

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**The State of South Carolina
And The State Ports
Authority**

Respondents,

R - - - - -

v

NOV 15 2010

Yelsen Land Co , Inc ,

Appellant

SC 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**

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STATEMENT OF ISSUES ON APPEAL

- I DID THE TRIAL COURT ERR IN FINDING RES JUDICATA, OR CLAIM PRECLUSION, AND COLLATERAL ESTOPPEL, OR ISSUE PRECLUSION, ARE APPLICABLE IN THIS MATTER?
- II DID THE TRIAL COURT ERR 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?
- III DID THE TRIAL COURT ERR IN FINDING THAT THE DOCTRINE OF ACCRETION DOES NOT APPLY TO THE SUBJECT PROPERTY?
- IV DID THE TRIAL COURT ERR IN FINDING THAT S C CODE ANN § 15-67-20, § 15-67-90, § 15-3-380 APPLY IN THIS MATTER?
- V DID THE TRIAL COURT ERR 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 ACQUIRED BY THE STATE PORTS AUTHORITY IN 1967?

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 party¹ This controversy involves only the respective claims of the parties to the adjacent tidelands

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

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)

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 (Def s Ex 3) 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 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)

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 (Compl) The matter was subsequently referred to the Charleston County Master-in-Equity, the Hon Mikell R Scarborough (Order of Reference)

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 (Mot to Intervene)

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. (Am Compl.)

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 (Order of April 16, 2010). Yelsen timely filed a motion to alter or amend pursuant to Rule 59(e), SCRCP (Mot to Alter or Amend). 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 (Order of June 24, 2010). 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 (Def ’s Ex 1)

On December 27, 1967, the Secretary of State sent a letter back to the South Carolina Ports Authority acknowledging receipt of its letter (Def ’s Ex 2)

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 (Def ’s Ex 3)

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 Felkel² or someone else on a claim that a portion of this property was in fact high land

(Pl s Ex 5)

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

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

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.

(Pl 's Ex 6)

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)

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 (Def 's Ex 10)

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

It was also explained by Mr Hostetter in his trial testimony (Trial Trans 46-64)

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), 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)

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 (Mot to Intervene) 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 (Am Compl) 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 (Def.'s Ex. 10, 11, 12). 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)

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" (Mot to Intervene ¶¶ 4- 5) (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 State contended that 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 ' (Def 's Supp Reply 1)

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 (Def 's Supp Reply to Pl 's Return to Def 's Mot for Partial Summ J 2)

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” (Def.’s Supp. Reply to Pl.’s Return to Def.’s Mot. for Partial Summary Judgment). In other words, the Respondents contended that there was nothing inconsistent with claiming that the 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 (Order of April 16, 2010 at 14). As stated by the Master, "Moreover, the Defendants cannot lose title to this land when it is being used in aid of navigation" (Order of April 16, 2010 at 14). 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 ” (Order of April 16, 2010 at 14)

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 (Trial Tr 84-109, Pl Exs 4, 4A, 4B, 4C, and 4D)

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. Lovington, 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 intervenors, 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 ACQUIRED 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.

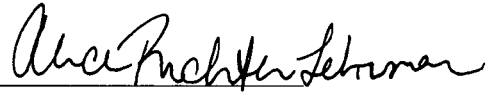
In the Second Cause of Action of its Amended Complaint, Appellant asks for a determination that its title to the 703 5 acres is prior and paramount to the title the Ports Authority received from the State on December 21, 1967 because Appellant holds a prior Sovereign Grant to this property. This second 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. (Trial Trans 46-64)

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,



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November 11, 2010

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

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JAN 25 2011

SC Court of Appeals

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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 *

Appellant brought the instant suit by a Complaint dated May 15, 2007¹ R p * 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 **

Subsequently, the Ports Authority moved to intervene in the suit because of its interest in the property at issue R p * (Motion to Intervene) Appellant moved to amend its complaint to include the Ports Authority as a Defendant and to include new allegations

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

R p * Motion to Amend The 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 * (Order, July 1, 2009), p * (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 * (Amended Complaint) 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 * (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 p * (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 (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 * (Order, p 3) The Amended Answer is dated December 11, 2009) R p * (Amended Answer)

At trial, the Circuit Court granted summary judgment to the Respondents on all causes of action including the third cause of action R p * (Order, p 1), p * (Tr p 39, l 12 - p 40, 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 * (Tr p 154, 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 * (Tr p 159, ll 9 - 21)

Appellant filed a Motion to Alter or Amend dated April 13, 2010 R p * (Motion) The State filed a letter Return in opposition to the Motion (R p *) The court denied the Motion by Order dated June 4, 2010 R p *

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 Record (R) p * (Order, pp 4 -6) 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 ** (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 ** (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 p * (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 p * (*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 p * (*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 p * (*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 * (*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 " *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 p * (*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

p * (*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 p * (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 p * (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 p * (*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

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

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 p ** (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 p ** (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 p ** 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. p. * (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

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:

- 1 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 * (p 19, §30) (Ground 2, counterclaim of Yelsen),
- 11 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 * (Testimony of Vaughan, p 20, §§ 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 * (p 21, §§ 70- 76). In addition, he talked to the attorney for the companies. *Id.*, R p * (p 21, §§71- 74).
- 111 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 * (*Yelsen I* Brief of Respondent State, p 25 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 * (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 ACCRETION⁷

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

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 " Letter, December 21, 1967, MSJ Exhibits, *see also*, Soils Disposal Agreement, 1967, 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 * (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 * (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 and the placing of material on any such land " ⁸ (emphasis added)

⁸ This footnoted paragraph was not in the Circuit Court Order

III

ACCRETION DOCTRINES DO NOT GIVE APPELLANT ANY INTEREST IN THE PROPERTY AT ISSUE⁹

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 Carolina Court of Appeals noted "[t]he rule [of accretion] rests on the impossibility of

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.

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 Lovington*, 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 pp *** (*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 ACTION¹¹

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

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

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 * (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 * 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 p * (Tr p 54, l 24 - p 55, l 4), p 59,

l 3 - p 61 , l 17, 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 * (Tr p 99, l 21 - p 103, l 4), 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 *8 (Tr p 56, 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 * (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 p * (Order at pp 21 and 22) Therefore, the Circuit Court properly granted summary judgment

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

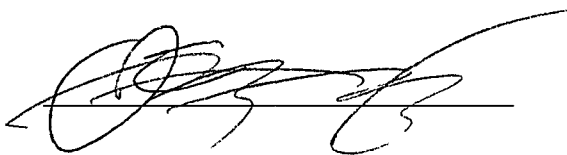
For the foregoing reasons, the Respondents respectfully request that this Court affirm the Master's decision

Respectfully submitted,

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BY

A handwritten signature in black ink, appearing to be "J Emory Smith", written over a horizontal line.

January 25, 2011

ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R Scarborough, Master-in-Equity

Case No 2007-CP-10-2053
Court of Appeals Tracking No 2010166806

Yelsen Land Co , Inc ,

Appellant,

v

The State of South Carolina
and The State Ports Authority,

Respondents

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STATEMENT OF ISSUES ON APPEAL

- 1 DID THE TRIAL COURT ERR IN FINDING RES JUDICATA AND COLLATERAL
ESTOPPEL ARE APPLICABLE TO THIS ACTION?
- 2 DID THE LOWER COURT ERR IN FINDING SECTION 54-3-170 AND THE
THEORY OF AID TO NAVIGATION ARE APPLICABLE AND DO NOT BAR THE
APPELLANT S CLAIM TO THE PROPERTY ON THE BASIS OF ACCRETION?
- 3 DID THE TRIAL COURT ERR IN FINDING THAT THE DOCTRINE OF
ACCRETION IS INAPPLICABLE TO THIS MATTER AND DOES NOT
ESTABLISHES APPELLANT S INTEREST IN THE PROPERTY AT ISSUE?
- 4 DID THE TRIAL COURT ERR IN FINDING THAT S C CODE ANN § 15-67-20, §
15-67-90, § 15-3-380 BAR THIS ACTION?
- 5 DID THE TRIAL COURT ERR 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 ACQUIRED BY THE STATE PORTS
AUTHORITY IN 1967 AND AS TO THE ACCRETION ISSUE?

ARGUMENTS

I RES JUDICATA AND COLLATERAL ESTOPPEL ARE NOT APPLICABLE TO THIS ACTION

The State and the State Ports Authority argue that Appellants action is barred by collateral estoppel and res judicata. This argument is clearly incorrect. The Respondents did waive res judicata and collateral estoppel. The Respondents entire argument is based on the premise that the State and the Ports Authority are both owners of the same property under different lines of ownership. This line of reasoning would render the statute, S C Code Ann § 54-3-170, completely meaningless. This statute enables the Ports Authority to “use” land owned by the state in the counties designated by the statute and further provides a procedure by which the Ports Authority may take ownership of the property it was using in such counties. As for the State s first claim, Yelsen contends that neither res judicata nor issue preclusion apply because

the State waived those claims when it conceded that the State Ports Authority, and not the State, actually owned the area in question in 1969. As for the State's second claim—that there is nothing inconsistent in the State's position because the State and the State Ports Authority are one and the same and the State owns all of the State Port's Authority's property—that obviously is incorrect. There is not a single reported decision which supports this extraordinary claim and, as Appellant noted in its principal brief, S C Code Ann § 54-3-170 would be rendered meaningless if the State's argument were accepted. That statute means exactly what it says: the Ports Authority may take, occupy, use and possess land owned by the State in Beaufort, Charleston, and Georgetown Counties, not in use for other State purposes, and after giving notice to the Secretary of State, “such areas of land are hereby granted to and shall be the property of the Authority” (Emphasis added.) There is no ambiguity in the statute, and the State's labored attempt to construe it as saying something other than what it plainly says falls flat. Obviously, it is impossible for land owned by the State to be granted to and become the property of the Authority and yet at the same time still be owned by the State.

In this action, the specific property that Yelsen seeks to quiet title in is 703.5 acres of highland which did not even exist in 1969. It is indisputable that none of this area is now tidelands as all of it is now above the mean high water mark. (Trial Tr. 84-109 and Pl.'s Ex. 4, 4a, 4b, 4c, 4d) It is likewise indisputable that this entire new highland was created gradually over a long period of time through no action of the Appellant. And it is indisputable that this entire newly created highland is contiguous to Appellant's other highland and not contiguous with any other highland. (Id. and Pl.'s Ex. 1)

II SECTION 54-3-170 AND THE THEORY OF AID TO NAVIGATION ARE NOT APPLICABLE AND DO NOT BAR THE APPELLANT'S CLAIM TO THE PROPERTY ON THE BASIS OF ACCRETION

Respondents have alleged that the Appellant's claim is barred under S C Code Ann § 54-3-170 as the property is used in aid to navigation, however, they have failed to provide any evidence that the two criteria used in applying this statute have been met. As Appellant has discussed in its principal brief, the Tilghman case holds that private rights give way to public interest where two criteria are met, "[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 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 Co 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) (emphasis added). It is inapplicable to our case because the test established requires that a project be undertaken in aid of navigation and that the benefit of the accreted alluvion be essential to the realizing the goal of the project. Nothing was ever presented by either the State or the Port that met this test. There was no evidence whatever that it is essential for either the State or the Ports Authority to have the benefit of this 703.5 acres in order to realize the goal of the original dredging project, or for that matter to realize the goal of any future dredging project.

III THE DOCTRINE OF ACCRETION IS APPLICABLE TO THIS MATTER AND ESTABLISHES APPELLANT'S INTEREST IN THE PROPERTY AT ISSUE

The State and Ports Authority have here sought to assert that the land involved in this matter should be exempt from the doctrine of accretion. Respondents argue that State v Holston Land Co., 272 S C 65, 248 S E 2d 922 (1978), in which our Supreme Court clearly stated that the diking and filling of submerged lands with dredge spoils constituted "artificial accretion," differs from our case. In Holston, as discussed in Appellants principal brief, the

Supreme Court noted in determining the ownership of dredge spoils on Drum Island in Charleston Harbor “[p]rior 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.) As in Holston, this matter likewise involves an area being surrounded by dikes and filled in with dredge spoils. In both cases the creation of new highlands took place gradually, over the course of several decades.

The Respondents incorrectly liken this process to avulsion, a “sudden and perceptible” loss of or addition to riparian land caused by the action of water (Resp’ts’ Br. 18). Yet it is undisputed that there was nothing sudden about the creation of the land in question. This land was created filling diked areas with dredge spoils in a process that took many years (Trial Tr. 117-124). The Court clearly acknowledged in Holston that this process constitutes artificial accretion. Respondents have failed to provide any evidence likening the accretion in the current case with the sudden and perceptible requirement extant in the doctrine of avulsion.

IV SECTIONS 15-67-20, 15-67-90 AND 15-3-380 DO NOT BAR THIS ACTION

The State contends that S.C. Code Ann. § 15-67-20 bars the action because this is Appellant’s second attempt to recover the same property. That is incorrect. It is not Appellant’s second attempt to recover the same property from the State because the 703.5 acre parcel of highland at issue in this case did not even exist in 1969. In Yelsen I, the only land the Appellant attempted to recover from the State was the tidelands of Morris Island. Appellant made no claim against the Ports Authority because the Ports Authority’s claim of ownership of the land in question remained a secret. In its May 23, 1969 Complaint, the State alleged

Plaintiff complaining of Defendant, alleges

1 All of the tidelands, submerged lands and water which are the subject of this
action are situate in the County of Charleston, State of South Carolina, and are
adjacent to Morris Island which is in Charleston Harbor, at Charleston, S C

2 The State of South Carolina has title to the tidelands (i e , the area between the
mean high water mark and the mean low water mark), the submerged lands (i e ,
the area below the mean low water mark) and the waters within the State of South
Carolina

3 The State of South Carolina is the owner of all tidelands, submerged lands,
and waters adjacent to Morris Island in Charleston Harbor, South Carolina

4 The Defendant, Yelsen Land Company, Inc , and Dajon Realty Company,
disregarding the rights of the Plaintiff and of its citizens are asserting title to and
ownership of the tidelands, submerged lands, and marshes adjacent to Morris
Island in the harbor of Charleston, South Carolina The two Defendants have
overlapping claims in the same area, and they are all the claimants in this area
They have objected to the Plaintiff's using this area in the public interest

(1969 Compl , emphasis added)

While the State now refuses to concede that the Supreme Court held in Yelsen I that
Appellant owned all the highlands of Morris Island, the State did in fact make that concession
As noted by the Supreme Court in Yelsen I, "It is conceded that Yelsen and Dajon own the
highlands comprising Morris Island This controversy involves only the respective claims of
the parties to the adjacent tidelands " State v Yelsen Land Co , Inc , 265 S C 78, 80, 216 S E 2d
876, 877 (1975) (Emphasis added) "A stipulation is an agreement, admission, or concession
made in judicial proceedings by the parties or their attorneys and is binding upon those who
make them The court must accept stipulations as binding on the parties " Bodkin v Bodkin,
388 S C 203, 228, 694 S E 2d 230, 243-44 (Ct App 2010)

Appellant's action is also not barred by S C Code Ann § 15-67-90 The State argues
that, "Because more than three years have elapsed since Yelsen I was decided, that decision
cannot be set aside now under § 15-67-90 " (Resp'ts' Br 21) What Yelsen I decided is that the
State was the presumptive owner of the tidelands Appellant makes no claim in this action for

any tidelands against the State. The Ports Authority did not obtain any judgment in Yelsen I quieting its title to tidelands or to any other lands. Once the Ports Authority asserted its claims in the present action to the 703.5 acre parcel, without any objection by the State, Appellant was entitled to contest the Ports Authority's claim. Even if the State and the Ports Authority are in privity, the Ports Authority's claim can be no stronger than the State's claim. Appellant's claim against the Ports Authority would not be barred even if the land in question in the present case was tidelands, but the fact of the matter is that the land in question is newly created highland. Ownership of tidelands simply is not a part of this case.

