest of the public" Tilghman at 481, 322 S E 2d at 834 Absolutely nothing was ever presented by either the State or the Ports Authority that it was essential that either of them have the benefit of the alluvion formed by the accretion in order to realize the goal of the dredging project

III THE TRIAL COURT ERRED IN FINDING THAT THE DOCTRINE OF ACCRETION DOES NOT APPLY TO THE SUBJECT PROPERTY

Regardless of whether the State, the Ports Authority, or Yelsen originally owned the land within the spoil area, the evidence shows that over the years all of the spoil area has been filled in by the process of artificial accretion to an elevation well above the mean high water mark and that Yelsen owns the only highland contiguous with the spoil area (R 304-329, Pl Exs 4, 4A, 4B, 4C, and 4D, Oversize Exhibit)

South Carolina courts have been faced repeatedly with questions as to what accretion is and to whose benefit accreted land may inure "Any increase of soil to land adjacent or contiguous to a navigable stream or water, formed by accretion or alluvion, belongs to the riparian or littoral owner" Hilton Head Plantation Prop Owners' Ass'n v Donald, 375 S C 220, 224, 651 S E 2d 614, 617 (Ct App 2007) "Accretion by natural alluvial action to lands on a navigable stream, such as ocean waters, becomes the

property of the owner of the land accreted or increased" State v The Beach Co., 271 S C 425, 429, 248 S E 2d 115, 117 (1978) In State v Holston Land Co., 272 S C 65, 248 S E 2d 922 (1978), a case involving Drum Island, the Supreme Court noted "Prior to 1950 much of the island stood below the mean high tide mark of the Cooper River By the early 1950's portions of the island were encircled by dikes, and, due to artificial accretion, most of the island has now been elevated above the high water mark" Id at 66 248 S E 2d at 923 (Emphasis added) The Holston Court held that diking and filling an area with dredge spoils constitutes artificial accretion "However, artificial accretions which are caused solely by the act of the upland owner should not inure to his benefit, for the upland owner should not be permitted to enlarge his own estate at the expense of the State" Hilton Head Plantation, 375 S C at 224, 651 S E 2d at 617 It is, of course, uncontested in this case that Yelsen had nothing to do with placing dredge spoils in the spoil area This was done entirely by the Corps of Engineers Further, the 1975 decision in Yelsen I clearly establishes that Yelsen owns the only areas of highland, the very highlands to which the accreted land attaches Yelsen Land Co., Inc., 265 S C at 80, 216 S E 2d at 877

In Reads Landing Campers Ass'n v Pepin, 546 N W 2d 10 (Minn 1996), the Minnesota Supreme Court dealt with a similar factual situation when the Corps of Engineers dredged a channel in the Mississippi River and deposited over one million cubic yards of dredge spoils contiguous with high land owned by the Railroad While not treating the spoils as accretion, the Court nevertheless determined that the Railroad was entitled to the newly created highland

> On the question of ownership of the riparian land made by deposit of dredge spoils, the parties rely on alternative characterizations of the

process by which the land was "made " Soo Line and RLCA would have us treat the creation of the land as an "accretion " According to the doctrine of accretion, all "made lands" created as a result of "small and imperceptible degrees shall go to the owner of the land adjoining " 2 William Blackstone, Commentaries 261-62 The Supreme Court has defined this as a change that is not perceptible when it takes place "Though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on " Philadelphia Co v Stimson, 223 U S 605, 624, 56 L Ed 570, 32 S Ct 340 (1912) (quoting County of St Clair v Lovingston, 90 U S (23 Wall) 46, 68, 23 L Ed 59 (1874)) This court, along with the majority of American jurisdictions, has held that the rights of the riparian owner include the "right to accretions formed or produced in front of his land by the action of the water " Lamprey v Metcalf, 52 Minn 181, 198, 53 N W 1139, 1143 (1893)

Further, there is a considerable body of caselaw nationally holding that accretions need not be by natural causes In Bd of Trustees of the Internal Improvement Trust Fund v Sand Key Associates, Ltd , 512 So 2d 934 (Fla 1987), the Florida Supreme Court said, "The law, as it has developed, does not distinguish between natural and artificial accretions " Id at 937 Similarly in Lakeside Boating & Bathing Inc v Iowa, 344 N W 2d 217 (Iowa 1984), the Iowa Supreme Court held that "[a] riparian owner's right to accreted land is the same whether the accretion occurs from natural causes or from artificial means " Id at 220

In contrast, Pepin, the interveners, and the state argue that the process is one of "avulsion," another theory of riparian law Avulsion is defined as any change that is "[a] sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream " Black's Law Dictionary 137 (6th ed 1990) As a general rule, riparian land made by avulsion does not change the underlying ownership, State v Longyear Holding Co , 224 Minn 451, 29 N W 2d 657 (1947), Hanson v Rice, 88 Minn 273, 92 N W 982 (1903), and so Pepin and the intervenors argue, the State of Minnesota is the owner of the "made" land They rely principally on Longyear, in which this court held the temporary drainage of a lake for purposes of allowing mining of the lake bed did not grant the riparian owners an ownership interest in the land thus created Longyear, 224 Minn at 468-69, 29 N W 2d at 667 Pepin and the intervenors urge that the land created by the dredging did not appear as the result of "small and imperceptible changes," but was the result of a sudden and abrupt action, akin to the temporary draining of the lake in Longyear

