THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-In-Equity

Civil Action No. 2007-CP-07-3212
Appellate Case No.: 2016-001277

H. Marshall Hoyler.....Appellant,

v.

The State of South Carolina, Merry Land Properties, LLC,
Sherbert Living Trust, Supan Living Trust, Elizabeth R. Levin,
Edward McCray Wise Revoc. Living Trust,
Carol Ann Devries Wise Revoc. Living Trust,
Amelie Cromer, Philip Cromer, Robert Chiavello, Tocharoen Living Trust,
Helen M. Olesak, Lesley Anne Glick a/k/a Lesley Anne Glick,
Shirley G. Lackey, Patricia Banfield, Bertrand Cooper, Jr.,
NHP SH South Carolina I, LLC n/k/a CCP Bayview 7176 LLC,
Oyster Cove Homeowners Assn., Shirley Ann Moyer,
Barry D. Malphrus, Garry D. Malphrus, Donnie Malphrus,
Rita Brown, Houston Family Partnership, Joan Taylor Trustee,
Michael Bull, Nancy Bull, Marny H. VonHarten, Dianne M. Donaldson,
Brian R. Evans, Stephen Durbin, Valerie Durbin, Phillip Marti,
Jane Marti, Michael Woodworth, Georgiana M. Cooke, Daniel B. Walsh,
Janet E. Walsh.....Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant is putative titleholder to certain real property lying between the high tide and low tide lines along the Beaufort River in Beaufort County. On November 8, 2007, Appellant filed a legal action against the State of South Carolina to determine whether Appellant's title was superior to that of the State of South Carolina's title, pursuant to the statutorily mandated obligations contained in *Section 48-39-220, S.C. Code, Ann., (1976, as amended), (Complaint, R.____).*

On November 26, 2011, Respondent, Merry Land Properties (**i**) moved to intervene in the action (**ii**) responded to the action and (**iii**) interjected counterclaims, claiming only that Merry Land had permits to use the marshland. In response, Appellant filed a Motion to Dismiss the Intervention/Counterclaims on December 26, 2011, citing various subsections of Rule 12, South Carolina Rules of Civil Procedure, *(Motion to Dismiss, R.___).*

Later, Appellant consented to the Intervention of Merry Land, while reserving all of his rights to his claims and defenses, and the Trial Court ordered the intervention. Appellant later filed a Reply to the Counterclaim of the Intervenor, Merry Land on February 8, 2012, *(Reply, R.____).*

STATEMENT OF THE CASE, (Cont.)

After a thorough discovery process, a first Hearing was held on January 31, 2011, before the Honorable Marvin H. Dukes, III, Master-in-Equity for Beaufort County. At that Hearing, Appellant moved to dismiss the Intervenor Merry Land from this action, for lack of subject matter jurisdiction, which was denied by the Trial Court, *(2011, Hearing Tr. p. 15, Line 23-p. 16, Line 2; R.___)*. At the Hearing, Appellant moved for Summary Judgment and the ruling on that Motion was postponed while Appellant presented his case, *(2011, Hearing Tr. p. 5, Line 1- p. 6, Line 6; R.___)*.

Also, at the Hearing, and after the completion of the presentation of an expert witness, on behalf of the Appellant, (*2011, Hearing Tr. p. 19, Lines 13-14; R.___)*, the Trial Court, *sua sponte,* ordered the Appellant to add as parties, all of the highland property owners that abutted Appellant's marshland property, approximately thirty-two additional Defendants, *(2011, Hearing Tr. p. 54, Lines 6-15; R___)*. Thereafter, the Trial Court issued its written Order confirming the Trial Court's earlier, oral Order of March 21, 2011, *(Order for Joinder of Parties, R.___)*. The Appellant notes two prior Orders of the South Carolina Court of Appeals, which dismissed the Appellant's prior Appeals as being **interlocutory**. These Orders were, S.C. Court of Appeals Orders filed September 26, 2011, and, August 20, 2013, (R. ____), (R. _____). The Appeals were not on the merits and have no bearing on this Appeal.

STATEMENT OF THE CASE, (Cont.)

The parties had then returned to the Trial Court and resumed the Hearing before the Trial Court that began on January 31, 2011. At the conclusion of the Hearing and after the presentation of all evidence and witnesses, the Trial Court adjourned the Hearing for an indefinite period of time and allowed Intervenor Merry Land's counsel to find and depose a second surveyor witness, (P. 304, 305, R.__). The Trial Court allowed Intervenor Merry Land's counsel to **introduce a second surveyor witness** testimony into the record before the Trial Court, (P. 307, 308, 309, R.__). All actions were timely objected to by Appellant's counsel, (P. 300, through 315, R. ___).