Finally, S.C. Code Ann. § 15-3-380 is also inapplicable. First, while it is true, as the State claims, that "The construction of the structure and the deposit of dredging spoils was going on during the Yelsen I litigation," (Resp'ts' Br. 22), it is also true that the highland in question did not exist 40 years before Appellant brought this action. As everyone conceded at the time Yelsen I was decided, and as the Supreme Court found, the area in question at that time was still tidelands. The State's argument that this statute cuts off all subsequent claims, even after the tidelands become highland, would render the law of accretion a nullity. According to the State's theory, once the State is declared the owner of tidelands, it remains the owner even though the tidelands become highlands by the process of accretion. That could not have been the intent of the legislature. The State is always the presumptive owner of high lands, whether established by judicial decree or otherwise. Nevertheless, when accretion occurs in State owned tidelands adjacent to highland, the resulting highland becomes the property of the owner of the adjacent highland. Obviously, the right to accreted land cannot accrue until after the accretion occurs, regardless of how long beforehand the State was declared the owner of the tidelands.

It is also not Appellant's second attempt to recover the same land from the Ports

Authority because the Ports Authority was not a party to the previous action and its ownership of the property had never been disclosed by either the State or the Ports Authority and was not of public record. The transfer of title from the State to the Ports Authority was accomplished by the Ports Authority sending a letter to the Secretary of State on December 21, 1967. There is no way the Appellant could have known about this letter and joined the Ports Authority, but the Ports Authority certainly knew about the 1969 litigation and it could have joined the State in raising its own claim of ownership at that time. Instead, the Ports Authority allowed the State to make the untrue claim that the State had always owned the property and had never parted title with it. Now the Ports Authority makes the mutually exclusive claims that (a) it somehow owns the 703.5 acres pursuant to the decree in favor of the State in Yelsen I and (b) that it owns the 703.5 acres pursuant S.C. Code Ann. § 54-3-170 and the 1967 letter to the Secretary of State. Each time the State and the Ports Authority are confronted with this contradiction they perform a smoke and mirrors routine, but it is clear that this is the Appellant's first attempt to claim ownership of the land as against the Ports Authority.

S.C. Code Ann. § 15-67-90 is inapplicable because that statute applies only to attempts to set aside judgments quieting title to land. Even though the 703.5 acre parcel was originally tidelands and title to it was quieted in the State in Yelsen I, two things happened after the original decision, either of which standing alone would justify quieting title of the 703.5 acres in Appellant. First, the basis for decision in Yelsen I was that the State was "presumptively the owner of the tidelands." 265 S.C. at 83, 216 S.E.2d at 879. Even assuming that claim had been true in 1969, which it was not, the 703.5 acres did not remain tidelands. Over a long period of time, it gradually became highland contiguous with Appellant's other highland. Second, during the course of this case, the State itself, while purporting to rely on res judicata and issue

preclusion as to ownership of the area, at the same time took the completely contradictory position that it had in fact not actually owned the 703 5 acres in 1969 because it had previously conveyed it to the State Ports Authority in 1967. When confronted with its own admission that it did not own this parcel of property in 1969, the State again adopted two mutually exclusive arguments. First, the State claimed that despite its admission the parties were still bound by res judicata and issue preclusion. And second, the State claimed that it had not actually admitted that the State had conveyed title to the Ports Authority in 1967 because the State and the State Ports Authority are one and the same entity and the State owns all of the State Ports Authority's property.

V A 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 ACQUIRED BY THE STATE PORTS AUTHORITY IN 1967, SUMMARY JUDGMENT WAS NOT PROPER

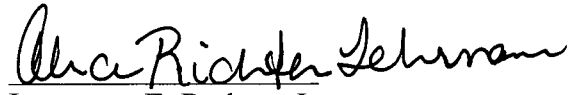
As discussed in the Appellant's initial brief at pages 23 and 24, Appellants have provided evidence sufficient to establish a clear chain of title to a sovereign grant for the property at issue here. Issues of material fact do exist as to both the accretion and chain of title issues and Respondents have failed to show that no such issues exist. As such, 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 remand the case for entry of a judgment in favor of Appellant.

February 23, 2011

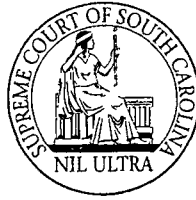
Respectfully submitted,

A handwritten signature in cursive script, reading "Alice Richter Lehrman".

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March 30, 2012

REMITTITUR

The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re Yelsen Land v. State & States Port
2007-CP-10-02053

Dear Ms. Armstrong:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

CLERK

DES/dmh

Enclosure

cc Alice Richter Lehrman, Esquire
Donald Bruce Clark, Esquire
Lawrence E. Richter, Jr., Esquire
Attorney General Alan Wilson
Assistant Deputy Attorney General J. Emory Smith, Jr.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Yelsen Land Company, Inc , Appellant,

v

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

Appeal from Charleston County
Mikell R Scarborough, Master-in-Equity

Opinion No 27103
Heard February 9, 2012 – Filed March 14, 2012

AFFIRMED

Lawrence E Richter, Jr and Alice Richter Lehrman, both of Mount Pleasant, and Donald Bruce Clark, of Charleston, for Appellant

Attorney General Alan Wilson and Assistant Deputy Attorney General J Emory Smith, Jr , both of Columbia, for Respondents

JUSTICE PLEICONES This is an action by appellant to declare that it is the owner of a 700-acre area adjacent to its Morris Island property The Master granted the State and the State Ports Authority (SPA) (collectively

respondents) summary judgment, and appellant appeals. We affirm, finding res judicata applies to bar appellant's attempt to relitigate title to this property.

FACTS

In 1969, the State sued appellant¹ alleging the State owned "all tidelands, submerged lands, and waters" adjacent to Morris Island. Appellant answered and claimed it owned all the tidelands, submerged lands, and marshes adjacent to Morris Island. Appellant also counterclaimed for trespass on those lands by the Corps of Engineers in the form of spoilage dredged from Charleston Harbor, the digging of a ditch, and the erection of a dike. In the first appeal, the Supreme Court held that the legal questions of title to the land should be tried to a jury and that the trial judge erred in denying the State a jury trial. State v. Yelsen Land Co., 257 S.C. 401, 185 S.E.2d 847 (1972).

The jury returned a general verdict for the State, having been charged that title to tidelands, submerged lands, and all land below the high water mark on navigable streams are presumptively the State's unless the entity claiming title can show a specific grant from the sovereign that included the words "to the low water mark." It was also charged that it was to determine title to marshlands and to return damages for appellant if it found the State had trespassed on marshland owned by appellant or if it found a taking.

Following the jury verdict, appellant moved for a judgment *non obstante verdicto* and a new trial, both of which the trial judge denied in a written order. The judge appended a map with red lines drawn upon it to illustrate the land determined to belong to the State. On appeal, this Court noted that it was conceded that appellant owned the Morris Island highlands, and that what was at issue was title to the adjacent tidelands. State v. Yelsen, 265 S.C. 78, 79, 216 S.E.2d 876, 877 (1975). The dispositive issue on appeal was whether the trial court erred in failing to direct a verdict for appellant on

¹ At that time two entities, appellant Yelsen and Dajon, claimed title to the property. Both appellant and Dajon were controlled by the same individual. Sometime later, Dajon deeded its interest to appellant. For simplicity's sake, we will refer to appellant as the plaintiff in the 1969 suit.

the title issue² The Court held "there was no evidence to sustain the claims of title of [appellant] to the tidelands in question " id. at 83, 216 S E 2d at 879, and affirmed We will refer to this decision as Yelsen I because the parties and the Master do so, although it is technically Yelsen II

Yelsen I was commenced by the State in 1969 in a complaint alleging "The State of South Carolina is the owner of all the tidelands, submerged lands, and waters adjacent to Morris Island " The record in this case reflects, however, that in December 1967 the SPA had taken the tidelands of Morris Island "for use as a spoil disposal area a necessary part of the dredging operation in Charleston Harbor" pursuant to S C Code Ann § 54-3-170 (1992) Section 54-3-170 provides

The [SPA] 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 [SPA] 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 provision 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

² Appellant also raised claims related to the statute of limitations, the admission of evidence, and the jury charge

Later in December 1967, the SPA gave the federal government a "Spoil Disposal Easement" over the Morris Island tidelands it had just condemned³ This document identifies the SPA as "a body corporate and politic through the instrumentality of which [SPA] the State may engage in [port activities] the [SPA] is specifically charged as an agency of the State to co-operate with [the federal government, et al] " SPA's acquisition of the tidelands in 1967, well prior to the institution of the State's 1969 title suit against appellant, is an important component of appellant's arguments We note, however, that appellant's pleading in Yelsen I includes trespass claims predicated on the spoilage being deposited on those tidelands, and that at the Yelsen I trial there was testimony that title to the land was at issue in 1967 because the Corps "needed a spoil disposal area and had requested the [SPA], as agent for the State, to acquire" it The attorney conducting the title search for the State and the SPA in 1967 testified he spoke with both appellant's principal and his attorney in 1967 as appellant planned to buy Morris Island There is little question but that appellant was well aware of the SPA's interest in the land as a spoilage site before the purchase

In 1968, the Corps began depositing spoilage in the Morris Island tidelands In 2007, appellant brought this suit against the State contending that the dredging spoils placed in the tidelands had created new highlands, and that as the adjacent highland owner, it was the owner of the newly "accreted" highlands as well The SPA sought to intervene, but in lieu of intervention appellant was permitted to amend its complaint to add the SPA

The amended complaint alleged three causes of action

- 1) State has no interest in the new highlands because it had transferred title to the tidelands to the SPA in 1967,
- 2) Appellant's title, allegedly derived from sovereign grants, was superior to the SPA's, and

³ A second twenty-five year easement was granted in 1992

- 3) Appellant was the owner of the newly created highlands by virtue of accretion

The Master granted summary judgment to respondents on all three theories, and this appeal follows

ISSUE

Did the Master err in granting summary judgment to respondents?

ANALYSIS

Appellant concedes, as it must, that the 1975 case determined it did not have title to the tidelands. Appellant contends, however, that since SPA took title to those tidelands in 1967, neither it nor the State can assert either res judicata or collateral estoppel with regard to the 1975 decision in Yelsen I. We agree with the Master that the doctrine of res judicata applies between the State and appellant to establish that the State owns the tidelands and appellant does not. Moreover, the State and the SPA are in privity as to this title issue, and thus as between appellant and the SPA, title resides in the State and not in appellant.

Appellant's claim to the newly created highlands essentially rests on two theories: (1) that since the State no longer had title to the tidelands when it brought Yelsen I in 1969, that decision is not binding, and (2) that newly discovered documents in appellant's chain of title establish a sovereign grant to the tidelands. Appellant's theories seeking to avoid res judicata are disposed of by Caston v. Perry, 17 S C L (1 Bailey) 533 (1830).

In Caston, the plaintiffs, as tenants in common, had previously prevailed against the defendant in an action to try title to a parcel of land. In that suit, each party's claim was based on "lines" (metes and bounds). The plaintiffs then brought a second suit against the defendant for trespass. Defendant raised the issue of superior title in this second suit, alleging that before the judgment had been entered in the first case, one of the plaintiff's interest in the land had been sold at an execution sale, and that the defendant

had purchased the title from the buyer at the sale. The Caston Court held the defendant's title claim was barred.

The record of recovery in the former suit between these parties is conclusive of the defendant's rights. The defendant had, at that time, the very title on which he now relies, at least his conveyance bears date long anterior, and whether the former suit depended on the extent of the lines, or the title itself, is wholly immaterial. If one, having a dozen different titles, could set them up in succession in this way, a plaintiff might be kept in Court all his life. The defendant was a stranger to the plaintiffs, they had a right to sue him, and he was bound to defend himself. If he had a title, by which he could claim to be a co-tenant with the plaintiffs, he should have produced it.

A later judge explained that Caston establishes that "a recovery by a plaintiff in trespass to try titles is conclusive between the parties as to all titles which the defendant had at the time of trial." Dorn v Beasley, 28 S C Eq (7 Rich Eq) 84 (S C App Eq 1854) (quote from Chancellor's decision)

Two rules can be derived from the Caston decision. First, even a plaintiff who does not have good title, but who prevails against the defendant in that first suit, has good title as against that defendant. Second, a defendant may not relitigate title based on newly discovered documents in his chain where those documents predate the first judgment. Applying those rules to this case, the State has title to the tidelands as against any claim by appellant by virtue of Yelsen I. As between these two parties, it matters not whether the State had good title as against another (i.e., the SPA), or even against appellant, as that is settled. Second, the newly discovered evidence proffered by appellant at this trial as to his title, even if probative (which the Master found it was not) would not entitle appellant to relitigate his claim to the "new" highlands.

The Master held res judicata barred all three of appellant's claims. Res judicata's fundamental purpose is "to ensure that 'no one should be twice sued for the same cause of action.'" Judy v Judy, 393 S C 160, 173, 712 S E 2d

408, 414 (2011) (internal citation omitted) Res judicata bars a second suit where there is (1) identity of parties, (2) identity of subject matter, and (3) adjudication of the issue in the first suit Judy, at 412, 712 S E 2d at 167 The evidence supports the Master's conclusion that res judicata settles the title issue as between the State and appellant

The Master also held that the SPA and the State are in privity with regard to appellant's title claim, and that both respondents are entitled to assert against appellant that title to the tidelands is res judicata in light of Yelsen I Appellant asserts, however, that the State and the SPA cannot rely on privity here because "it only applies if [they] were basing their claims on the same set of facts" and that while the State relies on Yelsen I the SPA relies on its 1967 statutory taking For purpose of res judicata, however, the concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation E g Richburg v Baughman, 290 S C 431, 351 S E 2d 164 (1986) ("The term 'privity' when applied to a judgment or decree means one so identified in interest with another that he represents the same legal rights ") Viewing the subject matter here as appellant's claim of title to the marshlands, and assuming that the State and the SPA are separate entities for purposes of res judicata, we agree with the Master that the State and the SPA are in privity to the extent the issue is appellant's claim of title to the Morris Island tidelands

Appellant next contends that the SPA waived its right to rely on the Yelsen I judgment because it asserted in its motion to intervene that it owned the property pursuant to the 1967 statutory taking The Master found no waiver, however, because the SPA's proposed answer specifically alleged res judicata and collateral estoppel Appellant next asserts the State waived its right to rely on res judicata because it did not contest the SPA's claim to ownership based on the 1967 condemnation but instead adopted that view The Master found, however, that the State did not waive res judicata or collateral estoppel because it specifically pled these doctrines in opposing appellant's motion to amend its complaint after the SPA was allowed to intervene, and because the State pled a continued interest after 1967 by virtue of the Public Trust Doctrine

Waiver is a question of fact Laser Supply and Servs., Inc v Orchard Park Assocs., 382 S C 326, 676 S E 2d 139 (Ct App 2009) The record is replete with evidence to support the Master's findings that neither the SPA nor the State waived res judicata Appellant relies heavily upon Kelly v Para-Chem Southern, Inc., 311 S C 223, 428 S E 2d 703 (1993) to argue that the State waived its right to rely on its Yelsen I judgment by admitting the SPA's 1967 condemnation This argument ignores the Master's finding that the State asserts a continuing interest in the property under the Public Trust Doctrine That ruling is not challenged by appellant and is therefore the law of the case E g, ML-Lee Acquisition Fund, L P v Deloitte & Touche, 327 S C 238, 489 S E 2d 470 (1997) (unchallenged ruling, whether correct or not, is law of the case)

The Master correctly held the doctrine of res judicata bars appellant's right to relitigate title to the tidelands around Morris Island and to deny the State's title to those lands As between appellant and any other party, res judicata or collateral estoppel establishes appellant has no claim, and the State has title

