THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M Young, Circuit Court Judge

Case No 06-CP-10-4839

Yelsen Land Co , Inc Appellant,

v

The State of South Carolina and the
State Ports Authority Respondents

FINAL BRIEF OF RESPONDENTS

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ATTORNEYS FOR RESPONDENTS

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STATEMENT OF THE CASE

Much of the following procedural history comes directly from the Master in Equity's Order of April 13, 2010 that is the subject of this appeal with changes to the Appellate designations of the parties, additions of references to the record and some minor edits Record (R) p 13

Appellant brought the instant suit by a Complaint dated May 15, 2007 [1] R p 40 The Complaint alleged that litigation was commenced in the year 1969 between the State, Appellant Yelsen and a third party, Dajon Realty, after the Corps of Engineers obtained permission from the State to deposit dredging spoils onto the tidelands immediately adjacent to the highland owned by Appellant on Morris Island *State v Yelsen Land Company Inc* , 265 S C 78, 216 S E 2d 876 (1975) (*Yelsen I*) Appellant alleged that the dredging deposits have continued since the *Yelsen I* litigation "with the effect that new highland has been created by accretion or otherwise immediately adjacent to and contiguous with the highland owned by Plaintiff " Appellant asked for a declaratory judgment that it owns all highland created by such dredging deposits adjacent to and contiguous with its property pursuant to its alleged legal right to all accretions of highland adjacent to its property The State filed an Answer in response to the Complaint R p 43

Subsequently, the Ports Authority moved to intervene in the suit because of its interest in the property at issue R p 48 Appellant moved to amend its complaint to include the Ports Authority as a Defendant and to include new allegations R p 83 The

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[1] Appellant reverses the order of the parties in the caption, listing itself in the section normally reserved for the Defendant

State objected to the Motion to Amend because the State contended that it addressed issues decided in *Yelsen I*, but the Court granted the Motion and ruled that it resolved the Motion to Intervene R p 9 (Order, July 1, 2009), p 95 (Return to Motion to Amend)

The Amended Complaint added a new First Cause of Action that the State had no interest in the dredging spoils structure because it transferred title to the Ports Authority in 1967, and added a Second Cause of Action that Appellant's title to the site was paramount as to the Ports Authority because of a prior sovereign grant R p 107 The cause of action in the original complaint for acquisition of the property by accretion became the Third Cause of Action in the Amended Complaint

In their Answer to the Amended Complaint, the Respondents alleged that they both have legal interests in the property at issue, that res judicata and collateral estoppel barred Appellant from raising any issues that were or could have been decided in *Yelsen I,* and that the doctrine of accretion did not apply to the property at issue or defeat the interests of the Appellants in that property R p 111 (Answer to Amended Complaint, July 31, 2009)

Respondents moved for partial summary judgment as to Appellant's First and Second Causes of Action because they involve issues that were or could have been decided in earlier litigation, *Yelsen I* R pp 130-154 (Motion and Exhibits, August 21, 2009) The Court held a hearing regarding this motion in September 2009, but did not rule on the motion until the trial date R p 15 (Order, April 13, 2010, p 3) Before trial, the State moved to amend its answer to add additional defenses, and the Court granted the Motion R p 15 (Order, p 3) The Amended Answer is dated December 11, 2009 R p 203

At trial, the Circuit Court granted summary judgment to the Respondents on all causes of action including the third cause of action R p 13(Order, p 1), p 259, l 12 - p

260, l 8 Court allowed Appellant to proffer its evidence by narrative or by placing the witnesses on the stand Appellant decided to present the live testimony of its witnesses and to offer their exhibits At the end of the Appellant's presentation of witnesses and exhibits, the Respondents renewed their Motion for Summary Judgment and also moved for a Directed Verdict, to the extent necessary R p 374, ll 9 - 12 This Court again stated that it was granting summary judgment finding this matter was determined as a question of law R p 379, ll 9 - 21

Appellant filed a Motion to Alter or Amend dated May 26, 2010 R p 215 The State filed a letter Return in opposition to the Motion R p 219 The court denied the Motion by Order dated June 4, 2010 R p 36

Appellant served and filed a Notice of Appeal of the April and June Orders

STATEMENT OF FACTS

Much of the following factual background comes directly from the Master in Equity's Order of April 13, 2010, with minor edits, citations to the Record and Appellate naming of the parties R pp 16 - 18 This background primarily comes from the *Yelsen I* decision

Under legislation dating from 1942 and now codified as S C Code Ann §54-3-170 (1992), 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 on Morris Island for dredging in Charleston Harbor *See* R pp 133 and 134 (Defendants' MSJ Exhibits, pp 4 & 5 (letters to and from the Secretary of State)) The Ports Authority granted spoils easements to the property to the United States Army Corps of Engineers *See* 1967 and