The Trial Court issued its written Order denying the relief sought by the Appellant on ____. Appellant's counsel filed timely Motions, pursuant to Rule 52(b) and Rule 59(e), (R.____). The Appellant timely sought reconsideration, which was denied by the Trial Court, by its Order filed _____, 2016, R.___)Appellant filed a timely Notice of Appeal (R. ___).Intervenor Merry Land's counsel then filed a Motion to Dismiss this Appeal on _____, (R. ___). This Court denied Intervenor Merry Land's counsel's Motion to Dismiss and this Court returned jurisdiction to the Trial Court to hear Appellant's pending Motions described above by its Order, dated ___, 2016, (R.___), Thereafter, the Trial Court denied Appellant's pending Motions. This Court resumed jurisdiction by its correspondence to all parties of record dated ____, R.___). In compliance with this Court's correspondence dated ___, Appellant's Initial Brief follows.

STATEMENT OF THE FACTS

Appellant is putative owner of fee simple title to ninety-five acres, more or less, lying between the mean high and low water marks along the Beaufort River in Beaufort County, South Carolina. The property includes areas described as marshlands, (hereinafter as, "The Property").

Respondent State of South Carolina includes its political subdivisions, agents and officials. Respondent State of South Carolina, holds title to certain real properties as assets of the Respondent State of South Carolina. In accordance with Chapter 11 of Title 1 of the S.C. Code of Laws, the Respondent State of South Carolina can acquire, encumber, transfer and lease real property in the name of the Respondent State of South Carolina.

The Property is the identical conveyance of real property to J.M. Crofut, Appellant/Landowner Hoyler's predecessor in title, from the Honorable Benjamin R. Tillman, then Governor of South Carolina, dated July 27, 1891, and was for approximately ninety-five acres of marshland described as being located on the Beaufort River, (hereinafter as, "Deed"), (R. ____).

STATEMENT OF THE FACTS (Cont.)

The Deed is accompanied by a plat which depicts a tract of land containing approximately ninety-five acres. Appellant/Landowner's witnesses demonstrated an unbroken chain of title to the Property at the trial, which is identical to the Property encompassed in the Deed allowing for erosion and accretion over the period of time the Appellant/Landowner's predecessors in interest have held the Property, (R. ____). Appellant/Landowner demonstrated alienation of the Property from the State of South Carolina, based on the Deed. The Appellant/Landowner argued at Trial and the Trial Court found, that title to these tidelands has not reverted back into the State of South Carolina, (R._____).

On November 8, 2007, Appellant/Landowner filed a legal action against the State of South Carolina to determine whether Appellant/Landowner's title was superior to that of the State of South Carolina's title, pursuant to the statutorily mandated obligations contained in *Section 48-39-220, SC Code, Ann., (1976, as amended), (Complaint, R.____).*

At the first Hearing on January 31, 2011, and after the completion of the presentation of one witness, the Trial Court, *sua sponte,* ordered the Appellant/Landowner to add, as parties, all of the highland property owners that abutted Appellant/Landowner's marshland property, approximately thirty-two additional Defendants, *(2011, Hearing Tr. p. 54, Lines 6-15; R___).* Factually, not a single one of the thirty-plus additional Defendants ordered to be added to this litigation by the Trial Court, participated in the Trial of this case, which lead to the Orders under Appeal.

STATEMENT OF THE FACTS (Cont.)

In order to determine the ownership of tideland, as between the State of South Carolina and an individual or corporate claimant, the State of South Carolina has established a specific statutory procedure which is set forth in *Section 48-39-220 S.C. Code Ann., (1976, as amended)*. The Trial Court lacked subject matter jurisdiction to add additional Defendants, because the Appellant/Landowner's action was brought pursuant to *Section 48-39-220, S.C. Code Ann. (1976, as amended)*. This Statute contemplates an action against the State of South Carolina, and no other party.

Once the South Carolina General Assembly has established a statutory scheme, a Trial Court lacks subject matter jurisdiction to fashion a remedy outside the clear parameters of a specific Statute such as *Section 48-39-220*. Byrd v. Irmo High School, 468 SE 2d 861 (1996), stated that "[w]here a statute expressly enumerates the requirements on which it is to operate, additional requirements are not to be implied." Citing, Trayco, Inc. v. United States, 994 F.2d 832 (Fed.Cir.1993), Byrd *supra* at 865. Therefore, the Trial Court cannot arbitrarily add Defendants beyond those anticipated under *Section 48-39-220, S.C. Code Ann., (1976, as amended)*.