We agree with the Master that res judicata bars appellant's suit, and therefore the appealed order is

AFFIRMED

TOAL, C J , BEATTY, KITTREDGE and HEARN, JJ , concur



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

January 30, 2012

Alice Richter Lehrman, Esquire
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464

Donald Bruce Clark, Esquire
Donald B. Clark, LLC
39 Broad St., Ste. 210
Charleston, SC 29401

Attorney General Alan Wilson
Assistant Deputy Attorney General J. Emory Smith, Jr.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Yelsen Land v. State & States Port

Dear Counsel:

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows:

Appellant	15 minutes
Respondents	15 minutes
Appellant in Reply	5 minutes

This case is scheduled for hearing on Thursday, February 9, 2012 at 10 00 a m

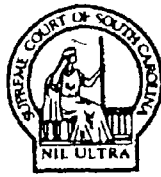
Very truly yours,

Daniel E Shearouse, Clerk

By Debbie M Hopkins

Administrative Assistant

DES/dmh



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Donald Bruce Clark Esquire
From Daniel E. Shearouse
Date December 12, 2011
RE February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of February 7, 8, 9, 22, and 23. Please notify this office in writing prior to December 20, 2011, as to any scheduling conflicts for the February term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Yelsen Land v. State & States Port



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Assistant Deputy Attorney General J. Emory Smith, Jr.
Attorney General Alan Wilson
From Daniel E. Shearouse
Date December 12, 2011
RE February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of February 7, 8, 9, 22, and 23. Please notify this office in writing prior to December 20, 2011, as to any scheduling conflicts for the February term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Yelsen Land v. State & States Port



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Alice Richter Lehrman Esquire
From Daniel E. Shearouse
Date December 12, 2011
RE February Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the February 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of February 7, 8, 9, 22, and 23. Please notify this office in writing prior to December 20, 2011, as to any scheduling conflicts for the February term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

Yelsen Land v. State & States Port

The Supreme Court of South Carolina

Yelsen Land Company, Inc , Appellant,

v

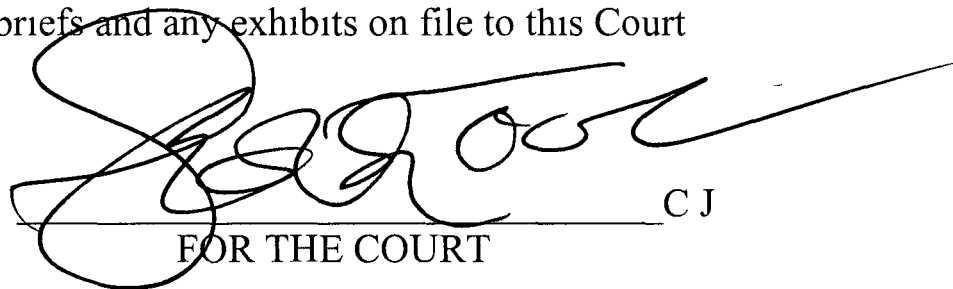
The State of South Carolina
and the State Ports Authority, Respondents

The Honorable Mikell R Scarborough
Charleston County
Trial Court Case No 2007-CP-10-02053

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court. Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED


C J
FOR THE COURT

Columbia, South Carolina

November 14, 2011

cc Alice Richter Lehrman, Esquire
Donald Bruce Clark, Esquire
Attorney General Alan Wilson
Assistant Deputy Attorney General J Emory Smith, Jr
The Honorable Tanya Gee

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E Richter Jr
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

May 23, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RECEIVED

MAY 24 2011

SC Court of Appeals

In Re Yelsen Land Company, Inc vs The State of South Carolina and
State Ports Authority
Trial Court Case No 2007-CP-10-2053
Court of Appeals Case No 2010199806

Dear Madam Clerk

Enclosed please find the original Certificate of Compliance with Rule 211(b) in the above referenced matter This Certificate of Compliance with Rule 211(b) was inadvertently left out of the previous mailing to the Court of Appeals By copy of this letter and enclosure I am alerting Mr Smith of this communication with the Court

Please do not hesitate to contact our office with any questions or concerns
Thank you for your assistance with this matter With best regards, I am

Very truly yours,



Michelle Stith

/cms
Enclosures

CC J Emory Smith, Jr , Esquire
Assistant Deputy Attorney General
Office of the Attorney General of South Carolina
P O Box 11549
Columbia, SC 29211

Don Clark, Esquire
Donald B Clark, LLC
39 Broad St , Ste 210
Charleston, SC 29401



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA SOUTH CAROLINA 29711
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
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FAX (803) 734 1809
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May 20, 2011

Alice Richter Lehrman, Esquire
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464

Donald Bruce Clark, Esquire
Donald B Clark, LLC
39 Broad Street, Suite 210
Charleston, SC 29401

Re Yelsen Land Co v State
2010166806

Dear Counsel

We have received the Appellant's Final Brief and Final Reply Brief in the above case. However, you must provide a Certificate of Counsel for each brief according to Rule 211 of the South Carolina Appellate Court Rules. Please provide the certificate within ten days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc Assistant Deputy Attorney General J Emory Smith, Jr
Attorney General Alan Wilson



ALAN WILSON
ATTORNEY GENERAL

May 18, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
HAND DELIVERY

Re Yelsen Land Co , Inc v State of South Carolina et al 07-CP-10-2053
Tracking No 2010166806

Dear Ms Gee

Enclosed for filing with your Office are the original and fourteen copies of the Final Brief of Respondents in this case together with a Certificate of Service and a Rule 211 (b) Certificate (please see the footnote in the 211 Certificate)

Thank you for your assistance

Sincerely,

J Emory Smith, Jr
Assistant Deputy Attorney General

cc Lawrence E Richter, Jr , Esquire
Alice Anne Richter Lehrman, Esquire
Donald B Clark, Esquire

RECEIVED
MAY 18 2011
SC Court of Appeals

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E. Richter, Jr.
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E. Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

May 17, 2011

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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MAY 18 2011

SC COURT OF APPEALS

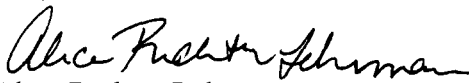
In Re Yelsen Land Company, Inc. vs The State of South Carolina and
State Ports Authority
Trial Court Case No. 2007-CP-10-2053
Court of Appeals Case No. 2010199806

Dear Madam Clerk:

Please find enclosed the unbound original Final Brief and fifteen (15) bound copies of the Final Brief in the above referenced matter. Also enclosed is the Proof of Service, which has been served on Mr. Smith along with three (3) copies of the Final Brief as required by the SCACR.

Thank you for your assistance with this matter. With best regards, I am

Very truly yours,


Alice Richter Lehrman

AARL/cms
Enclosures

CC: J. Emory Smith, Jr., Esquire
Assistant Deputy Attorney General
Office of the Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E Richter Jr
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

May 17, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

In Re Yelsen Land Company, Inc vs The State of South Carolina and
State Ports Authority
Trial Court Case No 2007-CP-10-2053
Court of Appeals Case No 2010199806

Dear Madam Clerk

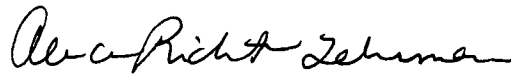
Please find enclosed the unbound original Appellant's Reply Brief and fifteen (15) bound copies of the Appellant's Reply Brief in the above referenced matter Also enclosed is the Proof of Service, which has been served on Mr Smith along with three (3) copies of the Appellant's Reply Brief as required by the SCACR

Thank you for your assistance with this matter With best regards, I am

RECEIVED

MAY 18 2011

Very truly yours,



Alice Richter Lehrman

SC Court of Appeals

AARL/cms
Enclosures

CC J Emory Smith, Jr , Esquire
Assistant Deputy Attorney General
Office of the Attorney General of South Carolina
P O Box 11549
Columbia, SC 29211

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law

622 Johnnie Dodds Boulevard
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William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

May 17, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

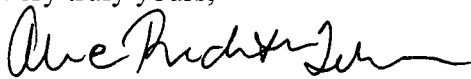
In Re Yelsen Land Company, Inc vs The State of South Carolina and
State Ports Authority
Trial Court Case No 2007-CP-10-2053
Court of Appeals Case No 2010199806

Dear Madam Clerk

Please find enclosed the unbound original Amended Record on Appeal and fifteen (15) bound copies of the Amended Record in the above referenced matter Also enclosed is the Proof of Service, which has been served on Mr Smith along with three (3) copies of the Amended Record as required by the SCACR

Thank you for your assistance with this matter With best regards, I am

Very truly yours,



Alice Richter Lehrman

AARL/cms
Enclosures

CC J Emory Smith, Jr , Esquire
Assistant Deputy Attorney General
Office of the Attorney General of South Carolina
P O Box 11549
Columbia, SC 29211

RECEIVED

MAY 18 2011

SC COURT OF APPEALS



ALAN WILSON
ATTORNEY GENERAL

April 14, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
HAND DELIVERY

Re Yelsen Land Co , Inc v State of South Carolina et al 07-CP-10-2053
Tracking No 2010166806

Dear Ms Gee

Enclosed for filing with your Office is the Certificate of Service executed by Appellant's counsel for the filing of the Record in this case Her Office inadvertently mailed the original to me, and called me about it after I had already punched holes in it and put it in my binder

Sincerely,

J Emory Smith, Jr
Assistant Deputy Attorney General

cc Lawrence E Richter, Jr , Esquire
Alice Anne Richter Lehrman, Esquire
Donald B Clark, Esquire

RECEIVED
APR 14 2011
SC Court of Appeals

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
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Mount Pleasant South Carolina 29464

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William Bee Ravenel Lewis
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May 17, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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MAY 18 2011

SC Court of Appeals

In Re Yelsen Land Company, Inc vs The State of South Carolina and
State Ports Authority
Trial Court Case No 2007-CP-10-2053
Court of Appeals Case No 2010199806

Dear Madam Clerk

Enclosed for filing please find the following original oversized exhibits labeled Plaintiff's Exhibit 11 and Defendant's Exhibit 9 inadvertently not enclosed for filing with the rest of the oversized exhibits in the above referenced matter Please note that Defendant's Exhibit 7 and 8 have been addressed by separate order of this Court attached hereto for your convenience and are no longer designated as oversized exhibits

Please do not hesitate to contact our office with any questions or concerns

Thank you for your assistance with this matter With best regards, I am

Very truly yours,



Alice Richter Lehrman

AARL/wcc
Enclosures

CC J Emory Smith, Jr , Esquire
Assistant Deputy Attorney General
Office of the Attorney General of South Carolina
P O Box 11549

Columbia, SC 29211

Don Clarke, Esquire
Donald B Clark, LLC
39 Broad St , Ste 210
Charleston, SC 29401



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
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FAX (803) 734-1839
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April 28, 2011

Alice Richter Lehrman, Esquire
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464

Donald Bruce Clark, Esquire
Donald B. Clark, LLC
39 Broad Street, Suite 210
Charleston, SC 29401

Re Yelsen Land Co v State
2010166806

RECEIVED

MAY 18 2011

SC Court of Appeals

Dear Counsel

The following Order has been endorsed on your Motion to Amend the Index to the Record on Appeal and to Withdraw an Oversized Exhibit in the above entitled case on appeal

"Granted

John Cannon Few C.J.
For the Court

By s/ Tanya A. Gee
Clerk

April 28, 2011 "

Please be advised the Amended Record on Appeal and the Supplement to the Record on Appeal, Final Briefs and all Oversized Exhibits must be served and filed within 20 days of the date of this letter

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc J. Emory Smith, Jr., Esquire

The South Carolina Court of Appeals

Yelsen Land Company, Inc

Appellant

v

The State of South Carolina and the
State Ports Authority

Respondents

The Honorable Mikell R. Scarborough
Charleston County
Trial Court Case No 2007 CP-10 02053

ORDER

The Clerk of Court is requested to release the following exhibits filed in the above referenced case to Alice Richter Lehrman or her designee for consideration by the Court of Appeals

Plaintiff's Exhibit 1 (Large Tax Map)
Plaintiff's Exhibit 3 (Title Book)
Plaintiff's Exhibit 4 (James Island Quadrangle)
Plaintiff's Exhibit 4A (Transparent Overlay)
Plaintiff's Exhibit 4B (Transparent Overlay)
Plaintiff's Exhibit 4C (Transparent Overlay)
Plaintiff's Exhibit 4D (Transparent Overlay)
Plaintiff's Exhibit 7 (Large Plane Table Survey)
Plaintiff's Exhibit 8 (Forsberg Drawing)
Plaintiff's Exhibit 8a (Overlay)
Plaintiff's Exhibit 10 (Large Aerial)
Plaintiff's Exhibit 11 (Yellow Aerial)

Defendant's Exhibit 7 (1963 Aerial Morris Island)
Defendant's Exhibit 8 (3/1/73 Aerial Photo Morris Island)
Defendant's Exhibit 9 (1979 Morris Island Aerial)
Defendant's Exhibit 24 (2006 Charleston City Parcel Map)
Defendant's Exhibit 30 (1951 Morris Island Jetty Project)
Defendant's Exhibit 37A (1818 Plat)
Defendant's Exhibit 37B (1818 Grant)

Partial

Date 5-17-11

Exhibit(s) Delivered By Emily Smith

Exhibit(s) Received By Laura Stield

Verified By [Signature]

Not Delivered
as of 5/17/11
RGT

IT IS SO ORDERED

V. Claude Allen, Deputy
For the Court

Clerk

Columbia South Carolina
Original to The Honorable Julie Armstrong
cc Alice Richter Lehrman Esquire
Donald Bruce Clark Esquire
J. Emory Smith Jr Esquire

FILED

3/28/11

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

RECEIVED
MAY 18 2011
SC Court of Appeals

Yelsen Land Co., Inc.,

Appellant

v

The State of South Carolina
and The State Ports Authority

Respondent

PROOF OF SERVICE

I certify that I have served for filing the original oversized exhibits labeled Plaintiff's Exhibit 11 and Defendant's Exhibit 9 in the above referenced matter 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
May 17, 2011

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

RECEIVED

MAY 17 2011

SC Court of Appeals

Lawrence E Richter Jr
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

RECEIVED
MAY 17 2011
SC Court of Appeals

May 16, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

In Re Yelsen Land Company, Inc vs The State of South Carolina and
State Ports Authority
Trial Court Case No 2007-CP-10-2053
Court of Appeals Case No 2010199806

Dear Madam Clerk

Enclosed for filing please find the following original oversized exhibits
Plaintiff's Exhibit 1, 3, 4, 4A, 4B, 4C, 4D, 7, 8, 8A, 10 and Defendant's Exhibit 24, 30,
37A, 37B in the above referenced matter

Please do not hesitate to contact our office with any questions or concerns

Thank you for your assistance with this matter With best regards, I am

Very truly yours,


Alice Richter Lehrman

AARL/wcc
Enclosures

CC J Emory Smith, Jr, Esquire
Assistant Deputy Attorney General
Office of the Attorney General of South Carolina
P O Box 11549
Columbia, SC 29211

Don Clarke, Esquire
Donald B Clark, LLC
39 Broad St , Ste 210
Charleston, SC 29401



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
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April 28, 2011

Alice Richter Lehrman, Esquire
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464

Donald Bruce Clark, Esquire
Donald B. Clark, LLC
39 Broad Street, Suite 210
Charleston, SC 29401

Re Yelsen Land Co. v. State
2010166806

Dear Counsel,

The following Order has been endorsed on your Motion to Amend the Index to the Record on Appeal and to Withdraw an Oversized Exhibit in the above entitled case on appeal:

“Granted”

John Cannon Few C.J.
For the Court

By s/ Tanya A. Gee
Clerk

April 28, 2011 ”

Please be advised the Amended Record on Appeal and the Supplement to the Record on Appeal, Final Briefs and all Oversized Exhibits must be served and filed within 20 days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc J. Emory Smith, Jr., Esquire

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

Respondents

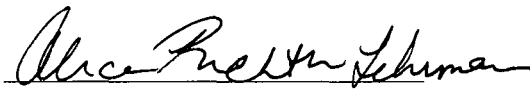
RECEIVED
APR 22 2011
SC Court of Appeals

MOTION TO AMEND THE INDEX TO THE RECORD ON APPEAL AND TO
WITHDRAW AN OVERSIZED EXHIBIT

Appellant Yelsen Land Co , Inc, hereby moves that the Court allow the parties to this action to withdraw one oversized exhibit previously designated and included in the Record on Appeal namely, Defendant's Exhibit 7 as it was apparently not in the record below Counsel have also agreed that a Supplement to the Record on Appeal is necessary and are in the process of compiling this Supplement Based on these necessary changes to the Record, the index to the Record on Appeal will need to be amended and we also ask that the Court allow such amendments to be made and submitted with the Supplement to the Record on Appeal Counsel for Appellant and Respondents have mutually consented to all of the requests made herein

Please see attached Exhibit A The amendments and removal of Defendant's Exhibit 7 so requested will work no prejudice to any party to this action and are in the interest of justice Within twenty (20) days of the Court's action on this Motion to Amend, the parties will file any amendments to the Record authorized by the Court, an agreed upon Supplement to the Record on Appeal, all Oversized Exhibits in the Record and the Final Briefs

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

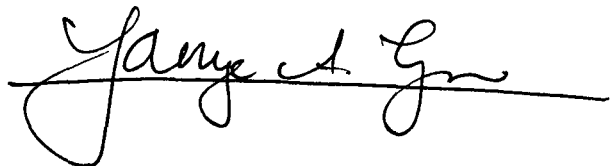
Donald B Clark
Donald B Clark, LLC
39 Broad St , Ste 210
Charleston, SC 29401
(843)720-8866

Attorneys for Appellant

Mount Pleasant, South Carolina
April 21, 2011

GRANTED.