1992 easements R pp 135-146 (Defs' MSJ Exs) The 1992 easement includes a drawing of an over 600 acre disposal area

The State brought suit in 1969 contending that it owned all tidelands adjacent to Morris Island R vol 2, p 452 (Instant Defendants' Exhibit 10, Record, *Yelsen I* p 3, Complaint) *Yelsen I* Defendants Yelsen Land Co and Dajon Realty, Co alleged in their Answer that they owned title to Morris Island by virtue of an 1818 grant from the State and a 1790 act of the legislature R vol 2, p 454 (*Yelsen I*, Record, pp 6 and 7) Their Counterclaim alleged trespass by the State and others such as the Corps of Engineers by means including "the erection of a dyke around a substantial portion of Morris Island" and depositing dredging spoil R vol 2, p 455 (*Yelsen I*, Record, p 8) Therefore, at the time of the *Yelsen I* litigation, instant Appellant Yelsen was well aware of the construction of the disposal site

At trial in April 1972, attorney William Vaughan testified that he examined title for the Ports Authority because the Corps of Engineers requested the Authority, as the agent for the State, to acquire this property for the Corps R vol 2, pp 452 and 458 (*Yelsen I*, Record, pp 2 and 15) Mr Vaughan referred to the high land on Morris as including Cummings Point, and the beach along the shore "such of it as is high " R p 463 (*Yelsen I*, Rec , p 24) He testified that the area to the west of the high land was "where the spoil area is now This is former marsh land being filled in " R vol 2, p 463 (*Yelsen I*, Rec , p 24)

St Elmo (Speedy) Felkel was an officer in both the Yelsen and Dajon companies at the time of trial R vol 2, pp 460, 471 and 474 (*Yelsen I* Rec , pp 18, 41 and 46) Mr Felkel testified in that proceeding that he had not made any effort to ascertain the "high tide" on Morris Island R vol 2, p 471 (*Yelsen I*, Rec , p 41) Counsel for the State in *Yelsen*

I, stated as follows "we have never claimed the high land and still don't claim the high land, but we have always asserted claim to the tidelands and marsh areas and we have done it as late as 1956 and we certainly did it in 1967 when we put that spoil area in there between 1967 and 1970 The state has asserted its rights to the entire area " R vol 2 pp 484 and 485 (Def Ex 10, *Yelsen I*, Rec , p 67, see also, p 68) Therefore, the State asserted its claim to the entire spoils area in *Yelsen I* This claim of the State to the entire spoils structure is also made clear by the State's Brief on appeal in *Yelsen I* which stated that "Felkel [the Yelsen officer] stated that he wished to 'develop' the tidelands including the S C State Ports Authority spoil area " R vol 2, p 505 (Def Ex 11, at pp 6 and 7 of Brief)

The Jury returned a verdict for the State in *Yelsen I* The trial judge denied Yelsen's and Dajon's Motions for a Judgment Notwithstanding the Verdict and a New Trial on December 3, 1973 R vol 2, p 452 (*Yelsen I*, Rec , p 2) On appeal, the Supreme Court found that a 1790 grant to the United States government under which Yelsen and Dajon claimed did not include land below mean high water and that those parties could not connect their interest to an 1818 grant to Joseph Maillard *Yelsen I supra* 216 S E 2d 876 The Court ruled that "Yelsen has completely failed to establish its claim to the tidelands in question "*Id* Contrary to Appellant's argument in the instant case, the Supreme Court in *Yelsen I* did not hold that instant Appellant and Dajon owned the high ground of Morris Island Instead, the Court noted that the State had conceded their ownership of the highlands comprising Morris Island, and that all that was at issue were the claims of the parties to the adjacent tidelands As noted above, the State's concession in *Yelsen I* that Yelsen owned the high ground did not include the spoils structure

ARGUMENT

I

RES JUDICATA AND COLLATERAL ESTOPPEL BAR THIS ACTION

Much of the following argument comes directly from the Circuit Court's April, 2010 Order with the parties referenced by their Appellate designations *See* note 2, *infra* References to the Record have been added as have some additional citations and points regarding Appellant's arguments

A

Res judicata bars all causes of action

As to both of the Respondents, Appellant is barred by res judicata from litigating any issues litigated and decided in *State v Yelsen (Yelsen I)* or any issues that might have been raised in *Yelsen I* including, but not limited to, the State's legal interest in the property at issue, the Ports Authority's legal interest in that property, the applicability of any sovereign grants to that property, the Appellant's failure to establish its ownership of the property and any claims of accretion These issues encompass all causes of action in this case, and they are all barred by res judicata