APPELLANT/LANDOWNER'S WITNESSES AT TRIAL

Witness Georgianna Coates

First, Appellant/Landowner called Georgianna Coates, to the stand. Ms. Coates was offered by Appellant/Landowner, and qualified by the Trial Court as an expert in real estate title examination. Ms. Coates stated that she had examined the title to real estate claimed by the Appellant/Landowner. Ms. Coates testified that Appellant/Landowner's title to the real property in question could be traced back to a conveyance from the Honorable Benjamin R. Tillman, then Governor of South Carolina, to James M. Crofut.[1] Ms. Coates also testified to the references made in the deed to a plat which was referenced in the deed from Governor Tillman to Appellant/Landowner's predecessor in title. Ms. Coates then was able to trace an unbroken chain of title from Mr. Crofut to Appellant/Landowner. Ms. Coates also testified to the ready availability of this information in the public record, including the real estate records as well as the tax records. Ms. Coates affirmed the publicly available nature of this information during the time when Intervenor Merry Land was having its title examined.

Witness Chester Williams, Esquire

Second, Appellant/Landowner called Chester Williams, Esquire, to the stand. Mr. Williams was offered by the Appellant/Landowner, and qualified by the Trial Court as an expert in real estate title[2] and the conclusiveness of the information offered by Ms. Coates on the title to Appellant/Landowner's property. Mr. Williams offered his expert opinion that based on the title examination of Ms. Coates, Appellant/Landowner was the owner of the property in question and Appellant/Landowner's property was located between the mean high-water and mean low water marks of the Beaufort River in Beaufort County, South Carolina. Mr. Williams affirmed the easy availability of this information in the public records of Beaufort County, including the real estate records as well as the tax records.

APPELLANT/LANDOWNER'S WITNESSES AT TRIAL, (Cont.)

[1] Transcript of January 31, 2011, P. 20 LL. 14-23, R.____; P. 21 LL. 1- 21, R.___).
[2] Transcript P. 33 LL. 22-25 (R.___); P. 34 LL 1-4, (R.____).

Witness Lorick Fanning, RLS

Finally, Appellant/Landowner called Lorick Fanning. Mr. Fanning was offered by the Appellant/Landowner, and qualified by the Trial Court as an expert in real estate surveying.[3] Mr. Fanning had been asked by the Appellant/Landowner to recreate the plat which was incorporated into the deed from the state to Appellant/Landowner's predecessor in interest.[4] Mr. Fanning was able to recreate the plat in its entirety based on the plat incorporated into the original deed from the State and create an overlay of the two.[5] Mr. Fanning described the process by which he recreated the plat, including field survey work, historical research relying on publicly filed documents and other publicly available documents and surveying techniques[6], specifically the land lot and section system[7]. Mr. Fanning stated that the plat attached to Mr. Crofut's deed and his recreation of the plat represented intent to convey property between the high and low water marks of the Beaufort River.[8]

Mr. Fanning had little of difficulty in "closing" the plat, i.e. making the plat represent a drawing that started at one point and closed on that same point of reference.[9] Mr. Fanning's plat did not contain the exact acreage of the original plat, which he explained by noting that the eastern and western boundaries of the plat were "natural monuments" which were the high and low water marks of the marshes of the Beaufort River.[10] Because these were natural monuments subject to the vagaries of the tidal flow and erosion or accretion of soil over the whole of the property the property had obviously been diminished by some natural forces.[11]

APPELLANT/LANDOWNER'S WITNESSES AT TRIAL, (Cont.)

[3] Transcript P. 69 LL. 22-25, (R.____); P. 70 LL. 1-3, (R.___).
[4] Transcript P. 70 LL. 8-25, (R. ___); P. 71 LL. 1-9, (R.___).
[5] Transcript P. 85, LL. 21-25, (R.____); P. 86 LL. 1-6 (R.___).
[6] P. 70 LL. 8-25, (R.___); P. 71 LL. 1-5, (R.___); P. 72 LL. 1-25, (R.___); P. 73 LL. 1-16, (R.___); P. 76 LL. 24-25, (R.___); P. 77 LL. 1-24, (R.___); P. 78 LL. 24-25, (R.____); P. 79 LL. 1-25, (R.___); P. 80 LL. 1-25, (R.___); P. 81 LL. 1-25, (R.___); P. 82 LL. 1-25, (R.___).
[7] Transcript P. 152 LL. 7-13, (R. ___).
[8] Transcript P. 87 LL. 1-25, (R.___); P. 88, LL. 1-3, (R.___).
[9] Transcript P. 135 LL. 16-34, (R.___).
[10] Transcript P. 162 LL. 3-25, (R.___); P. 163 LL. 1-8, (R.___); P. 174 LL. 24-25, (R.___); P. 175, LL. 1-25, (R.___); P. 176 LL. 1-25, (R.___); P. 177 LL. 1-25, (R.___); P. 178 LL. 1-4, (R.___).
[11] Gardner Deposition P. 48 LL. 15-25, (R.___); P. 49 LL. 1-3, (R.___).