John Cannon Few, C.J

By 

FILED
4/29/11 

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

CONSENT OF THE PARTIES TO REMOVE EXHIBIT FROM THE RECORD

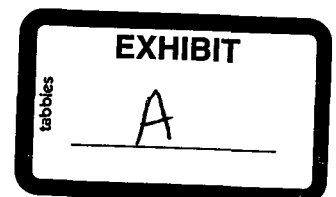
I certify that I consent to the removal of Defendant's Exhibit 7, which is designated as an oversized exhibit, from the Record on Appeal in the above captioned matter as it was apparently not included in the record below

(remainder of page intentionally blank)

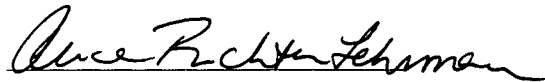
(signature page follows immediately)

4

RECEIVED
APR 22 2011
SC Court of Appeals



I CONSENT



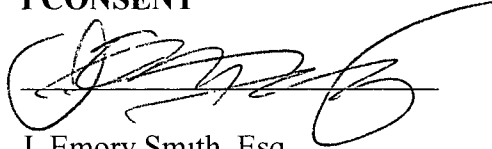
Lawrence E Richter, Jr
Alice Richter Lehrman
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464
(843) 849-6000

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

Attorneys for Appellant

Mt Pleasant, South Carolina
April 21, 2011

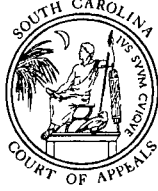
I CONSENT



J Emory Smith, Esq
Assistant Deputy Attorney General
Office of the Attorney General of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Attorney for Respondents

Columbia, South Carolina
April 22, 2011



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

April 26, 2011

MEMORANDUM

To Tanya / Claire

From Laurie Field

Re Case No 2010-166806, Yelsen Land Co v State

Attached for your consideration Motion to Amend the Index to the ROA and to Withdraw an Oversized Exhibit. Consent from all parties received.

Please advise

granted on motion

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

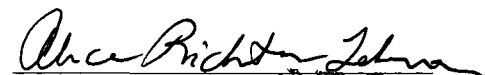
Respondent

PROOF OF SERVICE

I certify that I have served the Motion to Amend the Index to the Record on Appeal and to Withdraw an Oversized Exhibit along with a Consent signed by me to which Mr. Smith will affix his signature and file. I certify that I have served via FedEx on April 21, 2011 said documents, 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
Alice Richter Lehrman

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APR 22 2011

SC Court of Appeals

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
April 21, 2011



ALAN WILSON
ATTORNEY GENERAL

April 22, 2011

RECEIVED
APR 22 2011
SC Court of Appeals

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
HAND DELIVERY

Re Yelsen Land Co , Inc v State of South Carolina et al 07-CP-10-2053
Tracking No 2010166806

Dear Ms Gee

Alice Richter Lehrman delivered the enclosed documents to me including her cover letter of April 21, 2011 to you, the other documents referenced in that letter and her firm's check for \$25 00 She sent them to me first so that I could sign the consent to the withdrawal of an exhibit and attach it to the Motion as Exhibit A Now that I have done so, I am having these documents delivered to you I will be leaving today at 11 15, but should you have questions, please call me on my cell phone (360-7306) or call Ms Lehrman

Sincerely,

J Emory Smith, Jr
Assistant Deputy Attorney General

cc Lawrence E Richter, Jr , Esquire
Alice Anne Richter Lehrman, Esquire
Donald B Clark, Esquire

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E Richter Jr
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

April 21, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

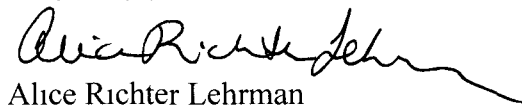
In Re Yelsen Land Company, Inc vs The State of South Carolina and
State Ports Authority
Trial Court Case No 2007-CP-10-2053
Court of Appeals Case No 2010199806

Dear Madam Clerk

Please find enclosed the original and seven copies of the Motion to Amend the Index to the Record on Appeal and to Withdraw an Oversized Exhibit in the above referenced matter Please file the original and return the clocked copy to our office in the enclosed envelope Also enclosed is a signed proof of service, a copy of which has been sent to Mr Smith Should anything else be needed please do not hesitate to contact our office

Thank you for your assistance with this matter With best regards, I am

Very truly yours,


Alice Richter Lehrman

AARL/cms
Enclosures

CC J Emory Smith, Jr , Esquire
Assistant Deputy Attorney General
Office of the Attorney General of South Carolina
P O Box 11549
Columbia, SC 29211

RECEIVED

APR 22 2011

OFFICE OF THE ATTORNEY GENERAL



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 116 9
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
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www.sccourts.org

April 22, 2011

Lawrence E Richter, Jr
Alice Richter Lehrman
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464

Donald B Clark
Donald B Clark, LLC
39 Broad St , Ste 210
Charleston, SC 29401

Re Yelsen Land Co v State Ports
2010166806

Dear Counsel

The following Order has been endorsed on your Motion for Extension of Time for Parties to File Final Briefs in the above entitled case on appeal

"Granted

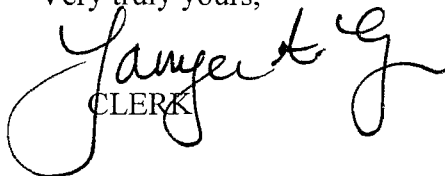
John Cannon Few C J
For the Court

By s/ V. Claire Allen
Deputy Clerk

April 22, 2011 "

Please be advised the Appellant and Respondents Final Briefs must be served and filed 20 days after the Motion to Amend Index to the Record on Appeal and Withdraw an Oversized Exhibit has been acted on

Very truly yours,


CLERK

TAG/laf
cc J Emory Smith, Jr , Esquire

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

RECEIVED

APR 18 2011

SC Court of Appeals

Yelsen Land Co , Inc ,

Appellant

v

The State of South Carolina
and The State Ports Authority

Respondent

MOTION FOR EXTENSION OF TIME FOR PARTIES TO FILE FINAL
BRIEFS

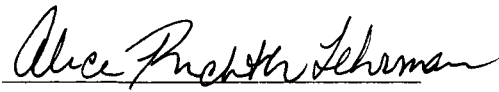
Appellant Yelsen Land Co , Inc, hereby moves for an extension of time for both Appellant and Respondents to file their Final Briefs to last until twenty (20) days after the Court takes action on the Motion to Amend the Index to the Record on Appeal and Withdraw an Oversized Exhibit. The parties will file the Motion to Amend the Record and Remove an Oversized Exhibit From the Record by Friday, April 22, 2011. Within twenty (20) days of the Court's action on the Motion to Amend, the parties will file any amendments to the Record authorized by the Court, an agreed upon Supplement to the Record on Appeal, all Oversized Exhibits in the Record and the Final Briefs.

4-18-11

Counsel respectfully requests that the time limits on the appeal be stayed pending this motion

This Motion is filed by consent of counsel for both the Appellant and Respondents
Please see the email attached hereto as Exhibit A. The extension so requested will work no prejudice to any party to this action and is in the interest of justice

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

Attorneys for Appellant

Charleston, South Carolina
April 15, 2011

GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT

By 
(Clerk) (Deputy Clerk)



Alice Richter Lehrman

From Emory Smith [AGESMITH@scag.gov]
Sent Friday, April 15, 2011, 1:06 PM
To AliceAnne@RichterFirm.com
Cc Don Clark
Subject Yelsen v. State et al

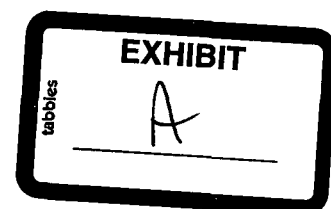
I consent to the Motion for Extension of Time to file the Final Briefs

Thank you

Emory Smith

J. Emory Smith, Jr.
Assistant Deputy Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803 734 3680
Email: agesmith@scag.gov

4/15/2011



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

PROOF OF SERVICE

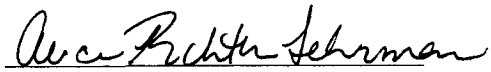
I certify that I have served the Respondents with the Motion for Extension of Time for Parties to File Final Brief by depositing a copy of the motion in the United States Mail, postage prepaid on April 15, 2011, addresses to their attorney of record as follows

J Emory Smith, Esq
Assistant Deputy Attorney General
Office Of the Attorney General of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

(signature page follows immediately)

RECEIVED
APR 18 2011
SC Court of Appeals

THE RICHTER FIRM, LLC

A handwritten signature in cursive script, reading "Alice Richter Lehrman".

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
April 15, 2011

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E. Richter Jr.
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E. Edwards

RECEIVED
APR 18 2011
SC Court of Appeals
Telephone (843) 849 6000
Telefax (843) 881 1400

April 15, 2011

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

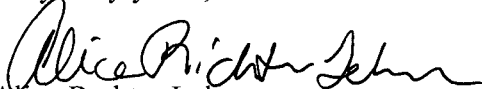
In Re Yelsen Land Company, Inc. vs The State of South Carolina and
State Ports Authority
Trial Court Case No. 2007-CP-10-2053
Court of Appeals Case No. 2010199806

Dear Madam Clerk:

Please find enclosed the original and seven copies of the Motion for Extension of Time for Parties to File Final Briefs in the above referenced matter. Please file the original and return the clocked copy to our office in the enclosed envelope. Also enclosed is a signed proof of service, a copy of which has been sent to Mr. Smith.

Thank you for your assistance with this matter. With best regards, I am

Very truly yours,


Alice Richter Lehrman

AARL/cms
Enclosures

CC: J. Emory Smith, Jr., Esquire
Assistant Deputy Attorney General
Office of the Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29901
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

April 5, 2011

Alice Richter Lehrman, Esquire
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464

Re Yelsen Land Co v State
Case #2010166806

Dear Ms Lehrman

We have received the Record on Appeal regarding the above matter. However, Rule 262 of the South Carolina Appellant Court Rules requires that at least one copy of any document filed with this court contain an original signature. Upon review, it does not appear that the Proof of Service for the Record on Appeal contains an original signature. Please provide a Proof of Service for the Record on Appeal with an original signature within ten (10) days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/jt

cc Donald Bruce Clark, Esquire
J Emory Smith, Jr, Esquire

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

RECEIVED

MAR 29 2011

Yelsen Land Co. Inc.

Appellant

SC Court of Appeals

v

The State of South Carolina
and The State Ports Authority

Respondents

CERTIFICATE OF SERVICE

I DO HEREBY certify that on this date I have served 3 copies of the Record on Appeal upon counsel for the Respondents by mailing a copy to each at the address below via United States Mail.

Timothy Smith Jr. Esquire
Assistant Deputy Attorney General
100 Assembly Street
Columbia, SC 29201


ALICE RICHTER LEHRMAN
The Richter Firm, LLC
Counsel for Appellant

Mt. Pleasant, South Carolina
March 28, 2011

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law

622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence I. Richter Jr.
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron F. Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

March 28, 2011

RECEIVED

MAR 29 2011

SC Court of Appeals

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

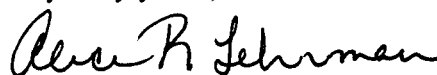
In Re Yelsen Land Company, Inc. vs The State of South Carolina and
State Ports Authority
Trial Court Case No. 2007-CP-10-2053
Court of Appeals Case No. 2010199806

Dear Madam Clerk:

Please find enclosed the unbound original Record on Appeal and fifteen (15) bound copies of the Record on Appeal in the above referenced matter. Also enclosed is a copy of the signed certificate of service, which has been served on Mr. Smith along with three (3) copies of the Record on Appeal as required by the SCACR.

Thank you for your assistance with this matter. With best regards, I am

Very truly yours,



Alice Richter Lehrman

AARL/cms
Enclosures

CC: J. Emory Smith, Jr., Esquire
Assistant Deputy Attorney General
Office of the Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211

The South Carolina Court of Appeals

Yelsen Land Company, Inc ,

Appellant,

v

The State of South Carolina and the
State Ports Authority,

Respondents

The Honorable Mikell R Scarborough
Charleston County
Trial Court Case No 2007-CP-10-02053

ORDER

The Clerk of Court is requested to release the following exhibits filed in the above referenced

case to Alice Richter Lehrman or her designee, for consideration by the Court of Appeals

✓ Plaintiff's Exhibit 1 (Large Tax Map)
✓ Plaintiff's Exhibit 3 (Title Book)
✓ Plaintiff's Exhibit 4 (James Island Quadrangle)
✓ Plaintiff's Exhibit 4A (Transparent Overlay)
✓ Plaintiff's Exhibit 4B (Transparent Overlay)
✓ Plaintiff's Exhibit 4C (Transparent Overlay)
✓ Plaintiff's Exhibit 4D (Transparent Overlay)
✓ Plaintiff's Exhibit 7 (Large Plane Table Survey)
✓ Plaintiff's Exhibit 8 (Forsberg Drawing)
✓ Plaintiff's Exhibit 8a (Overlay)
✓ Plaintiff's Exhibit 10 (Large Aerial)
✓ Plaintiff's Exhibit 11 (Yellow Aerial) *LA 7*

Defendant's Exhibit 7 (1963 Aerial Morris Island)
Defendant's Exhibit 8 (3/1/73 Aerial Photo Morris Island)
Defendant's Exhibit 9 (1979 Morris Island Aerial) *LA 7*
✓ Defendant's Exhibit 24 (2006 Charleston City Parcel Map)
✓ Defendant's Exhibit 30 (1951 Morris Island Jetty Project)
✓ Defendant's Exhibit 37A (1818 Plat)
✓ Defendant's Exhibit 37B (1818 Grant)

Partial

Date 5-17-11

Exhibit(s) Delivered By Emory Smith

Exhibit(s) Received By Ramona Field

Verified By Della

Not Delivered
as of 5/19/11

Date 5/19/11

Exhibit(s) Delivered By mail

Exhibit(s) Received By Ramona Field

Verified By Ramona Field

IT IS SO ORDERED

V. Clare Allen, Deputy Clerk
For the Court

Columbia, South Carolina
Original to The Honorable Julie Armstrong
cc Alice Richter Lehrman, Esquire
Donald Bruce Clark, Esquire
J Emory Smith, Jr, Esquire

FILED
3/28/11

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E. Richter Jr.
William Bae Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E. Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

March 22, 2011

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

In Re Yelsen Land Company, Inc. vs. The State of South Carolina and
State Ports Authority
Trial Court Case No. 2007-CP-10-2053
Court of Appeals Case No. 2010199806

Dear Madam Clerk:

I am writing to request that you direct the Charleston County Clerk of Court to release the oversized exhibits created in the above reference matter pursuant to Rule 210 (f) SCACR so that we may have them delivered to the Court of Appeals. Upon receipt, we will have these exhibits, which are listed below, transported to your office to be filed.