"When claims arising out of a particular transaction or occurrence are adjudicated, res judicata bars the parties to that suit from bringing subsequent actions on either the adjudicated issues or any issues that might have been raised in the first suit " *Judy v Judy*, 383 S C 1, 677 S E 2d 213 (Ct App , 2009), cert granted, May 28, 2010, [*see* also *Plott v Justin Ent* , 374 S C 504, 511, 649 S E 2d 92, 95 (Ct App 2007) *Plum Creek Dev Co v City of Conway* 334 S C 30, 34, 512 S E 2d 106, 109 (1999)] Ownership claims as to the property at issue were adjudicated in *Yelsen I* and res judicata bars their reconsideration

here Any particular issues regarding the effect of the transfer of an interest in the property from the State to the Ports Authority pursuant to §54-3-170 "might have been raised in" *Yelsen I* because the Record shows that the Appellant was aware of the Ports Authority's interest in the property at the time of *Yelsen I* *See also*, Part C, infra Therefore, Yelsen, who was a party to both the past and present suits, is barred from raising these issues in the instant *Yelsen II* suit

Res Judicata applies to parties in privity with those in the prior litigation *Pye v Aycock*, 325 S C 426, 480 S E 2d 455 (Ct App ,1997) Certainly, the Ports Authority is in privity with the State as an instrumentality of the State and as a successor to the State's interests under §54-3-170 as to the title issue in this case

Although Appellant asserts that the State and the Ports Authority are not in privity because they are claiming ownership based upon different sets of facts, this assertion is not correct The property claims of the State and the Ports Authority are derived from the same sources in that the Ports Authority's interest was conveyed by the State, and the State retains an interest in the property as discussed *infra* "The term privity when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right " *Richburg v Baughman* 290 S C 431, 434, 351 S E 2d 164, 166 (1986) The State and the Ports Authority are in privity under this rule as to the instant case because they each have a legal interest in the same property derived from the same source Accordingly, res judicata bars the instant Appellant Yelsen from relitigating the title issues determined in *Yelsen I*, including but not limited to the applicability of any grants [2]

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[2] This paragraph is responsive to Appellant's brief and was not in the original order

Appellant contends that *Yelsen I* was limited to "tidelands" and that the Court did not hold that the State owned any highland on Morris Island Appellant appears to suggest that *Yelsen I* did not adjudicate ownership of the spoils structure or that if the Court did do so, it now owns the structure due to dredging and filling The ownership issues as to the structure are barred because they were raised or could have been raised in *Yelsen I* *See infra* As noted above, the State's concession of ownership of highlands did not include the structure, and Appellant Yelsen was well aware of the construction of the spoils disposal structure going on during *Yelsen I* Appellant Yelsen specifically counterclaimed in *Yelsen I* for trespass due to the construction of the dike and the deposit of dredging spoil Therefore, these accretion issues in the Third Cause of Action in the instant suit are barred by res judicata as are the First and Second Causes of Action [3]

B

Collateral estoppel bars all causes of action as to the State

As stated in *Judy* supra, 677 S E 2d at 217

> Collateral estoppel, or issue preclusion, prohibits a court from adjudicating an issue that was "actually litigated and determined by a valid and final judgment" in a prior suit *Zurcher v Bilton*, 379 S C 132, 135, 666 S E 2d 224, 226 (2008) Collateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same *Id* It applies only if "the precluded party has had a full and fair opportunity to litigate the issue in the first action " *Id*

See also Plott supra

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[3] This paragraph contains arguments in addition to those in the corresponding paragraph in the Order

Certainly, the issue of ownership was litigated and finally determined in *Yelsen I* Appellant had a full and fair opportunity to litigate the issue in that action Accordingly, Appellant is collaterally estopped from litigating this issue now That the issue of the effect of the §54-3-170 transfers was not specifically addressed in *Yelsen I* is of no consequence because the Court determined that the State owned the property State ownership was decided in *Yelsen I*, and the State still retains an interest in the Property Therefore, the First Cause of Action was determined

The Second Cause of Action regarding the applicability of a grant to the Ports Authority's interests is also barred Certainly, the issue of whether a sovereign grant applies to the property in question was litigated and finally determined in *Yelsen I* As discussed *supra*, the Ports Authority is in privity as to the State, but not even privity is required now for the application of collateral estoppel when, as here, the Appellant had a full and fair opportunity to litigate the issue *Doe v Doe*, 346 S C 145, 551 S E 2d 257 (2001)

The Third Cause of Action also may be barred by collateral estoppel Although Yelsen did not specifically allege title by accretion in *Yelsen I*, Yelsen counterclaimed on the basis of the construction of the disposal structure and the deposit of dredging spoil, and the Court found that it failed to establish title Appellant certainly had a full and fair opportunity to litigate ownership as to those matters yet failed to establish title Even, if this Third Cause of Action were not barred by collateral estoppel, it clearly is barred by res judicata