"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. Conversely, lands gradually encroached upon by water cease to belong to the former riparian or littoral owner. The rule 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. It ensures that riparian land will remain riparian, whatever changes may take place in the adjacent watercourse or shoreline by accretion or reliction. The law gives the riparian proprietor the benefit of additions to his land caused by accretion or reliction. However, it also requires him to bear the corresponding risk that land will be lost by gradual erosion or submergence. The rule is said to rest on the principle of natural justice that one who sustains the burden of losses imposed by the contiguity of waters shall be entitled also to whatever benefits they bring." Horry County v. Woodward, 282 S.C. 366, 369-370, 318 SE 2d 584 (Ct. App. 1984), (Internal Citations Omitted).

Witness Fanning's Rebuttal Testimony

Mr. Fanning, Appellant/Landowner's expert witness, on being recalled to the stand, contradicted Mr. Cook's testimony and described that by using the plats and the Beaufort County grid system, a surveying tool that was contemporary with the plats, that he was able to locate the southern boundary of the property.[12]

ARGUMENT

Summary of Argument

[12] Transcript P. 310 LL. 16-25, (R.___); P. 311 LL. 1-25, (R.___); P. 312 LL. 1-6, (R.___).

Appellant's argument is a simple one. The Trial Court in this case agreed with Appellant and found that the State of South Carolina deeded the 95.27 acre parcel to Plaintiff's predecessor in interest, intending to convey property between the high and low water mark on the Beaufort River, (R.___). However, the Trial Court then improperly determined that the description of the property was inadequate to convey the property to Appellant's predecessor in interest. The law is clear that the ultimate fee in every tract of land must rest somewhere. Title to real estate cannot be held in abeyance; it must be vested somewhere. Abrams v. Templeton, 465 S.E.2d 117,121 (Ct. App., 1995), (Internal Citations Omitted). The Trial Court, having correctly determined the Grantor's intent to convey the Property, failed in its duty to discern and carry out the Grantor's intent. The determination of a Grantor's intent and carrying out that intent is a matter of law and this Court is not bound by the Trial Court's findings. The determination of ambiguity is a question of law for this Court to determine, not being bound by the Trial Court's findings. The Trial Court, over the Appellant's objection, erroneously allowed testimony to try to create an ambiguity in a deed where none existed, R.___). Assuming that there was an ambiguity, the Trial Court erred in allowing Intervenor's extrinsic testimony over the objection of the Appellant since they were not offered to resolve the ambiguity. Assuming that the Trial Court did not err in allowing the Intervenor's testimony the Trial Court erred in that there was no evidence to reasonably support the Trial Court's findings. The arguments surrounding the Intervenors are also simple.

The Trial Court erred when it allowed any of the parties to intervene. The State of South Carolina has, by Statute created a methodology whereby entities or individuals who

claim title to marshland, as defined in the Statute to bring litigation against the State of South Carolina to determine who has superior title. Because no other party (any of the Intervenors), claimed an interest in the real estate, they should not have been allowed to intervene. Likewise, under principles set out in the South Carolina Rules of Civil Procedure, the Intervenors should not have been allowed to Intervene, nor should the Trial Court, at Appellant's expense, have allowed a very large number of other intervenors into the litigation. Furthermore, under the standards required to establish standing in this State, Intervenor Merry Land does not meet those standards and thus should not have been allowed to participate in the Trial.

Appellant timely objected to the introduction of witness testimony, by deposition, where the witness/deponent should have been called to testify at Trial but was not. The failure to call the later added witness was a failure by Intervenor Merry Land's counsel and that failure should not have been excused by the Trial Court, to the prejudice of the Appellant.

Appellant was not given the opportunity to make oral post-trial motions after the long delayed post trial testimony of Intervenor, Merry Land's witness, in violation of the South Carolina Rules of Civil Procedure and against the interests of the Appellant.

ARGUMENT

I. THE TRIAL COURT ERRED AND MISAPPREHENDED AND MISAPPLIED SOUTH CAROLINA LAW, WITH REGARD TO THE CONVEYANCE IN ISSUE.

The Deed in Controversy.

In the instant case the deed in question is an 1891 grant from the State of South Carolina to Appellant's predecessor in interest, (EXH 2, R.___; and Exhibit 2A, R.___). The tract is further described as "Being a parcel of tract of land on the Beaufort River in the County and State aforesaid and lying between high and low water mark on river above mentioned. Having such shape, form and marks as are represented by a Plat of said land on file in the office of the Secretary of State in Book 1 or Public Land Plats, Page 16…", (Exh 2, R.___ and Exhibit 2A, R.___). There is a contemporaneous Plat dated, July 1891, showing the 95.27 acre tract and a second, earlier Plat dated 1882, which shows a larger 114.12 acre tract from which the 95.27 acre tract is derived, (Exhibit 3, P. 20, R.___).