Plaintiff's Exhibit 1 (Large Tax Map)
Plaintiff's Exhibit 3 (Title Book)
Plaintiff's Exhibit 4 (James Island Quadrangle)
Plaintiff's Exhibit 4A (Transparent Overlay)
Plaintiff's Exhibit 4B (Transparent Overlay)
Plaintiff's Exhibit 4C (Transparent Overlay)
Plaintiff's Exhibit 4D (Transparent Overlay)
Plaintiff's Exhibit 7 (Large Plane Table Survey)
Plaintiff's Exhibit 8 (Forsberg Drawing)
Plaintiff's Exhibit 8a (Overlay)
Plaintiff's Exhibit 10 (Large Aerial) —
Plaintiff's Exhibit 11 (Yellow Aerial) —

Defendant's Exhibit 7 (1963 Aerial Morris Island)
Defendant's Exhibit 8 (3/1/73 Aerial Photo Morris Island)
Defendant's Exhibit 9 (1979 Morris Island Aerial)
Defendant's Exhibit 24 (2006 Charleston Cty Parcel Map)

RECEIVED
MAR 24 2011
SC Court of Appeals

Defendant's Exhibit 30 (1951 Morris Island Jetty Project)
Defendant's Exhibit 37A (1818 Plat)
Defendant's Exhibit 37B (1818 Grant)

Thank you for your assistance with this matter and should any further information be needed please contact our office so that we may supply it promptly With best regards,
I am

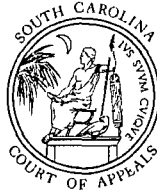
Very truly yours,


Alice Richter Lehrman

AARL/cms

~~Enclosures~~

CC J Emory Smith, Jr , Esquire
Assistant Deputy Attorney General
Office of the Attorney General of South Carolina
P O Box 11549
Columbia, SC 29211



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLARE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

March 1, 2011

Alice Richter Lehrman, Esquire
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464

Re Yelsen Land Co v State
Case #2010166806

Dear Counsel

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Clare Allen, Deputy
CLERK

TAG/jt

cc Donald Bruce Clark, Esquire
J Emory Smith, Jr, Esquire

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

Respondents

RECEIVED

FEB 25 2011

SC Court of Appeals

CERTIFICATE OF SERVICE

I DO HEREBY certify that on this date I have served a copy of the Appellant's Reply
Brief upon counsel for the Respondents by mailing a copy to him at the address below via United
States Mail

J. Emory Smith, Jr., Esquire
Assistant Deputy Attorney General
P O Box 11549
Columbia, SC 29211


ALICE RICHTER LEHRMAN
The Richter Firm, LLC
Counsel for Appellant

Mt Pleasant, South Carolina
February 24, 2011

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E Richter Jr
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

February 24, 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
FEB 25 2011
SC Court of Appeals

In Re Yelsen Land Co , Inc vs State of South Carolina
Court of Appeals Case No 2010199806

Dear Madam Clerk

Please find enclosed the original and two (2) copy of the Appellant's Brief in Reply to the Initial Brief of Respondents in the above referenced matter Please file and retain the original and return the clocked copies to our office in the enclosed envelope Also enclosed is a signed certificate of service, a copy of which has been sent to Mr Smith along with the Appellant's Reply Brief

Thank you for your assistance with this matter With best regards, I am

Very truly yours,


Alice Richter Lehrman

AARL/meh
Enclosures

cc J Emory Smith, Jr , Esquire
Assistant Deputy Attorney General
Office of the Attorney General of South Carolina
P O Box 11549
Columbia, SC 29211



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

February 14, 2011

Alice Richter Lehrman, Esquire
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464

Donald Bruce Clark, Esquire
Donald B Clark, LLC
39 Broad Street, Suite 210
Charleston, SC 29401

Re Yelsen Land Co v State

Dear Counsel

The following Order has been endorsed on your Motion in the above entitled case on appeal

“Granted

John Cannon Few C J
For the Court

By s/ V Claire Allen
Deputy Clerk

February 14, 2011 ”

Please be advised the Appellant’s Initial Reply Brief must be served and filed no later than
February 24, 2011

Very truly yours,

V Claire Allen, Deputy
CLERK

TAG/laf

cc J Emory Smith, Jr , Esquire

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

RECEIVED
FEB 10 2011
SC Court of Appeals

MOTION FOR EXTENSION OF TIME TO FILE
APPELLANT'S RESPONSE TO THE INITIAL BRIEF OF RESPONDENTS

Appellant Yelsen Land Co., Inc., hereby moves for a 10-day extension, until February 24, 2011, in which to file its Response to the Initial Brief of Respondents. This extension is requested because Mr. Clark has been out of the office sick and his heavy case load has backed up due to his illness.

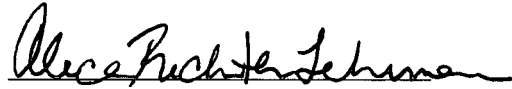
Counsel for the Appellant respectfully requests that the time limits on the appeal be stayed pending this motion.

Counsel for the Appellants has spoken with Counsel for the State and State Ports Authority and has consented to this request via the email attached hereto as Exhibit A. An

2/14/11 2nd Motion

extension of 10 days will work no prejudice to any party to this action and is in the interest of justice

THE RICHTER FIRM, LLC



Lawrence E Richter, Jr
Alice Richter Lehrman
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29465
(843) 849-6000

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

Attorneys for Appellant

Charleston, South Carolina
February 9, 2011

Granted
John Cannon Few, C.J.
By V. Claire Allon
Deputy Clerk

2/14/11 **FILED**

Alice Richter Lehrman

From Emory Smith [AGESMITH@scag.gov]
Sent Wednesday, February 09, 2011 3:23 PM
To Alice Richter Lehrman
Subject Re: Yelson Land

We consent. My assistant, Jon Ecksrom, conveyed to Don verbally yesterday that we consent. Thank you.

J. Emory Smith, Jr.
Assistant Deputy Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3680
Email: agesmith@scag.gov

>>> Alice Richter Lehrman" <AliceAnne@RichterFirm.com> 2/9/2011 10:25 AM >>>
Emory

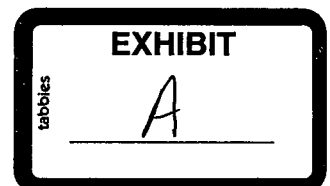
It is my understanding that Don Clark spoke with someone in your office yesterday and requested that we have a continuance from February 14 to Thursday, February 24, to file our Reply Brief. If you consent to this request, would you please reply to this email to confirm?

Thank you,

Alice Anne

Alice Richter Lehrman
The Richter Firm, LLC
622 Johnnie Dodds Blvd.
Mount Pleasant, SC 29464
(843) 849-6000 phone
(843) 881-1400 fax

--- Scanned by M+ Guardian Messaging Firewall ---



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

RECEIVED
FEB 10 2011
SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Motion for Extension of Time to File Appellant's Response to the Initial Brief of Respondents by faxing and depositing a copy of it in the United States Mail, postage prepaid on February 9, 2011, addresses to his attorneys of record as follows

J Emory Smith, Esq
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

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
February 9, 2011

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E Richter Jr
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

February 9, 2011

VIA FSCIMILE AND U S MAIL

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re Yelsen Land Company, Inc v The State of South Carolina and
The State Ports Authority
Case No 2010166806

Dear Madam Clerk

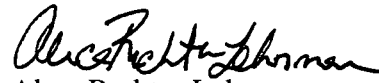
Enclosed please find the following documents with regards to the above-referenced matter

- 1 Original and seven copies of Motion for Extension of Time to file Appellant's Response to the Initial Brief of Respondents,
- 2 Original and one copy of Proof of Service, and
- 3 Check in the amount of \$25 00

Please file the originals and return the file-stamped copies to me in the enclosed, self-addresses, stamped envelope

By copy of this letter to Emory J Smith, attorney for the Respondent, I am serving him with a copy of the same

Very truly yours,



Alice Richter Lehrman

AARL

Enclosures

cc J Emory Smith, Esq
Thomas Daniels

RECEIVED

FEB 10 2011

SC Court of Appeals

The South Carolina Court of Appeals

Yelsen Land Company, Inc ,

Appellant,

v

The State of South Carolina and the
State Ports Authority,

Respondents

The Honorable Mikell R. Scarborough
Charleston County
Trial Court Case No 2007-CP-10-02053

ORDER

For good cause having been shown, and with consent of opposing counsel, the time for the Appellant's Initial Reply Brief to be served and filed in the above entitled matter is hereby extended until February 14, 2011

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claude Allen, Deputy
CLERK

Columbia, South Carolina

cc Alice Richter Lehrman, Esquire
Donald Bruce Clark, Esquire
J Emory Smith, Jr, Esquire

FILED
2/3/11

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

RECEIVED
FEB 02 2011
SC Court of Appeals

MOTION FOR EXTENSION OF TIME TO FILE
APPELLANT'S RESPONSE TO THE INITIAL BRIEF OF RESPONDENTS

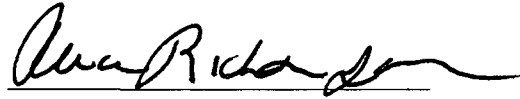
Appellant Yelsen Land Co., Inc., hereby moves for a 10-day extension, until February 14, 2011, in which to file its Response to the Initial Brief of Respondents. This extension is requested because the Respondent's Brief was served on January 25, 2011, and counsel has only ten days to respond to said brief and Mr. Clark is currently out of the office sick.

Counsel for the Appellant respectfully requests that the time limits on the appeal be stayed pending this motion.

Counsel for the Appellants has spoken with Counsel for the State and State Ports Authority and has consented to this request via the email attached hereto as Exhibit A. An

extension of 10 days will work no prejudice to any party to this action and is in the interest of justice

THE RICHTER FIRM, LLC

A handwritten signature in black ink, appearing to read "Lawrence E. Richter, Jr.", written over a horizontal line.

Lawrence E Richter, Jr
Alice Richter Lehrman
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29465
(843) 849-6000

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

Attorneys for Appellant

Charleston, South Carolina
January 27, 2011

Alice Richter Lehrman

From Emory Smith [AGESMITH@scag.gov]
Sent Thursday, January 27, 2011 5:03 PM
To Alice Richter Lehrman
Subject Re: Appellant's Reply Brief

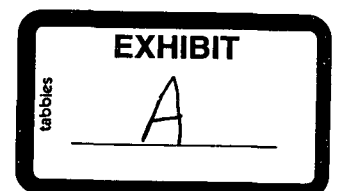
The Respondent's consent

>>> 'Alice Richter Lehrman' <AliceAnne@RichterFirm.com> 1/27/2011 4:55
>>> PM >>>
Emory,

Thank you for consenting to our Motion For Extension to File Reply Brief on February 14th rather than February 4th. Would you please confirm by reply to this email? Thank you,
Alice Anne

Alice Richter Lehrman
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464
(843) 849-6000 phone
(843) 881-1400 fax

--- Scanned by M+ Guardian Messaging Firewall ---



THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E Richter Jr
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

January 27, 2011

VIA FSCIMILE AND U S MAIL

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

FEB 02 2011

SC Court of Appeals

Re Yelsen Land Company, Inc v The State of South Carolina and
The State Ports Authority
Case No 2010166806

Dear Madam Clerk

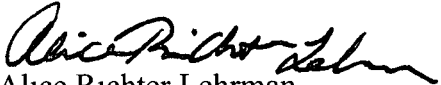
Enclosed please find the following documents with regards to the above-referenced matter

- 1 Original and seven copies of Motion for Extension of Time to file Appellant's Response to the Initial Brief of Respondents,
- 2 Original and one copy of Proof of Service, and
- 3 Check in the amount of \$25 00

Please file the originals and return the file-stamped copies to me in the enclosed, self-addresses, stamped envelope

By copy of this letter to Emory J Smith, attorney for the Respondent, I am serving him with a copy of the same

Very truly yours,


Alice Richter Lehrman

AARL

Enclosures

cc J Emory Smith, Esq
Thomas Daniels

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

RECEIVED

FEB 02 2011

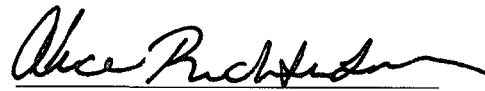
SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Motion for Extension of Time to File Appellant's Response to the Initial Brief of Respondents by faxing and depositing a copy of it in the United States Mail, postage prepaid on January 27, 2011, addresses to his attorneys of record as follows

J Emory Smith, Esq
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

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
January 27, 2011

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

RESPONDENTS' DESIGNATION OF MATTER FOR RECORD

ALAN WILSON
Attorney General

J EMORY SMITH,
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680

ATTORNEYS FOR RESPONDENTS

RECEIVED
JAN 25 2011
SC COURT OF Appeals

Respondents designate the following matters for the Record pursuant to Rule 209,
SCACR

Letter Return in Opposition to Rule 59 Motion to Alter or Amend dated May 28,
2010

Exhibits to Defendants' Motion for Partial Summary Judgment

Proposed Answer attached to Motion to Intervene

Letter to Master, September 23, 2009, - Response to Plaintiff's Supp Return to
Defendants' Motion for Partial Summary Judgment

Respectfully submitted,

ALAN WILSON
Attorney General

J EMORY SMITH, JR
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680

By

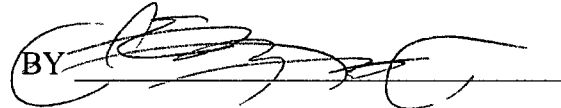


ATTORNEYS FOR THE RESPONDENTS

January 25, 2011

CERTIFICATE OF COMPLIANCE WITH RULE 209(c), SCACR

I certify that the foregoing Designation contains no matter which is irrelevant to the
appeal

BY 

J EMORY SMITH, JR
Assistant Deputy Attorney General

January 25, 2011

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

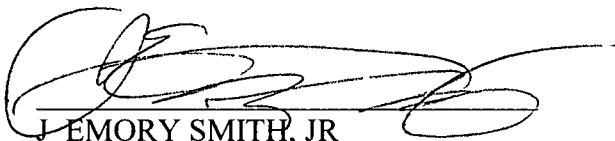
CERTIFICATE OF SERVICE

I hereby certify that I have served a copy each of the Respondents' Initial Brief and Designation upon counsel for the Appellant by mailing copies to them at the addresses below via the United States Mail this January 25, 2011

Lawrence E Richter, Jr, Esquire
Alice Anne Richter Lehrman, Esquire
The Richter Law Firm, LLC
622 Johnnie Dodds Blvd
Mt Pleasant, S C 29465

Donald B Clark, Esquire
Donald B Clark, LLC
39 Broad Street, Suite 210
Charleston, SC 29401