C

Reexamination of *Yelsen I* issues is not permitted by either the transfer of an interest in the property to the State Ports Authority or by the intervention of the Authority

Appellant claims that the transfer of an interest in the property from the State to the Ports Authority relinquished all State interest in the property and that the addition of the Ports Authority to this litigation waives the res judicata and collateral estoppel defenses These arguments are clearly wrong The State retains an interest in the property, and the intervention of the Ports Authority on its own motion did not waive the defenses of the State or the Authority

The transfer of an interest in the property to the Ports Authority preceded *Yelsen I* and was made pursuant to legislation dating from 1942 and now codified as S C Code Ann §54-3-170 (1992) That legislation provides that the Ports Authority has use of State property under these circumstances

> 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

Under this legislation, 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 *See* R pp 133 and 134 (MSJ exhibits, pp 4 & 5 (letters to and from Secretary of State)) The Ports Authority then granted spoils easements to the property to the United States Army Corps of Engineers *See* R pp 135 - 146 (MSJ exhibits, pp 6 - 17 (1967 and 1992 easements))

The State retains an interest in the property despite the transfer of some of its interests to the Ports Authority because the Authority is an instrumentality of the State §54-3-130 When the Authority holds an interest in the property [under §54-3-170], the State does also

Furthermore, the Authority's acquisition of the property pursuant to §54-3-170 was for purposes of the State under Chapter 3 of the Code regarding the State Ports Authority *See eg*, §54-3-130, *see also* R pp 133 and 134 (MSJ exhibits, pp 4 & 5 (letters to and from Secretary of State)) Accordingly, the Ports Authority is successor in interest to the State as to those rights acquired by the Authority pursuant to statute *Id see also Ristow v South Carolina Ports Authority*, 58 F 3d 1051 (4th Cir 1995), *cert denied* 516 US 987 (1995)(Ports Authority entitled to State's Eleventh Amendment Immunity from suit), *South Carolina State Ports Authority v Jasper County*, 368 S C 388, 629 S E 2d 624, 632 (2006)("Because condemnation by a state agency [the Ports Authority] is on behalf of the State, a state agency's power of eminent domain is superior to that of a political subdivision ")

Moreover, the State retains the public trust interest in the property As stated in *McQueen v South Carolina Coastal Council*, 354 S C 142, 580 S E 2d 116, 119 (2003)

> As a coastal state, South Carolina has a long line of cases regarding the public trust doctrine in the context of land bordering navigable waters Historically, the State holds presumptive title to land below the high water mark As stated by this Court in 1884, not only does the State hold title to this land in jus privatum, it holds it in jus publicum, in trust for the benefit of all the citizens of this State *State v Pacific Guano Co* , 22 S C 50, 84 (1884), see also State v Hardee, 259 S C 535, 193 S E 2d 497 (1972)]

Nothing in §54-3-130 indicates that the public trust interest in the property is to be transferred nor does the 1967 transfer indicate such intent The statute provides that the Ports Authority "may take, exclusively occupy, use and possess, in so far as may be necessary any areas of land owned by the State " The conveyance of the public trust is neither indicated nor necessary The filing with the Secretary of State in 1967 indicates only that the property was taken and occupied "for use as a spoil disposal area " Accordingly, the State retains this public trust interest in the property

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right " *Parker v Parker*, 313 S C 482, 487, 443 S E 2d 388, 391 (1994) Stated differently, waiver requires a party to have known of a right and known he was abandoning that right " *Eason v Eason*, 384 S C 473, 682 S E 2d 804 (Ct App 2009)

The Respondents have neither voluntarily nor intentionally abandoned the defenses of collateral estoppel and res judicata The proposed Answer attached to the Ports Authority's Motion to Intervene expressly asserted the collateral estoppel and res judicata defenses, and the State opposed Appellant's Motion to Amend on grounds that included collateral estoppel and res judicata R pp 48 and 71 (Motion and proposed Answer) Contrary to the Appellant's First Cause of Action, neither the State nor the Ports Authority have ever contended that the State does not retain a legal interest in the property

Appellant's rely on *Kelly v Para-Chem*, 311 S C 223, 428 S E 2d 704 (1993), but it is inapplicable to this case In *Kelly*, the Appellant had introduced contradictory evidence on an issue decided by earlier litigation and then was not allowed to apply res judicata to the earlier decision In the instant case, the Respondents have not challenged any finding in the earlier litigation The only reason the Authority intervened in the instant case was to respond to the accretions issue that Appellant alleged [4]