Interpretation of the Deed to Crofut (Appellant/Landowner Hoyler's Predecessor).

The Trial Court agreed with Appellant and found in its May 27, 2016 Order, Paragraph 1 under "Conclusions", that in the deed from the State of South Carolina to Crofut, Plaintiff's predecessor in title that the grant "was legally permissible and, although was an alienation of the public trust land, was allowed because the ***intent*** to grant tidelands between the high water and low water was clearly expressed." (Emphasis not in original), (Order Paragraph 1 p. 33, R.____).

By these words, the Trial Court ruled that Appellant had met his burden of proof

under Section 48-39-220 of the S.C. Code of Laws as amended and as interpreted by the Courts in this State.[13] [14]

However, the Trial Court further found that, "...because of the vague and incomplete survey and description, (in the deed and plat, Appellant's) request to declare title to tidelands is, hereby, Denied, (Order Paragraph 2 P. 33, R.___). This is in error because no effort was made by the Trial Court to effectuate the intent of the grantor, which is the primary goal of all Courts in this State. The Trial Court's decision results in a forfeiture of the Appellant's rights to the Property which he and his predecessors in title have held for over one hundred years.

This Court Reviews *De Novo.*

"The determination of the grantor's intent when reviewing a clear and unambiguous deed is a question of law for the court. This court reviews questions of law *de novo*. In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court." Proctor v. Steedley, 398 S.C. 561, 730 S.E.2d 357, 363 (S.C. Ct. of App., 2012), (Internal Citations Omitted).

"One of the first canons of construction of a deed is that the intention of the grantor must be ascertained and effectuated if no settled rule of law is contravened, " Bennett v.

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[13] "To establish fee simple ownership of the marshland tract, therefore, [Lowcounty Open Land Trust] must show (1) its predecessors in title possessed a valid grant, and (2) the grant's language was sufficient to convey the land below the high water mark to Peronneau." Lowcountry Open Land Trust v State, 347 S.C. 96, 103. 552 SE 2d 778 (Ct. of App. 2001).

[14] The intent of the State to divest itself of the 95.27 acre tract lying between the low and high water marks is now **the Law of The Case**. Ulmer v Ulmer, 369 S.C. 486, 490-491, 632 S.E.2d 858 (SC 2006), (emphasis added).

Investors Title Ins. Co., 370 S.C. 578, 590, 635 S.E.2d 649 (S.C. App., 2006), (Internal Citations Omitted).

"Moreover, in ascertaining such intention the deed must be construed as a whole, and effect given to every part thereof, if such can be done consistently with law." Bennett v. Investors Title Ins. Co., *supra,* at p. 59), (Internal Citations Omitted). "As a general rule, when maps, plats, or field notes are referred to in a grant or conveyance they are to be regarded as incorporated into the instrument and are usually held to furnish the true description of the boundaries of the land...." Bennett v. Investors Title Ins. Co., *supra,* at p. 594.

The first question that this Court should ask is: are there settled rules of law that are contravened by the Trial Court in ascertaining and effectuating the intent of the Grantor, the State, to Crofut, Appellant's predecessor in title? Because the tract in question involves alienation of State land, the proper question is (**i**) could the State convey and (**ii**) did the State convey it?

Beyond, "...the ... principle of tidelands law, it is well settled that the State comes into court with a presumption of title, and, if an individual is to prevail, he must recover upon the strength of his own title, of which he must make proof. It is further a settled rule of construction that a grant by the government to a subject is construed most strongly against the grantee and in favor of the grantor." State v. Fain 273 S.C. 748, 752, 259 S.E.2d 606 (1979), (Internal Citations Omitted).

However, if the State or one of its royal antecedents has conveyed tidal property, the

State does not hold presumptive title.[15] Once the State divests itself of property, it "... must prove by positive evidence that it regained title in some manner at a subsequent time."[16]

The Trial Court affirmatively answered the question of whether or not there are any settled rules of law that are contravened by effectuating the intent of the Grantor in the negative when it agreed with Appellant and found in its Order that the grant, "...was legally permissible and, although was an alienation of the public trust land, was allowed because the intent to grant tidelands between high water and low water was clearly expressed." (R.___).

Having satisfactorily answered the preliminary questions of (**i**) could and (**ii**) did the State intend to convey the tract of marshland to Crofut, the only question left for decision by the Trial Court and now this Court was; what quantity of real property did the State of South Carolina convey to Crofut?

[15] The rule that the State comes into court with a presumption of title, which is the correct rule when lands have never been granted by the sovereign, does not apply when lands have once been granted, as they were in this case. State ex rel McLeod v. Sloan Const. Co., 284 SC App 491,500, 328 SE 2d 84 (S.C. Ct. of App. 1985), (Internal Citations Omitted).