RECEIVED
JAN 27 2011
SC


JEREMY SMITH, JR
Assistant Deputy Attorney General
Counsel for the Respondents



ALAN WILSON
ATTORNEY GENERAL

January 25, 2011

RECEIVED
JAN 25 2011

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
HAND DELIVERY

SC Court of Appeals

Re Yelsen Land Co , Inc v State of South Carolina et al 07-CP-10-2053
Tracking No 2010166806

Dear Ms Gee

Enclosed for filing with your Office is the Defendants' Initial Brief and Designation of Matter for the Record together with a certificate of service The Designation includes a Rule 209 Statement Thank you for your assistance

Sincerely,

J Emory Smith, Jr
Assistant Deputy Attorney General

cc Lawrence E Richter, Jr , Esquire
Alice Anne Richter Lehrman, Esquire
Donald B Clark, Esquire

The South Carolina Court of Appeals

Yelsen Land Company, Inc ,

Appellant,

v

The State of South Carolina and the
State Ports Authority,

Respondents

The Honorable Mikell R. Scarborough
Charleston County
Trial Court Case No 2007-CP-10-02053

ORDER

For good cause having been shown, and with consent from opposing counsel, the time for serving and filing Respondent's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until January 26, 2011

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY *V. Claude Allen, Deputy*
CLERK

Columbia, South Carolina
cc Alice Richter Lehrman, Esquire
Donald Bruce Clark, Esquire
J Emory Smith, Jr, Esquire

FILED

1/7/11 *[Signature]*

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

MOTION FOR EXTENSION OF TIME OF RESPONDENTS
TO HOLD DEADLINES IN ABEYANCE

Pursuant to Rule 263 (b), SCACR, the Respondents hereby move for a two week extension of time to file their Initial Brief and Designation of Matter for the Record and request that the current deadline for filing these documents be held in abeyance until a decision is made regarding this extension request The Respondents note the following

- 1 The current deadline for filing the Initial Brief and Designation is January 12, 2011 pursuant to this Court's Order of December 16, 2010
- 2 This Court previously granted the State a thirty day extension to file the Brief and Designation

1/12/11 2nd
1/26/11

RECEIVED
JAN 06 2011
SC Court of Appeals

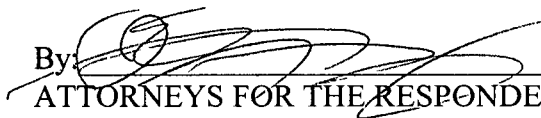
- 3 The amount of additional time requested is two weeks The proposed date
for the filing of the State's Initial Brief and Designation is January 26, 2011
- 4 This extension is needed because undersigned counsel has had other
conflicting deadlines this week and for the next few days The brief may take
considerable time to prepare
- 5 A separate supporting memorandum is not filed with this Motion because the
grounds for the Motion are set forth in the Motion
- 6 Counsel for the Appellants has informed undersigned counsel that she
consents to this request See attached emailed consent

For the foregoing reasons, the Respondents respectfully request that their Motion for
Extension of Time be granted so that they may serve and file their Initial Brief and
Designation on January 26, 2011 They also ask that the current January 12 deadline for
the Brief and Designation be held in abeyance pending the Court's decision regarding this
motion

Respectfully submitted,

HENRY D MCMASTER
Attorney General
J EMORY SMITH, JR
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680

January 6, 2011

By: 
ATTORNEYS FOR THE RESPONDENTS

From Alice Richter Lehrman <AliceAnne@RichterFirm.com>
To Emory Smith <AGESMITH@scag.gov>
Date 1/6/2011 3:58 PM
Subject RE: Yelsen

We consent to Mr. Smith's request for an extension. Please do not hesitate to contact me directly should anything further be required.

Alice Richter Lehrman
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464
(843)849-6000 phone
(843)881-1400 fax

Original Message

From: Emory Smith [mailto:AGESMITH@scag.gov]
Sent: Thursday, January 06, 2011 3:31 PM
To: AliceAnne@RichterFirm.com
Cc: Don Clark
Subject: Yelsen

Thank you for your consent to the Motion for Extension for the Respondents to file their Initial Brief and Designation on January 26 rather than January 12. Would you please confirm this by consent by reply email, and I will attach this confirmation to my Motion?

Emory Smith

J. Emory Smith, Jr.
Assistant Deputy Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-3680
Email: agesmith@scag.gov

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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' Motion for Extension of Time, etc upon counsel for the Appellant by mailing copies to them at the addresses below via the United States Mail this January 6, 2011

Lawrence E Richter, Jr , Esquire
Alice Anne Richter Lehrman, Esquire
The Richter Law Firm, LLC
622 Johnnie Dodds Blvd
Mt Pleasant, S C 29465

Donald B Clark, Esquire
Donald B Clark, LLC
39 Broad Street, Suite 210
Charleston, SC 29401


J EMORY SMITH, JR
Assistant Deputy Attorney General
Counsel for the Respondents

RECEIVED
JAN 06 2011
SC Court of Appeals



HENRY McMASTER
ATTORNEY GENERAL

January 6, 2011

RECEIVED
JAN 06 2011
SC Court of Appeals

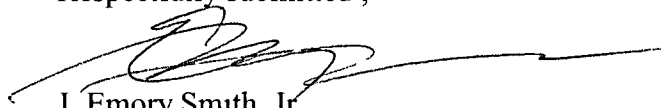
The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
HAND DELIVERY

Re Yelsen Land Co , Inc v State of South Carolina et al 07-CP-10-2053
Tracking No 2010166806

Dear Ms Gee

Enclosed for filing with your Office are the original and six copies of the Motion for Extension of Time of the Respondents in this case together with a certificate of service Thank you for your consideration of this request

Respectfully submitted ,



J Emory Smith, Jr
Assistant Deputy Attorney General

cc Lawrence E Richter, Jr , Esquire
Alice Anne Richter Lehrman, Esquire
Donald B Clark, Esquire



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11679
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

December 16, 2010

J. Emory Smith, Jr., Esquire
Office of the Attorney General
P O Box 11549
Columbia, SC 29211

Re Yelsen Land Co v State
2010166806

Dear Counsel

The following Order has been endorsed on your Extension Request in the above entitled case on appeal

"Granted

John Cannon Few C J
For the Court

By s/ Tanya A. Gee
Clerk

December 16, 2010 "

Please be advised Respondent's Initial Brief and Designation of Matter must be served and filed no later than January 12, 2011

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf

cc Alice Richter Lehrman, Esquire
Donald Bruce Clark, Esquire

HENRY McMASTER
ATTORNEY GENERAL



RECEIVED
DEC 02 2010
SC Court of Appeals

December 2, 2010

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
HAND DELIVERY

Re Yelsen Land Co., Inc. v. State of South Carolina et al 07-CP-10-2053

Dear Ms. Gee

I respectfully request a thirty day extension of time for the Respondents State and State Ports Authority to serve and file their Initial Brief and Designation of Matter for the Record in this case. I believe that these documents are currently due on December 13, 2010. With an extension, they would be due on January 12, 2011. I would appreciate this extension due to my hearing schedule and deadlines between now and the current deadline. Although I have not specifically discussed this extension request with my counsel for Appellant, based upon past conversations with counsel regarding briefing in this case, I do not believe that they would have any objection to this extension.

I respectfully request that the current deadline be held in abeyance while this extension request is considered. Thank you for your consideration of this matter.

Respectfully submitted,

J. Emory Smith, Jr.
Assistant Deputy Attorney General

cc Lawrence E. Richter, Jr., Esquire
Alice Anne Richter Lehrman, Esquire
Donald B. Clark, Esquire

12/12/10
1/12/11

1st motion

FILED

12/16/10

**DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No 2007-CP-10-2053

RECEIVED
NOV 15 2010
SC Court of Appeals

The State of South Carolina
and The State Ports Authority,

Respondents,

v

Yelsen Land Co , Inc ,

Appellant

**DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

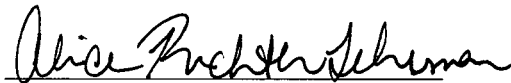
Appellant proposes the following be included in the Record on Appeal

- 1 Order of April 16, 2010,
- 2 Summons & Complaint,
- 3 Answer,
- 4 Consent Order of Reference to the Master-in-Equity,
- 5 Notice of Entry of Judgment/Order Pursuant to Rule 77 SCRPC,
- 6 Notice of Judgment Masters Scheduling Order,
- 7 Transcript of Proceedings
- 8 Plaintiff's Exhibits 1, 2, 3, 4, 4A, 4B, 4C, 4D, 5, 6, 7, 8, 8A, 9, 10, and 11,
- 9 Court Exhibit 1 (U S Customs House Tidal Datums)
- 10 Defendants' Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 24, 30, 37A, 37B,
- and 38,
- 11 Motion to Intervene of State Ports Authority,
- 12 Plaintiff's Return of Motion to Intervene of State Ports Authority,
- 13 Notice of Motion and Motion to Amend,
- 14 Return of State to Plaintiff's Motion to Amend,
- 15 Reply to Return of State to Plaintiff's Motion to Amend,

16 Notice of Entry of Judgment Return of State to Plaintiff's Motion to
Amend,
17 Notice of Judgment Defendants' Motion to Intervene is Resolved,
18 Amended Complaint,
19 Answer to Amended Complaint,
20 Memorandum in Support of Defendants' Motion for Partial Summary
Judgment,
21 Defendants' Motion for Partial Summary Judgment,
22 Return to Defendants' Motion for Partial Summary Judgment,
23 Reply to Plaintiff's Return to Defendants' Motion for Partial Summary
Judgment,
24 Supplemental Reply to Plaintiff's Return to Defendants' Motion for Partial
Summary Judgment,
25 Plaintiff's Supplemental Return to Defendants' Motion for Partial
Summary Judgment,
26 Motion to Amend Defendants' Answer,
27 Motion to Amend Defendants' Answer and Amended Answer to Amended
Complaint,
28 Amended Scheduling Order,
29 Order Motion to Amend Answer Granted,
30 Scheduling Order,
31 Plaintiff's Notice of Motion and Motion to Alter or Amend Judgment,
32 Order Denying Plaintiff's Notice of Motion and Motion to Alter or Amend
Judgment

I certify that this designation contains no matter which is irrelevant to this appeal

November 11, 2010



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

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

RECEIVED

NOV 15 2010

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State of South Carolina
And The State Ports Authority

Respondents,

v

Yelsen Land Co , Inc ,

Appellant

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

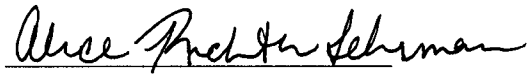
PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal on the Respondents by depositing a copy of the motion in the United States Mail, postage prepaid on November 12, 2010, addressed to their attorney of record as follows

J. Emory Smith, Esq.
Deputy Attorney General
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

(Signature page follows)

THE RICHTER FIRM, LLC



Lawrence E Richter, Jr
Alice Richter Lehrman
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29465
(843) 849-6000

Donald B Clark
39 Immigration Street, Suite 211
Charleston, SC 29401
(843)720-8866
Attorneys for Appellant

Mt Pleasant, South Carolina
November 12, 2010

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E. Richter, Jr.
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron F. Edwards

Telephone (843) 849 6000

Telefax (843) 881 1400

RECEIVED

NOV 15 2010

SC Court of Appeals

November 12, 2010

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia South Carolina 29211

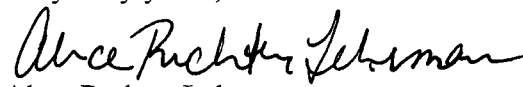
In Re Yelsen Land Company, Inc. vs The State of South Carolina and
State Ports Authority
Trial Court Case No. 2007-CP-10-2053
Court of Appeals Case No. 2010199806

Dear Madam Clerk:

Please find enclosed the original and one (1) copy of the Initial Brief of Appellant and Designation of Matter to Be Included in the Record on Appeal in the above referenced matter. Please file the original and return the clocked copy to our office in the enclosed envelope. Also enclosed is a signed proof of service, a copy of which has been sent to Mr. Smith.

Thank you for your assistance with this matter. With best regards, I am

Very truly yours,


Alice Richter Lehrman

AARL/meh
Enclosures

Cc: J. Emory Smith, Jr., Esquire
Assistant Deputy Attorney General
Office of the Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALI EN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

October 14, 2010

Alice Richter Lehrman, Esquire
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464

Donald Bruce Clark, Esquire
Donald B Clark, LLC
49 Immigration St , Ste 204
Charleston SC 29403

Re Yelsen Land Co v State
Case Tracking # 2010166806

Dear Counsel

The following Order has been endorsed on your Motion for Extension of Time in the above entitled case on appeal

“GRANTED

John Cannon Few, C J
For the Court

By s/ V Claire Allen
Deputy Clerk

October 14, 2010 ”

Please be advised Appellant’s Initial Brief and Designation of Matter should be filed on or before November 12, 2010

Very truly yours,

V Claire Allen, Deputy
CLERK

TAG/khh

cc J Emory Smith, Jr , Esquire

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

RECEIVED

OCT 12 2010

SC Court of Appeals

The State of South Carolina
And The State Ports Authority

Respondent,

v

Yelsen Land Co., Inc.,

Appellant

MOTION FOR EXTENSION OF TIME TO FILE
APPELLANT'S INITIAL BRIEF OF APPELLANT AND DESIGNATION
OF THE MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant Yelsen Land Co., Inc., pursuant to Rule 224, SCACR, hereby moves for a 30-day extension, until November 12, 2010, in which to file its Initial Brief of Appellant and Designation of Matter to be included in the record on appeal. This extension is requested because Mr. Clark is in the process of moving his practice to a new office and Ms. Lehrman has had to have an unexpected surgery.

Counsel for the Appellant respectfully requests that the time limits on the appeal be stayed pending this motion.

2d
10/13/10
11/12/10

Counsel for the Appellants has spoken with Counsel for the State and State Ports Authority and has consented to this request. An extension of 30 days will work no prejudice to any party to this action and is in the interest of justice.

DONALD B. CLARK, LLC



Donald B. Clark
49 Immigration Street, Suite 204
Charleston, SC 29403
(843) 720-8866

Lawrence E. Richter, Jr.
Alice Richter Lehrman
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29465
(843) 849-6000

Attorneys for Appellant

Charleston, South Carolina
October 8, 2010

GRANTED

JOHN CANNON FEW, C.J.
FOR THE COURT

By



(Clerk) (Deputy Clerk)

FILED
10/14/10

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

The State of South Carolina
And The State Ports Authority

Respondent,

v

Yelsen Land Co , Inc ,

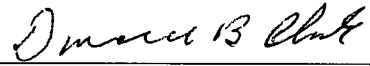
Appellant

PROOF OF SERVICE

I certify that I have served the Motion for Extension of Time to File Appellant's Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on Appeal on Respondent by faxing and depositing a copy of it in the United States Mail, postage prepaid on October 8, 2010, addresses to his attorneys of record as follows

J Emory Smith, Esq
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

DONALD B CLARK, LLC

A handwritten signature in cursive script, reading "Donald B. Clark", positioned above a horizontal line.