No Minnesota case appears to be precisely on point Further, the creation of riparian land on the banks of the Mississippi River through the deposit of dredge spoils does not fit neatly into the doctrine of either

> "accretion" or "avulsion " Rather, what is at issue here is the creation of land, over a period of almost 20 years, by regular, but intermittent man-made activity It was neither "small and imperceptible" nor "sudden and abrupt," but gradual and periodic Who, then, should be sanctioned as the owner of the property?
>
> We find our answer in the strong common law tradition of Minnesota in support of the riparian owner's access to the water This right of access has been called by this court, the "principal value of the land," upon which all others depend Lamprey, 52 Minn at 197, 53 N W at 1142 Were we to adopt the theory of Pepin, the intervenors, and the state, we would negate that principal value by inserting between the land of the riparian owner and the water, a strip of property owned by someone else The property at issue here was created by the dredging activity of a governmental entity in order to implement its legal right to keep the shipping channel open The riparian owner did not request the dredging and very likely had no ability to prohibit it Yet under Pepin's theory, these unsolicited actions of a third party would deprive the riparian owner of the "principal value" of its property We conclude that such an outcome would be both unfair and inconsistent with our previous rulings, and therefore hold that Soo Line is the owner of the riparian property at issue

Id , 546 N W 2d 10, 13-14 (Minn 1996)

Like the Read's Landing case Yelsen's land has been added to by the dredge spoils not suddenly but gradually and over time Yelsen's land has also been altered in that some 700 acres of land now border it where it was previously bordered in part by tidelands

Of key importance in the present case is the fact that the accretion which has occurred took place, and the accreted land which is now contiguous with the highland owned by Yelsen on Morris Island came into being, subsequent to the 1975 decision of the South Carolina Supreme Court in the Yelsen I case The accreted highland at issue here simply did not exist at the time of that prior litigation As is the case with all accretion, whether natural or artificial, the land at issue came into being over a period of time In this case the accretion occurred as a result of the Corps of Engineers dredging

and dumping the spoils into tidelands and creeks during the decades which have passed since the 1975 decision What the lower court has failed to recognize is that the issue as to whether this land has accreted to highlands which are admittedly owned by Yelsen is novel and, by the very nature of this claim could not have been raised previously as the land did not exist until it was created by the dredging process carried out by the Army Corps of Engineers Further, the only extant highland adjacent to the dredge spoils area belongs to Yelsen so there was no other land for the spoils to accrete to

IV THE TRIAL COURT ERRED IN FINDING THAT S C CODE ANN §§ 15-67-20, 15-67-90, AND 15-3-380 APPLY IN THIS MATTER

In his Order Granting Defendants' Motion for Summary, the Master erroneously relied on South Carolina Code Annotated §§ 15-67-20, 15-67-90, and 15-3-380 Reliance on these statutes was in error for several reasons

S C Code Ann § 15-67-20 provides "The plaintiff in actions for recovery of real property or the recovery of the possession of real property is limited to one action for recovery" This statute is inapplicable for two reasons First, the State brought the previous action for recovery in the 1969 decision Yelsen counterclaimed seeking a determination of its ownership of tidelands Yelsen's present action is to determine its ownership of highland which did not exist in 1969 and therefore, could not have been the subject of an earlier action Moreover, the State waived its right to rely on this statute when it *itself* introduced evidence into this current proceeding that the State in fact did not own the 700 acre area in question in 1969 when the prior litigation took place and that the Ports Authority has owned the area since 1967

S C Code Ann § 15-67-90 provides

> No judgment or decree quieting title to land or determining the title thereto, or adverse claims therein, shall be adjudged invalid or set aside for any reason, unless the action or proceeding to vacate or set aside such judgment or decree shall be commenced or application for leave to defend be made within three years from the time of filing for record a certified copy of such judgment or decree in the office of the clerk of court of the county in which the lands affected by such judgment or decree are situated or, in case of minors, within three years after coming of age

This statute likewise does not apply

S C Code Ann § 15-3-380 elaborates

> No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period

These two statutes are inapplicable for two reasons First, the land in dispute is not the same land as the land litigated in Yelsen I Due to accretion, as well as other natural and man-made circumstances, the land in question in the present case is different in kind and location from the property at issue in the 1975 action As such, ownership of the property at issue in the pending matter has yet to be litigated, and is unique from the property that was in previously dispute in Yelsen I, and the above-referenced statutes were wrongly applied to the current litigation

Second, Yelsen is not seeking to set aside Yelsen I, but does contend that the State has waived its right to rely on Yelsen I as discussed above Yelsen should be allowed to show that it has paramount title as to both the State and the Ports Authority The State has admitted that the Ports Authority gained title in 1967, over a year before the State brought the Yelsen I litigation Yelsen's title is paramount as to the Ports