Appellant's quotation of CJS Judgments §930, demonstrates that waiver does not apply That section states that "[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 re judicata based upon the inconsistent position taken " *Id* (Emphasis added) The Respondents have not taken positions inconsistent with the prior litigation and, therefore, have not waived their interests [5]

Moreover, the next paragraph of §930 includes the statement that "the collateral estoppel effect of a decision on a particular issue is not waived by presentation of evidence on that issue where such evidence is necessary to the determination of another issue " (Emphasis added) The role of the Authority is necessary for the determination of the accretion issue in this case which Appellant raised in the original suit Therefore, Respondents have not waived res judicata and collateral estoppel [6]

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[4] This footnoted paragraph was not in the Circuit Court Order

[5] This footnoted paragraph was not in the Circuit Court Order

[6] This footnoted paragraph was not in the Circuit Court Order

The addition of the Ports Authority does not allow Appellant to avoid res judicata and collateral estoppel and reexamine ownership issues as to that party The Instant Appellant Yelsen was clearly aware of the Ports Authority's interest in the property during *Yelsen I* for these reasons

i Yelsen filed a counterclaim about the State's "attempting" to grant the right to the Corps of Engineers to deposit dredging spoil on the property *See Yelsen I record* R p 148 (§30 (Ground 2, counterclaim of Yelsen)),

ii Counsel for the Ports Authority testified at trial in *Yelsen I* about his examination of title to the property in 1967 because the Ports authority wanted to acquire the property for the Corps of Engineers *See Yelsen I* record, R p 149 (Testimony of Vaughan,§§ 54 - 59) He also testified that he talked about the property to a Mr Felkel who was an officer of Yelsen and its co-defendant in that case *Id* , R p 150 (§§ 70- 76) In addition, he talked to the attorney for the companies *Id* , R p 150§§71- 74)

iii The Brief of the State in the *Yelsen I* appeal specifically stated that "[t]he State had the entire area between the usual high water marks of James Island and Morris Island under oyster leases with the exception of the spoil area taken by the South Carolina State Ports Authority under statutory authority " R p 154 (*Yelsen I* Brief of Respondent State, at p 6 of Brief) (emphasis added) As noted above, the Brief continued by saying that "Felkel [the Yelsen officer] stated that he wished to 'develop' the tidelands including the S C State Ports Authority spoil area " *Id* at R p 154 (p 7 of Brief)

As recognized above, res judicata bars "issues that might have been raised in the first suit " *Judy v Judy supra* Appellant could have raised issues then regarding the Ports Authority's interest in the property and failed to do so

II

SECTION 54-3-170 AND THE USE OF THE PROPERTY IN AID TO NAVIGATION BARS ANY CLAIM OF THE APPELLANT TO THE PROPERTY ON THE BASIS OF ACCRETION[7]

Appellant's Third Cause of Action alleges a claim to the property on the basis of accretion Although this cause of action fails because the construction of the spoils structure does not constitute accretion (*see infra*, Argument III), it is barred under §54-3-170 and the use of the property as an aid to navigation

Under§54-3-170, the General Assembly has determined that the legal interest of the Respondents in the property cannot be defeated by any alleged accretion That statute gives the Ports Authority a legal interest in and the use of State land and expressly states that "the meaning of the term 'use' shall include the removal of material from and the placing of material on any such land " *Id* (emphasis added) Accordingly the deposit of spoils on the property at issue cannot become the property of the Appellant when the Respondents have express authority to deposit spoils on it

Moreover, the Respondents cannot lose title to this land when it is being used in aid of navigation "[I]f 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

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[7] Except for the last paragraph, the following argument comes directly from the Circuit Court's April, 2010 Order References to the Record have been added and the parties are now referenced by their Appellate designations

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 " *Horry County v Tilghman*, 283 S C 475, 481, 322 S E 2d 831, 834 (Ct App 1984), quoting *Borough of Wildwood Crest v Masciarella*, 92 N J Super 53, 222 A 2d 138 (1966) Accordingly, the deposit of dredging spoil at the spoils disposal structure belongs to the State because it was in aid of navigation "as a necessary part of the dredging operation in Charleston Harbor " R p 133 (Letter, December 21, 1967, MSJ Exhibits), *see also*, Soils Disposal Agreement, 1967, R p 135 (MSJ Exhibits), §54-3-170

Appellant contends that the Respondents did not show that their having the benefit of the alluvion formed by the accretion was essential to the goal undertaken by the project This argument ignores that the Ports Authority was given the use of the property as a "spoils disposal area" (R pp 133 and 134 (MSJ Exs, Letters December 21 and 27, 1967)), and that the Ports Authority's easement to the United States was for the use of the property "as a dumping ground for spoil removed from the bottom of the various waterways in and around Charleston Harbor" (R p 135 (MSJ Exs , 1967 Easement)) These documents contain no basis for separating the spoil from the needs of project in aid of navigation The purpose of the above documents was to provide for a place to put the spoil, and Appellant has no legal basis to claim an interest in the spoil Moreover, Appellant ignores the express language of §54-3-170 that gives the Ports Authority a legal interest in and the use of State land including "the removal of material from <u>and the placing of material on any such land</u> "[8] (emphasis added)