Donald B Clark
49 Immigration Street, Suite 204
Charleston, SC 29403
(843)720-8866

Lawrence E Richter, Jr
Alice Richter Lehrman
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29465
(843) 849-6000

Attorneys for Appellant

Charleston, South Carolina
October 8, 2010

THE RICHTER FIRM, LLC
622 JOHNNIE DODDS BLVD
MT. PLEASANT SC 29464

THE BANK OF SOUTH CAROLINA
CHARLESTON SC 29401
67 187/532

2313

Details on Back

PAY TO THE ORDER OF *** TWENTY FIVE & 0/100 DOLLARS

10/08/10

\$

**25 00

DOLLARS

SC Court of Appeals
P O Box 11629
Columbia SC 29211

MEMO

Zarai M. Hegler
AUTHORIZED SIGNATURE

Security Features Included

THE RICHTER FIRM LLC

2313

VENDOR ID 2202

NAME SC Court of Appeals

Check Date
Check Amount

10/08/10
25 00

MEMO State of SC v Yelsen Land
filing fee

Reference	Invoice Bal	Payment Amt	Discount	Net Amount
OCT1	25 00	25 00	0 00	25 00
Check Totals	25 00	25 00	0 00	25 00

Donald B Clark, LLC
Attorney at Law

Donald B Clark
SC & IA
dbc@donclarkllc.com

49 Immigration Street, Suite 204
Charleston, SC 29403
www.donclarkllc.com

Phone (843) 720-8866
Fax (843) 720-4566

October 8, 2010

VIA FSCIMILE AND U S MAIL

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

OCT 12 2010

SC Court of Appeals
2313 825

Re Yelsen Land Company, Inc v The State of South Carolina and
The State Ports Authority
Case No 2010166806

Dear Ms Gee

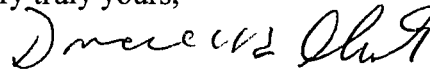
Enclosed please find the following documents with regards to the above-referenced matter

- 1 Original and seven copies of Motion for Extension of Time to File Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal,
- 2 Original and one copy of Proof of Service, and
- 3 Check in the amount of \$25 00

Please file the originals and return the file-stamped copies to me in the enclosed, self-addressed, stamped envelope

By copy of this letter to Emory J Smith, attorney for the Respondent, I am serving him with a copy of the same Mr Smith has kindly consented to this request

Very truly yours,



Donald B Clark

DBC

Enclosures

cc J Emory Smith, Esq
Thomas Daniels



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 116 9
COLUMBIA SOUTH CAROLINA 29711
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29701
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

September 30, 2010

Alice Richter Lehrman, Esquire
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464

Re Yelsen Land Co v State
Case Tracking # 2010166806

Dear Ms Lehrman

The following Order has been endorsed on your Motion for Extension to File Appellant's Initial Brief and Designation of Matter in the above entitled case on appeal

"GRANTED

John Cannon Few, C J
For the Court

By s/ Tanya A Gee
Clerk

September 30, 2010 "

Please be advised Appellant's Initial Brief and Designation of Matter should be filed on or before October 13, 2010

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/khh

cc Donald Bruce Clark, Esquire
J Emory Smith, Jr , Esquire

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

RECEIVED
2214
SEP 09 2010
SC Court of Appeals
22
9-13-10
10-13-10

The State of South Carolina
And The State Ports Authority

Respondent,

v

Yelsen Land Co , Inc ,

Appellant

MOTION FOR EXTENSION OF TIME TO FILE
APPELLANT'S INITIAL BRIEF OF APPELLANT AND DESIGNATION
OF THE MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant Yelsen Land Co , Inc , pursuant to Rule 224, SCACR, hereby moves for a 30-day extension, until October 13, 2010, in which to file its Initial Brief of Appellant and Designation of Matter to be included in the record on appeal This extension is requested because of counsel's heavy workload

Counsel for the Appellant respectfully requests that the time limits on the appeal be stayed pending this motion

An extension of 30 days will work no prejudice to any party to this action and is in the

interest of justice

THE RICHTER FIRM, LLC

Alice Richter Lehrman

Lawrence E Richter, Jr
Alice Richter Lehrman
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29465
(843) 849-6000

Donald B Clark
49 Immigration Street, Suite 204
Charleston, SC 29403
(843) 720-8866

Attorneys for Appellant

Mount Pleasant, South Carolina
September 8, 2010

GRANTED
JOHN CANNON FEW, C J
FOR THE COURT

By Tanya A. Gee IV-A
(Clerk) (~~Deputy Clerk~~)

FILED
10/1/10

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

SEP 09 2010

SC Court of Appeals

The State of South Carolina
And The State Ports Authority

Respondents,

v

Yelsen Land Co , Inc ,

Appellant

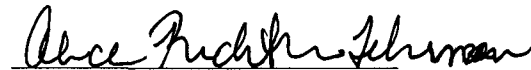
APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R Scarborough, Master-in-Equity
Trial Court Case No 2007-CP-10-2053
Court of Appeals Case No 2010199806

PROOF OF SERVICE

I certify that I have served the Motion for Extension of Time to File the Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal on the Respondents by faxing and depositing a copy of the motion in the United States Mail, postage prepaid on September 8, 2010, addressed to their attorney of record as follows

J Emory Smith, Esq
Deputy Attorney General
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

THE RICHTER FIRM, LLC


Lawrence E Richter, Jr
Alice Richter Lehrman
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29465
(843) 849-6000

Donald B Clark
49 Immigration Street, Suite 204
Charleston, SC 29403
(843)720-8866
Attorneys for Appellant

Mt Pleasant, South Carolina
September 8, 2010

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E Richter Jr
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

September 8, 2010

VIA FSCIMILE AND U S MAIL

The Honorable Tanya A Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
SEP 09 2010
SC Court of Appeals

Re Yelsen Land Company, Inc v The State of South Carolina and
The State Ports Authority
Case No 2010166806

Dear Madam Clerk

Enclosed please find the following documents with regards to the above-referenced matter

- 1 Original and seven copies of Motion for Extension of Time to File Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal,
- 2 Original and one copy of Proof of Service, and
- 3 Check in the amount of \$25 00

Please file the originals and return the file-stamped copies to me in the enclosed, self-addresses, stamped envelope

By copy of this letter to Emory J Smith, attorney for the Respondent, I am serving him with a copy of the same

Very truly yours,



Alice Richter Lehrman

AARL/meh

Enclosures

cc J Emory Smith, Esq
Thomas Daniels

The South Carolina Court of Appeals

Yelsen Land Company, Inc ,

Appellant,

v

The State of South Carolina and the
State Ports Authority,

Respondents

The Honorable Mikell R Scarborough
Charleston County
Trial Court Case No 2007-CP-10-02053

ORDER

For good cause having been shown, the time for serving and filing Appellant's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until September 13, 2010

IT IS SO ORDERED

V. Claire Allen, Deputy CLERK
For the Court

Columbia, South Carolina

8/19/2010

cc Alice Richter Lehrman, Esquire
Donald Bruce Clark, Esquire
J Emory Smith, Jr, Esquire

FILED
8/20/10 *lac*

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E Richter Jr
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

August 12, 2010

Hon Tanya Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 111629
Columbia, SC 29211

RECEIVED
2143
AUG 13 2010
SC Court of Appeals
1st 8-14-10
9-13-10

In Re Yelsen Land Company, Inc vs The State of South Carolina
Case No 2010166806

Dear Madam Clerk

I am writing in regard to the above referenced matter We have realized that we previously ordered and received the trial transcript which makes our July transcript request superfluous By our calculations this makes our initial brief due August 14, 2010

Additionally, we would now request a thirty day extension for the submission and service of our initial brief According to our calculations, this will make our initial brief due Monday, September 13, 2010 We have made no prior request for an extension in this matter We have spoken with, Emory J Smith, the attorney for the respondents, and he has consented to this continuance Appellants would further request that the current deadline for submission be held in abeyance pending the decision regarding our request for an extension Please find enclosed our twenty-five dollar check

Thank you for your assistance with this matter Should anything further be required please do not hesitate to contact me

With best regards, I am

Very truly yours,


Alice Anne Richter Lehrman

Enclosure

cc Emory J Smith, Esq
Donald B Clark, Esq
Thomas B Daniels

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E. Richter, Jr.
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E. Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

July 22, 2010

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

South Carolina Court of Appeals
Attn: Court Administrator
Post Office Box 11629
Columbia, South Carolina 29211

J. Emory Smith, Jr., Esq.
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

Donald B. Clark
Donald B. Clark, LLC
49 Immigration Street, Suite 204
Charleston, SC 29403

In Re: Yelsen Land Company, Inc. v. The State of South Carolina
Case No. 2007-CP-08-1917

Dear All:

Please find enclosed the requested order for transcripts in the appeal of the
abovementioned matter, pursuant to Rule 207(a) of the South Carolina Appellate Court
Rules.

With best personal regards I am,

Very truly yours,



Megan Harrigan

RECEIVED

JUL 26 2010

SC Court of Appeals

/meh
Enclosures

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant South Carolina 29464

Lawrence E. Richter Jr.
William Bee Ravenel Lewis
Alice Anne Richter Lehrman
Aaron E. Edwards

Telephone (843) 849 6000
Telefax (843) 881 1400

July 22, 2010

Ms. Bernadette Kelly
Court Reporter
Charleston County Master-in-Equity
100 Broad Street
Charleston, South Carolina 29401

RECEIVED

JUL 26 2010

SC Court of Appeals

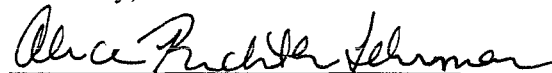
In Re Yelsen Land Company, Inc. v. The State of South Carolina
Case No. 2007-CP-08-1917

Dear Ms. Kelly:

On March 9, 2010, the above case was heard before the Honorable Mikell R. Scarborough, Master-in-Equity, in Charleston County. Our records indicate that you were the court reporter for this case.

We request that you provide us with a transcript of the proceedings. Please transcribe the entire record. We agree to pay the per page charge for this transcript as provided by Rule 607, SCACR.

Sincerely,



Alice Anne Richter Lehrman
The Richter Firm, L.L.C.
622 Johnnie Dodds Boulevard
Mount Pleasant, South Carolina 29464
(843) 849-6000

Donald B. Clark
49 Immigration Street, Suite 204
Charleston, South Carolina 29403
(843) 720-8866

Attorneys for Appellant

cc J Emory Smith, Jr , Esquire
S C Court Administration
Tanya Gee, Clerk, Court of Appeals



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

July 22, 2010

Alice Richter Lehrman, Esquire
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464

Re Yelsen Land Co v State
2010166806

Dear Ms Lehrman

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1015 Sumter Street, Columbia, S C 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as

amended June 1, 1999, no [redacted] the Clerk's office of the Court of Appeals [redacted] als immediately The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours,

V. Claire Allen, Deputy

Tanya A Gee
CLERK

TAG/dw

cc Donald Bruce Clark, Esquire
J Emory Smith, Jr, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

July 22, 2010

Alice Richter Lehrman, Esquire
The Richter Firm, LLC
622 Johnnie Dodds Blvd
Mount Pleasant, SC 29464

Re Yelsen Land Co v State
2010166806

Dear Ms Lehrman

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

A handwritten signature in black ink that reads "Claire Allen, Deputy".

CLERK

TAG/dw

cc Donald Bruce Clark, Esquire
J Emory Smith, Jr, Esquire

The Supreme Court of South Carolina

RE Interim Guidance Regarding Personal Data Identifiers and
Other Sensitive Information in Appellate Court Filings

ORDER

Under the Federal Constitution, our State Constitution, and our common law, court records are presumptively open to the public, and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness Ex parte Capital U-Drive-It, Inc., 369 S C 1 630 S E 2d 464 (2006) Davis v Jennings 304 S C 502, 405 S E 2d 601 (1991). Therefore with some few exceptions,¹ documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending.

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future. The ready availability of these documents raises significant privacy concerns. While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts:

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court 2:

- 1 Social Security Numbers. If a social security number must be included, only the last four digits of that number should be used.
- 2 Names of Minor Children. If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used. In all other cases, only the minor's first name and first initial of the last name (i.e., John S.) should be used.
- 3 Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.
- 4 Home Addresses. If a home address must be included, only the city and state should be used.

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file. The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed." No order of the appellate court will be required to file this sealed Appendix. The number of copies of the Appendix to be served and filed shall

be the same as that required for the brief record on appeal, motion or other filing that includes the redacted documents

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend the caption to redact the identifier. This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court. Without a motion to the appellate court, the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i.e. In the Interest of John S., a Juvenile).

A party seeking to seal material beyond those personal identifiers listed above, must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed. Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc. and Davis v. Jennings, supra, must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information.

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information. The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed; the responsibility for insuring that information is redacted or sealed rests with counsel and the parties.

IT IS SO ORDERED

s/Jean H. Toal _____ C J

s/James E. Moore _____ J

s/John H. Waller, Jr _____ J

s/E. C. Burnett, III _____ J

s/Costa M. Pleicones _____ J

Columbia, South Carolina

August 13, 2007

1 See e.g. Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502 SCACR Rule 402(n), SCACR and Rule 403(l), SCACR

2 This restriction shall not apply when this information is required or requested by the appellate court. For example, the application for admission to practice law under Rule 402, SCACR, requires many of these personal identifiers to be disclosed.

POS 7/15/10
PM 7/15/10

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Mikell R Scarborough, Master-in-Equity

Case No 2007-CP-10-2053

RECEIVED

JUL 20 2010

SC Court of Appeals

 The State of South Carolina
And The State Ports Authority

Respondent,

v

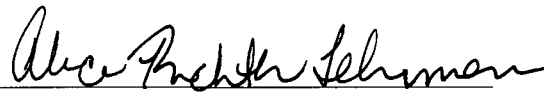
Yelsen Land Co , Inc ,

Appellant

NOTICE OF APPEAL

The Appellant, Yelsen Land Co , Inc appeals the Order Granting Defendant's Motion for Summary Judgment of the Honorable Mikell R Scarborough (attached as Exhibit "A"), filed on April 16, 2010 and the Order Denying Plaintiff's Motion to Alter or Amend of the Honorable Mikell R Scarborough (attached as Exhibit "B"), filed on June 24, 2010 and received by counsel on July 6, 2010

Respectfully submitted,



Alice Richter Lehrman
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JUL 20 2010

SC Court of Appeals

July 15, 2010

Tanya Gee
South Carolina Court of Appeals Clerk of Court
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Charleston, SC 29401

In Re Yelsen Land Company, Inc vs The State of South Carolina
Case No 2007-CP-10-2053

Dear Madam Clerk

Please find enclosed the original and four (4) copies of the Notice of Appeal in a Civil Case in the above referenced matter Please file the original and return the clocked copies to our office in the enclosed envelope

Thank you for your assistance with this matter

With kind regards, I am

Very truly yours,

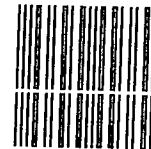
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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Yelsen Land Company, Inc.)

C/A No 07-CP-10-2053

Plaintiff,)

v)

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

Defendants)

ORDER

BY

JULIE J. ARMSTRONG
CLERK OF COURT

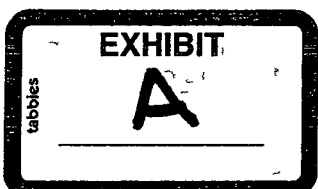
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FILED

This matter has come before this Court pursuant to the Defendants' Motion for Summary Judgment. Their Motion for Partial Summary Judgment as to the First and Second Causes of Action was argued at a hearing in September 2009, and this Court took the Motion under advisement. On March 9, 2010, this Court announced its intention to grant the Motion, and it granted the oral motion made then by counsel for the Defendants to amend the Motion for Summary Judgment to include Plaintiff's Third Cause of Action.¹ This Court granted summary judgment to the Defendants on all causes of action.

The Court allowed the Plaintiff to proffer their evidence by narrative or by placing the witnesses on the stand. Plaintiff decided to present the live testimony of their

¹ The Court received and took judicial notice of the full record at the Supreme Court and the State's Brief in the case *State v Yelsen Land Company Inc* 265 S C 78, 216 S E 2d 876 (1975) (*Yelsen I*). Although an earlier *Yelsen* decision determined the mode of trial, *Yelsen I* was the first opinion to address the merits of the case. *State v Yelsen Land Company Inc* 257 S C 401, 185 S E 2d 897 (1972).



witnesses and to offer their exhibits² At the end of the Plaintiff's presentation of witnesses and exhibits, the Defendants renewed their Motion for Summary Judgment and also moved for a Directed Verdict, to the extent necessary This Court again stated that it was granting summary judgment. The Court's reasons for granting this Motion are set forth below

Finding this matter is determined as a question of Law.