Authority based on Yelsen's ability to trace its chain of title to the original 1818 Sovereign Grant Alternatively, Yelsen can also establish paramount title as to the Ports Authority based on the doctrine of accretion As previously stated, both the parties and the land at issue in the pending litigation are different from the parties and land involved in the Yelsen I litigation Plaintiff merely wishes to address the issues involving ownership of the land before the court

As such, South Carolina Code Annotated §§ 15-67-20, 15-67-90, and 15-3-380 were wrongly applied to the current litigation

V THE TRIAL COURT ERRED IN FINDING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER APPELLANTS ARE ABLE TO ESTABLISH TITLE TO THE LAND IN QUESTION THAT IS SUPERIOR AND PARAMOUNT TO THE TITLE AQUIRED BY THE STATE PORTS AUTHORITY IN 1967

On December 21, 1967, the date the Ports Authority sent the letter to the South Carolina Secretary of State pursuant to S C Code Ann § 54-3-170, the Ports Authority could only have acquired whatever title the State then held to the 703 acre spoil area As noted above, in the 1975 decision of the Supreme Court, the Court held that Dajon was unable to connect its chain of title to the 1818 deed The missing link in that chain of title has been discovered Yelsen can directly connect its chain of title to the 1818 grant Additionally, neither the State nor the Ports Authority can claim ownership of the spoil area based on the earlier decision because the State has now admitted that its interest in the land was conveyed to the Ports Authority prior to that decision and has therefore waived its right to res judicata or issue preclusion and likewise the Ports Authority has asserted its claim based on the 1967 letter, not on the earlier decision Therefore, the issue of title can be determined anew Kelly, 311 S C at 223, 428 S E 2d at 703 The

evidence here shows that Yelsen holds paramount title to the spoil area

In the Second Cause of Action of its Amended Complaint, Appellant asks for a determination that its title to the 703 5 acres is prior and paramount to the title the Ports Authority received from the State on December 21, 1967 because Appellant holds a prior Sovereign Grant to this property This second cause of action is based on the recent discovery of documents which were missing in Appellant's chain of title in the 1975 litigation These documents could not be found when the case was originally tried because they were not on file anywhere in Charleston County but were recently discovered in Berkeley County These missing documents fill the gaps in Appellant's chain of title and establish that Appellant's claim to title of the 703 5 acres does indeed trace directly back to a Sovereign Grant The evidence proffered by the Appellant establishes a chain of title from Yelsen all the way back to a sovereign grant (R 266-284)

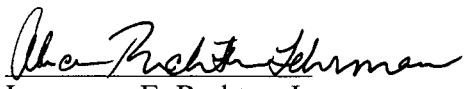
The State and State Ports Authority have provided no evidence refuting the testimony of Mr Hostetter as to Yelsen's superior title claims The Court erred in finding that the proffered evidence did show that genuine issues of material fact exist as to any of Yelsen's causes of action Issues of material fact do exist as to both the accretion and chain of title issues as well as others and Yelsen should not be precluded from being heard as to these and all its causes of action

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Master-in-Equity and hold that the Master in Equity should have found, based on the evidence presented, that Yelsen was not barred by res judicata or collateral estoppel in proving its

paramount title to the 703 acre area at issue and that the expert testimony and evidence provided established that Yelsen's title connected back to the original 1818 grant and also established paramount title based on the theory of accretion In the alternative this Court should remand the case to the lower court for a full trial to allow the State and State Ports Authority to present their case

Respectfully submitted,



Lawrence E Richter, Jr
Alice Richter Lehrman
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464
(843) 849-6000

Donald B Clark
Donald B Clark, LLC
39 Broad Street, Suite 210
Charleston, SC 29401
(843)720-8866
Attorneys for Appellant

May 17, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R Scarborough, Master-in-Equity

Trial Court Case No 2007-CP-10-2053
Court of Appeals Case No 2010199806

Yelsen Land Co , Inc , Appellant

v

The State of South Carolina and The State Ports Authority Respondent

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PROOF OF SERVICE

I certify that I have served 3 copies of the Final Brief via US Mail on May 17, 2011 to counsel for Respondents at the address as follows

J Emory Smith, Esq
Assistant Deputy Attorney General
1000 Assembly Street
Room 519 of the Rembert Dennis Building
Columbia, South Carolina 29201

THE RICHTER FIRM, LLC

Lawrence E Richter, Jr
Alice Richter Lehrman
The Richter Firm, LLC
622 Johnnie Dodds Blvd

Mount Pleasant, SC 29464
(843) 849-6000

Donald B Clark
39 Broad St , Ste 210
Charleston, SC 29401
(843)720-8866

Attorneys for Appellant

Charleston, South Carolina
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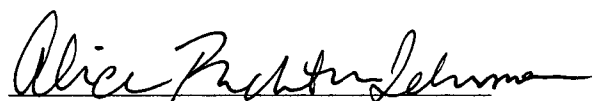
CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I DO HEREBY certify that the Final Brief of Appellant and the Apellants' Reply Brief comply with Rule 211(b)



ALICE RICHTER LEHRMAN
The Richter Firm, LLC
Counsel for Appellant

Mt Pleasant, South Carolina
May 17, 2011