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[8] This footnoted paragraph was not in the Circuit Court Order

III

ACCRETION DOCTRINES DO NOT GIVE APPELLANT ANY INTEREST IN THE PROPERTY AT ISSUE[9]

Appellant contends that it has acquired an interest in the spoils disposal structure because dredging deposits have accreted to its property This argument fails because the law does not give Appellant an interest in the State's property under these circumstances Accretion has not occurred as the Courts have recognized this term Plaintiff does not own property within the structure for reasons set forth above, and any alleged attachment of the over 600 acre structure to any other property Appellant owns on Morris Island does not constitute accretion

"South Carolina recognizes the general common law rule that accretions by natural alluvial action to riparian or littoral lands become the property of the riparian or littoral owner whose lands are added to " *Horry County v Woodward*, 282 S C 366, 318 S E 2d 584, 586 (Ct App 1984), *see also State v Beach Co* , 271 S C 425, 429, 248 S E 2d 115, 117 (1978), *Epps v Freeman*, 261 S C 375, 386, 200 S E 2d 235, 241 (1973) Accretion is the process whereby the action of water causes an increase in riparian land through the gradual and imperceptible deposit of solid material, whether silt, sand, soil, or sediment, so as to create new dry land in an area that was previously covered by water See, note 4, supra, Eppes ("imperceptible additions to the shore from such ["gradual"] deposits ") In discussing the underpinnings of the rule and ancient lineage of the rule from Roman times, the South

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[9] Except for the last paragraph, the following argument comes directly from the Circuit Court's April, 2010 Order References to the Record have been added and the parties are now referenced by their Appellate designations

Carolina Court of Appeals noted "[t]he rule [of accretion] rests on the impossibility of identifying at any given moment the imperceptible additions to or subtractions from riparian land caused by the constant natural action of water " *Woodward, supra* It should be noted that the Court repeatedly used the word "gradually" in its discussion of the rule By contrast, if the additions or subtractions from riparian land are sudden and perceptible the different rule of avulsion, with an opposite legal effect, applies

This limitation of accretion to gradual and imperceptible additions should apply to artificial additions as well In dicta, *Tilghman*, 322 S E 2d at 834, quoted from *Borough of Wildwood Crest v Masciarella*, 92 N J Super 53, 222 A 2d 138 (1966), which that stated that "if alluvion is formed artificially and not by his direction, [an upland owner] should be entitled to its benefit " *Wildwood* was limited to "alluvion formed by gradual and imperceptible accretion " *Id* Accordingly, an upland owner can acquire an interest in artificial accretions only if they are gradual and not at his direction The construction of the spoils disposal structure and the filling activity was most certainly not an "imperceptible" event

Appellant cites *State v Holston Land Co* , 272 S C 65, 248 S E 2d 922 (1978) for its argument that diking and filling constitutes artificial accretion *Holston* made no such ruling In that case, Holston proved that it had a grant to the underlying filled land Although the Court said that Holston had title to the accretions thereto, the Court did not define what an accretion is nor was accretion an issue on appeal

In contrast to accretion, avulsion is the process whereby the action of water causes a "sudden and perceptible" loss of, or addition to, riparian land The classic example of an avulsive event is a hurricane The principal significance of the distinction between erosion

and accretion on the one hand, and avulsion on the other has to do with legal effect the owner of the riparian land loses title to land that is lost by erosion and ordinarily becomes the owner of land that is added to his land by accretion, whereas if an avulsion has occurred, the boundary line remains the same regardless of the change in the river channel or shoreline 73 AMJUR POF 3d 167 Stated in a slightly different manner, according to the doctrines of accretion and avulsion, which have been adopted by statute or judicial decision in nearly all states, as well as by the federal courts as federal common law, if accretion causes alluvion to form upon a bank or shore, the owner of the bank or shore acquires title to the accreted land, whereas if avulsion causes the addition of land there is no change in title In explaining the common law rules, the U S Supreme Court has stated that "the test as to what is gradual and imperceptible in the sense of the rule [of accretion] is, that 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 " *St Clair County v Lovingston*, 90 U S 46, 68 (1874) The courts have often quoted or paraphrased this language as the relevant test for determining whether additions to riparian land were formed by accretion or avulsion *See also Georgia v South Carolina*, 497 U S 376, 3904 (1990)