[16] State ex rel McLeod v. Sloan Const. Co., 284 SC App 491,494, 328 SE 2d 84 (S.C. Ct. of App. 1985), (Internal Citations Omitted).

The Trial Court erroneously answered this question by finding that the State of South Carolina had engaged in a transaction that resulted in a nullity. The Trial Court found that the "...length and placement of the high-ground (western) boundary is of paramount importance and this Court finds that the Plaintiff can prove no more than a rough approximation. The granting plat is nothing more than a hand-drawn sketch. This Court accepts the testimony that the survey cannot 'close' or be accurately placed and is therefore unacceptable. An accurate description of a grant of property between high and low water in an area so interwoven with navigable watercourses and dozens of small marshy knolls must have more detail and accuracy than is given here." (Order Paragraph 2 Pg. 33, R.___).

In examining these conclusions *seriatim*, this Court should come to the conclusion that the Trial Court erred, as a matter of law, in reaching its Conclusions and reverse the Trial Court's findings.

The Trial Court's Order further read, "The length and placement of the high-ground (western) boundary is of paramount importance and this Court finds that the Plaintiff can prove no more than a rough approximation." (Order Paragraph 2 Pg. 33, R.____). It is axiomatic that the State of South Carolina is presumed to own land with, few exceptions, below the high water mark and adjacent to marshland.

Because none of the Intervenors in this case made any claim to any land below the

high water mark ***the high water mark is boundary for them,*** whether or not, the State of South Carolina or Appellant owns the marshland adjacent to them. The converse of that legal conclusion is also true. Whoever owns the marshland, neither the State of South Carolina nor Appellant can claim land above the high water mark as against the Intervenors. South Carolina also recognizes the dynamic nature of tidelands and that there is a likelihood that those boundaries between the high and low water marks can change over time, Horry County, *supra.*

This legal conclusion is implicit in Section 48-39-220, S.C. Code of Laws, (1976, as amended), because the putative owner of marshland, as defined in that Statute, can only claim between the mean high and mean low water marks. This legal conclusion is explicitly set out in Horry County *supra*, in which the Court discusses the natural ebb and flow of a littoral or riparian property can diminish or enhance the property but the property owner would always have property adjacent to water. Thus, from a legal standpoint, the plat adds nothing to the western boundary determination because the boundary is always the high water mark.

Also from the Trial Court's Order, "The granting plat is nothing more than a hand-drawn sketch. This Court accepts the testimony that the survey cannot 'close' or be accurately placed and is therefore unacceptable." (Order Paragraph 2 Page 33, R._____). These are factual conclusions and of no import to a legal inquiry.

However, the Trial Court's finding that, "The granting plat is nothing more than a

hand-drawn sketch" (Order Paragraph 2 P. 33, R.___), is factually inaccurate. None of the Trial experts described it in that fashion. It is described in the deed as a plat, and by Appellant's expert as a plat and by the Intervenor's witness(s) as a plat, albeit one whose courses and distances are sometimes hard to read. (Cook, P. 264 LL. 12-25, R____; P. 265 LL. 1-19, R.____); (Gardner P. 14 L. 1- P. 16 L. 25, R.___; P. 17 LL. 1-11, R. ___). Having determined the intent of the State of South Carolina's grant, the Trial Court cannot undo what it has determined was the Grantor's intent, but the Trial Court should have affirmed the description in the deed as the State of South Carolina intended.

Also from the Trial Court's Order, "An accurate description of a grant of property between high and low water in an area so interwoven with navigable watercourses and dozens of small marshy knolls must have more detail and accuracy than is given here.", (Order Paragraph 2 Page 33, R._____). The legal implications of this finding are again unimportant. The importance of the potential for navigable streams throughout the property are discussed in detail below, but they have nothing to do from a legal standpoint with the location of the property or the intent to convey it. Assuming *arguendo* that there are navigable streams there may be some implication for ownership as between Appellant and the State of South Carolina.

Because the Trial Court found that the State had conveyed the property to Mr.

Crofut, Appellant/Hoyler's predecessor in interest, there is no implication for the deed description. The navigable streams do not consume the tract but merely run through it. As discussed in Horry County, *supra*, littoral and riparian properties change under the pressure of the rivers or tides. In the instant case, navigable streams may arise and/or disappear over time and so, assuming *arguendo* that the State owns the navigable streams, they do not diminish the ownership of the vast majority of the property which is not navigable at low tide and which the Trial Court determined had been properly deeded by the State.

The Trial Court, erred as a matter of law when it did not follow what it admittedly found as the clear intent of the Grantor and the Trial Court improperly failed to affirm the Property in the Grantee's successor in title, Appellant, Hoyler.