PROCEDURAL HISTORY

Plaintiff brought the instant suit alleging that litigation was commenced in the 1969 between the State, Plaintiff 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 Plaintiff on Morris Island *State v Yelsen Land Company Inc* 265 S C 78, 216 S E 2d 876 (1975) (*Yelsen I*) Plaintiff alleges 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" Plaintiff 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

Subsequently, the Ports Authority moved to intervene in the suit because of its interest in the property at issue The Plaintiff moved to amend its complaint to include the Ports Authority as a Defendant and to include new allegations The State objected to

² Prior to this Court's confirmation at the end of Plaintiff's proffer that it was granting Defendants summary judgment, the Defendants called one witness to the stand out of order due to scheduling The Defendants did not present their entire case or call other witnesses because this Court confirmed that it was granting them summary judgment

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

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 Plaintiff's title to the site was paramount as to the Ports Authority because of a prior sovereign grant. 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 Defendants alleged that they both have legal interests in the property at issue, that res judicata and collateral estoppel barred the Plaintiff 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 Defendants in that property.

The Defendants moved for partial summary judgment as to Plaintiff's First and Second Causes of Action because they involve issues that were or could have been decided in earlier litigation, *State v Yelsen Land Company Inc* 265 S C 78, 216 S E 2d 876 (1975) (*Yelsen I*). The Court held a hearing regarding this motion in September 2009, but did not rule on the motion until the trial date. Last fall, the State moved to amend its answer to add additional defenses, and the Court granted the Motion. See *infra* legal issues



FACTUAL BACKGROUND

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 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 (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 (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 *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 *Yelson I*, Record, p 8 Therefore, at the time of the *Yelsen I* litigation, instant Plaintiff Yelsen was well aware of the construction of the disposal site

At trial in April 1972, attorney William Vaughn 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 *Yelson I*, Record, pp 2 and 15 Mr Vaughn referred to the high land on Morris as including Cummings Point, and the beach along the shore "such of it as is high" *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 ' *Yelsen I*, Rec , p 24

St Elmo (Speedy) Felkel was an officer in both the Yelsen and Dajon companies at the time of trial *Yelsen I*, Rec , p 41 Mr Felkel testified in that proceeding that he had not made any effort to ascertain the "high tide" on Morris Island *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 ' *Yelsen I*, Rec , p 57, *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 which stated that "Felkel [the Yelsen officer] stated that he wished to 'develop' the tidelands including the S C State Ports Authority spoil area " *Id* at p 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 *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* The Court ruled that "Yelsen has completely failed to establish its claim to the tidelands in question "

Contrary to Plaintiff's argument, the Supreme Court did not hold that instant Plaintiff 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 that Yelsen owned the high ground did not include the spoils structure.

CONCLUSIONS OF LAW

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, SCRPC. "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.



A

Res judicata bars all causes of action

As to both of the instant Defendants the instant Plaintiff is barred by res judicata from litigating any issues litigated and decided in *State v Yelsen* or any issues that might have been raised in *State v Yelsen*, 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 instant Plaintiff'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). 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 instant Plaintiff 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. Accordingly, res judicata bars the instant Plaintiff *Yelsen* from relitigating the title issues determined in *Yelsen I* including but not limited to the applicability of any grants.

The issues barred include not only the First and Second Causes of Action, but also the Third Cause of Action regarding accretion. Plaintiff *Yelsen* was well aware of the construction of the spoils disposal structure going on as shown by the above statements and counterclaim in *Yelsen I*. *Yelsen* specifically counterclaimed in that action for trespass due to the construction of the dike and the deposit of dredging spoil. Therefore, these accretion issues are barred by res judicata.

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.*

Certainly, the issue of ownership was litigated and finally determined in *Yelsen I*. Plaintiff had a full and fair opportunity to litigate the issue in that action. Accordingly, Plaintiff 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 Plaintiff 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. Plaintiff 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

Plaintiff 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, 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, 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, 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* 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 Defendants 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 Plaintiff’s Motion to Amend on grounds that included collateral estoppel and res judicata Contrary to the Plaintiff’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

The addition of the Ports Authority does not allow Plaintiff to avoid res judicata and collateral estoppel and reexamine ownership issues as to that party³ The Instant Plaintiff, Yelsen was clearly aware of the Ports Authority’s interest in the property during *Yelsen I* for these reasons

³ Plaintiff initially brought this action only to assert what is now its Third Cause of Action alleging that it has acquired this property due to accretion from the spoils deposited by the United States Corps of Engineers The Ports Authority, as well as the State, certainly has an interest in defending the accretion issue because of the Authority’s spoils easement to the Corps of Engineers for the property That defense does not give the Plaintiff cause to reopen the title issues already decided by *Yelsen I*

- 1 *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, p 19, §30 (Ground 2, counterclaim of Yelsen),
- 11 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, Testimony of Vaughn, p 20, §§ 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* p 21, §§ 70- 76 In addition, he talked to
the attorney for the companies *Id* p 21, §§71- 74
- 111 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” *Yelsen I* Brief of Respondent State, p 25 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 p 7 of
Brief

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

D

Section 54-3-170 and the use of the property in Aid to Navigation Bars any Claim of the Plaintiff to the Property on the Basis of Accretion

Plaintiff'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*, Point E), it is barred under §54-3-170 and the use of the property as an aid to navigation.

Under S C Code Ann §54-3-170, the General Assembly has determined that the legal interest of the Defendants 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 Plaintiff when the Defendants have express authority to deposit spoils on it.

Moreover, the Defendants 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 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” Letter, December 21, 1967, MSJ Exhibits, *see also* Soils Disposal Agreement, 1967, MSJ Exhibits, §54-3 170

E

Accretion doctrines do not give Plaintiff any interest in the property at issue

Plaintiff 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 Plaintiff an interest in the State’s property under these circumstances. Accretion has not occurred as the Courts have recognized ^{the} term ~~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 Plaintiff 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) ⁴ 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

⁴ In *Epps*, the Supreme Court held as follows

By all of the testimony, the former Swash area has become dry land by the exertions of man--not by the gradual deposit by water of mud, sand or sediment. Hence, the principle that title to imperceptible additions to the shore from such deposits should follow the title to the shore itself has no application. 56 Am Jur, Waters, Sec 476, et seq (1947), *Spigener v Cooner*, 8 Rich (42 S C L) 301 (1855)

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 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.”⁵ *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.

Plaintiff 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.

⁵ See also *Hilton Head Plantation Property Owners' Ass'n Inc v Donald*, 651 S.E.2d 614, 617, 375 S.C. 220, 224 (Ct. App. Jul. 06, 2007)

Although the Court said that Holston had title to the accretions there, 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.⁶ The principal significance of the distinction between erosion⁷ 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 alluvion⁸ 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.⁹ 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*

⁶ Florida common law treats hurricanes as avulsive events. See *Bryant v. Peppe*, 238 So. 2d 836, 838 (Fla. 1970) (applying the doctrine of avulsion and concluding that a small strip of land that a hurricane brought to the surface belonged to the State, not neighboring owners).

⁷ Erosion refers to the gradual washing away of land bordering on a stream or body of water by the action of the water. 73 AMJUR POF 3d 167 §2.

⁸ Solid material, whether silt, sand, soil, or sediment.

⁹ See 73 AMJUR POF 3d 167§ 1-7. The United States Supreme Court has acknowledged the common-law doctrine of avulsion. See *New Jersey v. New York*, 523 U.S. 767 (1998).

Lovington, 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 avulsion¹⁰ See also *Georgia v South Carolina* 497 U S 376 3904 (1990)¹¹

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 Defendants 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

Plaintiff's 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,

¹⁰ See, for example, *Cox v F-S Prestress Inc* 797 So 2d 839, 843 (Miss 2001), *Sharp v Learned*, 195 Miss 201, 14 So 2d 218, 220 (1943), *Borough of Wildwood Crest v Masciarella*, 51 N J 352, 240 A 2d 665 (1968) *Brainard v State*, 12 S W 3d 6 (Tex 1999), reh'g overruled (Jan 6, 2000)

¹¹ "Some of the changes here were caused gradually by the deposit of sediment by river waters Others were caused by the deposit of fill through the use of a hydraulic-pipeline dredge employed by the Corps pursuant to the paramount right of the United States Government to improve navigation See *South Carolina v Georgia*, 93 U S 4, 23 L Ed 782 (1876) The rapidity of some aspects of the dredging and other processes led the Special Master to conclude that the changes in the Savannah River were primarily avulsive in nature" *Ga v SC*, *supra* The Supreme Court agreed with the Master

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, Defendants can certainly deposit despoil on their own property without losing it simply because it, *arguendo*, attaches to Plaintiff's land. See also *New Jersey v New York* *supra* note 7.¹² 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.

F

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

Section 15-67-20 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."

¹² *New Jersey v New York* references *United States v California*, 381 U S 139, 177, 85 S Ct 1401, 1422, 14 L Ed 2d 296 (1965) as "referring to 'the rule of property law that artificial fill belongs to the owner of the submerged land onto which it is deposited'" 523 U S at 784.

This action is Plaintiff'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, Plaintiff 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 provides as follows:

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 Defendants 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 Defendants 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.

G

The Proffered Evidence Would Not Warrant Denial of Summary Judgment

When given the opportunity to proffer its evidence, Plaintiff chose to present that evidence in the form of actual testimony and exhibits. 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.

This proffered evidence included testimony and evidence regarding an 1818 sovereign grant. This grant was the subject of the *Yelsen I* proceeding. Although 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. That grant was at issue in the *Yelsen I* decision in which the Court found that instant Plaintiff's co-defendant in the earlier case, Dajon Realty, could not connect its title to the grant. Plaintiff Yelsen is not entitled to a second try at the issue in the instant proceeding.

Plaintiff also presented a 1968 drawing by the Corps of Engineers appearing to show elevations on the site at issue prior to the construction of the spoils disposal

structure Plaintiff contended that some of those elevations were above mean high water and that it owned those areas because the State conceded in *Yelsen I* that Yelsen and Dajon owned the highland portions of Morris Island Their theory appears to be that the filling connected with the areas of the structure that may have been above mean high water Even if, *arguendo* Plaintiff's theory were correct, this claim is still barred under ~~the~~ *res judicata* and the other defenses set forth above The concession of the State regarding high ground would not have extended to the spoils disposal structure because the structure was at issue and the State asserted its rights as to that entire area Moreover, Yelsen did not raise any issue on appeal in *Yelsen I* about alleged accretion or construction activity related to the structure even though Yelsen had counterclaimed in that case on the basis of the construction of the structure and the deposit of spoil *Yelsen I* Opinion and Record at pp 8, 92-95 This argument is barred, too, because, as discussed above, the nature of the deposit of dredging spoil did not constitute an accretion to any property of Plaintiff on Morris Island

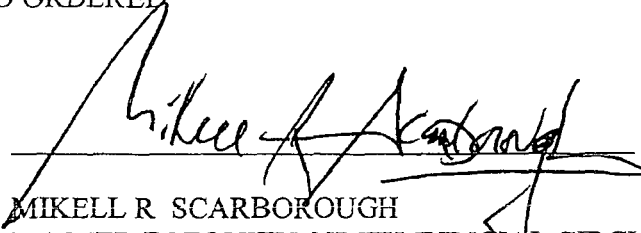
Because of the format by which Plaintiff presented its proffer, the Defendants moved for a Directed Verdict at the end of Plaintiff's case This Court did not need to rule on that motion because of its granting summary judgment, but the Defendants would have been entitled to a directed verdict had this testimony been presented at trial

CONCLUSION

Plaintiff has attempted to retry *Yelsen I* in this case. It is barred from doing so by the above defenses, and the Defendants are entitled to summary judgment for those reasons and the others set forth above.

Therefore, IT IS ORDERED THAT summary judgment is granted to the Defendants.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Mikell R. Scarborough", is written over a horizontal line.

MIKELL R. SCARBOROUGH
MASTER IN EQUITY, NINTH JUDICIAL CIRCUIT

April 13, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Yelsen Land Company, Inc ,)

C/A No 07-CP-10-2053

Plaintiff,)

v)

ORDER

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

Defendants)

2010 JUN 24 AM 9 58
JULIE J ARMSTRONG
CLERK OF COURT

FILED

This matter has come before this Court pursuant to the Plaintiff's Motion to Alter or Amend this Court's Order dated April 13, 2010. The Motion primarily lists various objections that have been exhaustively argued in prior proceedings in this case, and no basis exists to change this Court's ruling in this case.

Although Plaintiff raises issues about S.C. Code Ann. §§15-67-20, 15-67-90 and 15-3-380, which formed a sixth alternative ground for this Court's decision (Order at p. 19), Plaintiff could have raised those statutory issues at the hearing in March and apparently did not do so. Therefore, they are not before this Court now (Plaintiff's grounds 7, 8, 9).¹ Moreover, even if, *arguendo*, Plaintiff was correct in its interpretation of those statutes, the result would still be the same in that Judgment was granted to the Defendants based upon a number of other grounds independent of those statutes.

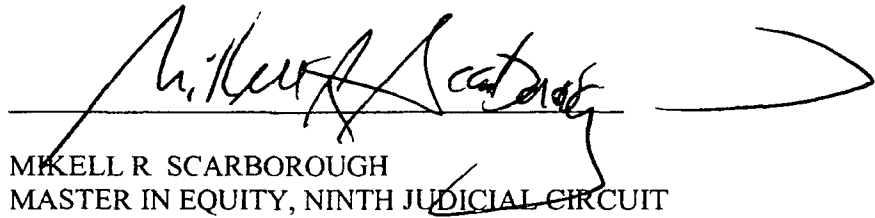
¹ 'An issue may not be raised for the first time in a motion to reconsider.' *Johnson v. Sonoco Products Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (S.C., 2009).



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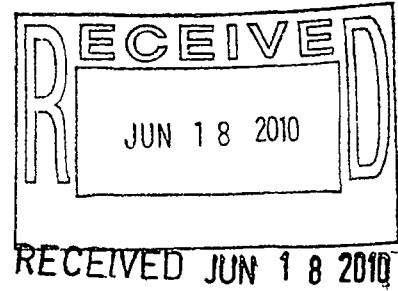
Therefore, IT IS ORDERED THAT Plaintiff's Motion to Alter or Amend is
denied

AND IT IS SO ORDERED



MIKELL R. SCARBOROUGH
MASTER IN EQUITY, NINTH JUDICIAL CIRCUIT

June 4, 2010



HENRY McMASTER
ATTORNEY GENERAL

June 16, 2010

The Honorable Mikell R. Scarborough
Master In Equity for Charleston County
Charleston Judicial Center
100 Broad Street Suite 266
Charleston, South Carolina 29401
Also by email Masci@charlestoncounty.org

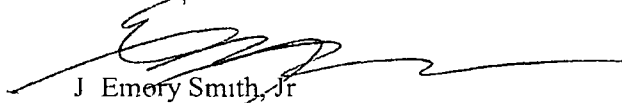
RE Yelsen Land Co, Inc v State of South Carolina 07 CP-10-2053
Proposed Order denying Rule 59 Motion

*pull case file
ORDER ALREADY
ISSUED 6/2*

Dear Judge Scarborough

As you requested, I am enclosing for your consideration a proposed order denying Plaintiff's Motion to Alter or Amend. If you have questions, please let me know.

Respectfully submitted,


J. Emory Smith, Jr.
Assistant Deputy Attorney General

cc Lawrence E. Richter, Jr., Esquire (also by email)
Alice Anne Richter Lehrman, Esquire (also by email)
Donald B. Clark, LLC, Esquire (also by email)
Mr. Jeff McDaniel (also by email)