This authority shows that the construction of the huge spoils disposal structure is well outside accretion law and is more comparable to a very, very large avulsive event Title does not change under those circumstances, so the Respondents retain title to the land on which the structure is built as well as the structure itself While no South Carolina case has addressed the common law rule of avulsion, both persuasive precedent from other jurisdictions suggest that a South Carolina court would apply the common law rule of avulsion in appropriate circumstances

Appellant cites *Reads Landing Campers Ass'n Inc v Township of Pepin*, 546 N W 2d 10 (MN,1996) because it said that the deposit of dredging spoil along Mississippi Riverfront property belonged to the upland owner because the event fell in between accretion and avulsion and blocked the access of the upland owner to the river This case is completely different from the instant case in that deposit of spoil in *Reads* was apparently outside a dike system such as the one used in the instant case Moreover, South Carolina law indicates that our courts would recognize title in the upland only as to a gradual, imperceptible accretion completely unlike the dike structure at issue here Significantly, unlike the freshwater site in *Reads*, the site of the structure in the instant case is marshland in which the State has a public trust interest

Moreover, Respondents can certainly deposit despoil on their own property without losing it simply because it, *arguendo*, attaches to Appellant's land *See also*, *New Jersey v New York supra*, note 7 In *Patton v Los Angeles* 169 Cal 521, 147 P 141, (1915), the contention was rejected that the owners of abutting upland were the owners of tideland which was filled in by the city, as grantee of the state, to fit it for navigation and commerce The court stating that such change could have no effect to transfer the land to the upland proprietors and that it still retained its character as tideland As recognized in *McQueen v SC Coastal Council*, 354 S C 142, 580 S E 2d 116 (2003), "the State has the exclusive right to control land below the high water mark for the public benefit " In exercising this exclusive control, the State most certainly may fill tidelands with dredge spoils

Appellant contends that accretion issues could not have been raised earlier because the land came into being after the 1975 decision Appellant cites to no evidence that supports his statement Instead, the record of *Yelsen I* shows that Appellant knew that the filling

activity was going on well before 1975, and that Appellant even counterclaimed on that basis R vol 2 , pp 455 and 463 §96 (*Yelsen I* Record on appeal, p 8 (Counterclaim)), p 24, §96 (testimony of Vaughan) [10]

IV

SECTIONS 15-67-20, 15-67-90 and 15-3-380 BAR THIS ACTION[11]

Code section 15-67-20 (2005) states that "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 action is Appellant's second attempt to recover the property at issue in that the first action was the Yelsen I counterclaim Therefore, this statute bars this action

Section 15-67-90 provides as follows

> 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

In effect, Appellant seeks to set aside *Yelsen I* Because more than three years have elapsed since *Yelsen I* was decided, that decision cannot be set aside now under §15-67-90

Section 15-3-380 (2005) provides as follows

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[10] This footnoted paragraph was not in the Circuit Court Order

[11] Except for the last paragraph, the following argument comes directly from the Circuit Court's April, 2010 Order except for references to the Record and the Appellate designations of the parties

> 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

The Respondents own the land at issue pursuant to the *Yelsen I* decision, statute (§54-3-170) and case law that the State is the owner of tidelands property *See Hobonny Club v McEachern*, 272 S C 392, 252 S E 2d 133 (1979) ("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 ") The Respondents have been in possession of the property in question for more than the requisite forty years as recognized by this authority as well as the beginning of construction of the spoils disposal structure more than forty years ago when *Yelsen I* was commenced Therefore, this action is barred by §15-3-380

Appellants contend that these statutes do not apply either because they are not seeking to set aside *Yelsen I* or because the property is not the same today because of the filling of the spoils disposal structure These arguments are a rehash of those made earlier by Appellant and are covered in the sections above The construction of the structure and the deposit of dredging spoils was going on during the *Yelsen I* litigation and was the subject of the instant Appellant's counterclaim therein The preclusive effect of *Yelsen I* as to issues that were raised or that could have been raised therein bars Appellant from trying to avoid the application of these statutes [12]

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[12] This footnoted paragraph was not in the Circuit Court Order

V

SUMMARY JUDGMENT WAS PROPER

Appellant contends that summary judgment should have been denied because it has evidence of superior title and issues of material fact exist as to accretion and unspecified other issues The Circuit Court granted summary judgment because, as a matter of law, Appellant was barred on these issues by the above defenses including res judicata and collateral estoppel As set forth in the Court's Order