The Trial Court should have followed the guidance of this Court and the Supreme Court when looking at old plats which related to tidal Property. This Court and the Supreme Court of South Carolina have held (**i**) that property was properly conveyed to individuals based on vague descriptions and old plats which are not as accurate as modern day plats,[17] (**ii**) have found incomplete plats to be acceptable[18], and (**iii**) even when deciding against a claimant, have had no trouble in relying on vague descriptions and old plats when rendering a decision.[19]

Finally, the Respondent, the State of South Carolina, raised no issue regarding the

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[17] State v. Holston Land Company, 272 S.C. 65, 67,248 SE 2d 922 (1978); Conch Creek Corp. v. Guess, 263 S.C. 211, 212-213, 209 SE 2d 560 (1974).

[18] The annexed plat is drawn to a scale of one inch to twenty chains. The perimeter lines of the plat consist primarily of segments of straight lines identified by distances and magnetic courses, with the corners and line points identified as trees of specified variety and designated marks. *Only on the northwest corner of the platted property near the bridge over Hobonny Creek is the boundary not shown as a straight line with specified courses and distances.* Hobbony Club v. McEachern 272 S.C. 392,395, 252 S.E.2d 133 (1979), (Emphasis Added).

[19] State v. Hardee, 259 S.C. 535, 537-538, 193 SE 2d 497 (1972).

intention of the State of South Carolina with regard to the description of the Property which it conveyed to Appellant's predecessor in interest with one exception, whether navigable waters which might run through the Property were conveyed to the Appellant. The State of South Carolina, on cross examination and in argument, raised the issue of whether or not the description in Appellant's deed which included, "... all woods, ***water courses***, profits, commodities, appurtenances and hereditaments..." included navigable stream beds which were encompassed by Appellant's property. (Trial Exhibit 2 R.___; and Exhibit 2A, R.___).

Appellant does not concede that there are any navigable water courses within the property conveyed to his predecessor in title and even if there were, it is clear that the State intended to convey them.

However, the intention of the parties to the deed, to convey the marshland, is not adversely affected by this contention. The deed may simply be interpreted to read that the State of South Carolina conveyed those water courses that were not navigable and which it had clear authority to convey and those which were navigable it never intended to convey as against settled law and public policy. It is of course, impossible to know what navigable water courses existed at the time of the conveyance and which have arisen as a result of the natural ebb and flow of property inundated by the Beaufort River twice daily. However, if this Court finds that the State's intention to convey those navigable water courses is not compatible with South Carolina law, then the navigable water courses would be exempted from that portion of the property that lies above them, which is the majority of the property conveyed by the State of South Carolina.

No Material Vagueness of Deed and Plat.

The Trial Court's primary error stems from finding an ambiguity in the deed through its annexed plat where none exists. That too is a decision that this Court can correct without deference to the Trial Court's decision.

The determination of whether language in a deed is ambiguous is a question of law." Proctor v. Steedley, 398 S.C. 561, 730 S.E.2d 357, 367 (Ct. App., 2012), (Internal Citations Omitted).

"It is fundamental law in this state that if a deed description is unambiguous, extrinsic evidence cannot add to, subtract from, vary or explain its terms, in the absence of fraud, accident or mistake in its procurement." Bellamy v. Bellamy, 292 S.C. 107,111, 355 S.E.2d 1 (S.C. App., 1987), (Internal Citations Omitted). Because no fraud, accident or mistake is argued by either party this Court must find the deed and its attached plat to be ambiguous to allow any extrinsic evidence into the proceeding to resolve the ambiguity.

The deed and attached plat are unambiguous and the language in the four corners of the deed and attached plat are ample evidence for this Court, not being bound under these circumstances to defer to the Trial Court, to determine the clear intent of the Grantor without resort to extrinsic evidence, (Trial Exhibit 2, R.____; Exhibit 2A, R.___; Exhibit 3, R.____). The property can be readily identifiable from the plat and this Court is free to make that determination and confirm the property in the Appellant. "Where the description on a deed can be related to the land, **parole (*sic*) evidence is inadmissible since extrinsic evidence is to be admitted to resolve ambiguities, not create them**." Kirven v. Bartell, 266 S.C. 385, 389, 223 S.E.2d 597 (1976), (Internal Citations Omitted), (Emphasis added).