> Defendants are entitled to summary judgment because the pleadings and exhibits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law Rule 56, SCRCP "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party " *Hooper v Ebenezer Sr Services and Rehabilitation Center*, 386 S C 108, 687 S E 2d 29, 32 (2009), quoting *Brockbank v Best Capital Corp* , 341 S C 372, 378-79, 534 S E 2d 688, 692 (2000) Under these standards, summary judgment must be granted to the Defendants
>
> Plaintiffs attempt to revisit the *Yelsen I* case tried thirty-eight years ago and decided on appeal thirty-five years ago They cannot do so The present action is barred due to a number of common law and statutory doctrines because these matters have already been decided and also because so many years have elapsed These grounds for judgment and others are addressed below

R p 18 (Order at p 6)

Appellant contends that the State did not refute the testimony of Mr Hostetter as to "Yelsen's superior title claims " The State was not required to do so, because Mr Hostetter testified as a proffer R p 13 (Order, p 1) Moreover, the grant which he testified related to Morris Island was for only 338 acres that were "part" of Morris Island which is much less than the approximately 700 acre tract in question R pp 274, l 24 - p 275, l 4, p 279, l

3 - 281, l 17, R p (Oversized exhibits - Def Exs 37A, 37 B)[13] Moreover, the Appellant's own surveyor was not able to testify that the 1818 plat associated with the grant covered any of the area in dispute R p 319, l 21 - p 323, l 4, R p (Oversized exhibits - Pl Ex 4, including overlays) The parcel 19 that he thought might be included was not part of the area in dispute *Id* and R p 276, ll 11- 14

The Master found that "[a]lthough the testimony of Appellant's expert surveyor and drawing indicated that the grant might not apply to any significant part of the property at issue, this Court need not consider that issue of applicability because consideration of the grant is barred by res judicata and collateral estoppel " R p 33 (Order, p 21)

The Court stated as follows regarding Appellant's proffer

> Although not required to do so, this Court has considered this proffer and concludes that it would not change this Court's ruling on summary judgment and that if this case had progressed to trial, the Defendants would be entitled to a directed verdict
>
> Because of the format by which Plaintiff presented its proffer, the Defendants moved for a Directed Verdict at the end of Plaintiff's case This Court did not need to rule on that motion because of its granting summary judgment, but the Defendants would have been entitled to a directed verdict had this testimony been presented at trial

R pp 33 and 34 (Order at pp 21 and 22) Therefore, the Circuit Court properly granted summary judgment

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[13] The State reserves its exceptions and objections to all proffered testimony and exhibits and maintains its reservation of objections when it introduced Defendants' exhibits 37A and 37B

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Court affirm the Master's decision

Respectfully submitted,

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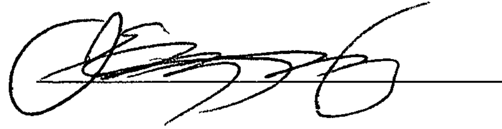
BY 

May 18, 2011

ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M Young, Cırcuıt Court Judge

Case No 06-CP-10-4839

Yelsen Land Co , Inc Appellant,

v

The State of South Carolına and the State Ports Authorıty Respondents

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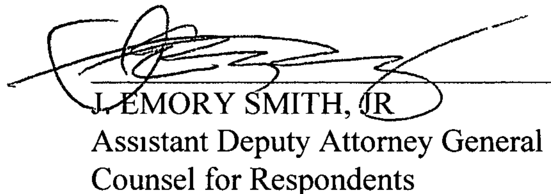
SC Court of Appeals

CERTIFICATE OF COMPLIANCE WITH RULE 211 (b)

I hereby certıfy that the Fınal Brıef of the Respondent complıes wıth Rule 211(b), SCACR [1]



J. EMORY SMITH, JR
Assıstant Deputy Attorney General
Counsel for Respondents

May 18, 2011

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1 Please note that I corrected the date of Plaıntıff / Appellant's Motıon to Reconsıder to show the actual date of May 26, 2010 rather than the typed date of Aprıl 13, 2010 ın the ınıtıal brıef This error was typographıcal ın that ıt lısted the date of the Order to whıch the Motıon was dırected rather than the date of the Motıon I also added the pages ın the record for the cıtatıon at the end of the paragraph at the top of page 16 I had ınadvertently omıtted the "R " reference ın the ınıtıal brıef

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R Scarborough, Master-in-Equity

Case No 2007-CP-10-2053

Yelsen Land Company, Inc , Appellant,

v

The State of South Carolina and
the State Ports Authority, Respondents

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Respondents' Final Brief upon each of the counsel for the Appellant by mailing copies to them at the addresses below via the United States Mail this May 18, 2011

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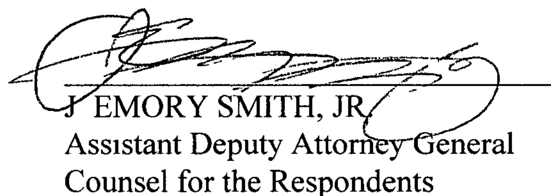

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