Appellant asserts that the deed and plat incorporated into it are not neither "vague"

nor "incomplete" and this Court should determine that either separately is, or taken together are, adequate to the task of "locating the land", (Kirven *supra,* at pg. 389), that the State of South Carolina intended to convey to Mr. Crofut, (Order, pg. 33, R. ____). Should this Court determine as a matter of law that the deed and attached plat are vague, then the question before the court becomes one of fact rather than one of law. Under those circumstances this Court would typically defer to the Trial Court's findings of fact because this type of litigation is a legal one rather than an equitable one. "A ***determination of title*** is legal in nature. Because this is a law case tried by the master alone with direct appeal to the Supreme Court, our review is limited to correcting errors of law. Accordingly, we will affirm the master's factual findings if there is any evidence in the record which reasonably supports them." Low Country Open Land Trust, *supra*, at 101-102 (Emphasis Added).

However, there is a substantial difference in this case and the Low Country Open Land Trust case. In the Low Country Open Land Trust case the Court was trying to determine whether title to the land was in the State or in the Low Country Open Land Trust and another issue regarding "wharfing out" which is not relevant to this case. Once the Trial Court had determined the title was in the Low Country Open Land Trust and there was no right to "wharf out" the appeal ensued. In the instant case the Trial Court has agreed with Appellant and already determined the title to be in the Appellant and not the State. (Order Paragraph 1 P. 33, R.____), thus resolving the legal question which is now the Law of This Case. Ulmer v Ulmer, *supra.*

The only question before this Court under these circumstances is the extent of the grant; not its quality or in whom title lies. There are two types of ambiguities which are recognized in documents in South Carolina.

"Ambiguities,(...) are patent and latent; the distinction being that in the former case the uncertainty is one which arises upon the words of the will, deed, or other instrument as looked at in themselves and before any attempt is made to apply them to the object which they describe, while in the latter case the uncertainty arises, not upon the words of the will, deed or other instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe. " Bellamy v. Bellamy, 292 S.C. 107,110, 355 S.E.2d 1 (Ct. of App., 1987), (Internal Citations Omitted).There are no apparent patent ambiguities in the deed or plat and so the Trial Court had to have found a latent ambiguity when it applied the deed and plat to the land which the State was conveying to Crofut.

The ambiguities recognized in South Carolina are not used to nullify a conveyance, but only to determine the intent of the grantor, so that the paramount concern of the Court may be addressed. "When the language in a deed is ambiguous, extrinsic evidence is admissible to aid the court in determining the grantor's intentions. See, Bellamy v. Bellamy, 292 S.C. 107, 111, 355 S.E.2d 1, 3 (Ct. of App. 1987)" Smith v. Rucker, 357 S.C. 532, 537, 593 S.E.2d 497 (Ct. of App., 2004).

The Trial Court erred in allowing in any extrinsic testimony to dispute the clear language of the deed and plat. "The rule of construction of a deed is that all parts of a description should be taken together and no part suffered to control absolutely the others...

So it often happens that facts outside of the deed, **not inconsistent with its terms**, may have a powerful effect." Smith v. DuRant 236 S.C. 80, 87-88, 113 S.E.2d 349 (1960) (Internal Citations Omitted), (Emphasis Added).

Appellant submitted allowable expert testimony to show that the deed and plat intended to convey land between the low and high water marks which and has regularly been used and found admissible in other trials of this nature, notably in Low Country Open Land Trust v State [20]. The Appellant's expert surveyor recreated the plat incorporated in the original deed (Exhibit 4, R___) which showed that all of the property conveyed was marshland and overlay his resurvey with the incorporated plat and it showed that they coincided to a substantial degree (Transcript P. 86 LL. 20-25, R.____; P. 87 LL. 1-25, R.____; P. 88 LL. 1-25, R.____; P. 89 LL. 1-7, R___). While the main purpose of the testimony was to establish the property conveyed as being marshland, it also indirectly served to locate the property conveyed with remarkable specificity (R___).

Later in the Trial, the Trial Court erroneously allowed in two witness surveyors for the Intervenor Merry Land to testify, over the objection of Appellant. **Neither of the surveyors offered by the Intervenor, Merry Land, did any field work**, although they normally would, (Trial Transcript P. 259 LL. 11-25, R.____; P. 260 LL. 1-3, R.___). Also,

[20] Given the limitations of surveying in 1836, the results of placing the 1836 overlay on top of the modern photo map[s] are remarkable. It is possible to identify numerous geographic features, including many inlets that still remain visible. Lowcountry Open Land Trust, *supra* at p. 105.

they were never asked to try to recreate the plat, so at a minimum even if their testimony is admissible, it is of limited value. The testimony of Mr. Cook and the Intervenor, Merry Land's Attorney characterization of that testimony showed that Mr. Cook's testimony was offered to elicit the difficulty in closing the plat, not that he couldn't close it. (Trial Transcript P. 263 LL. 12-25, R.____; P. 264 LL. 1-25, R.____; P. 298 LL. 2W3-24, R.___; P. 299 LL. 1-3, R.___).

Appellant asserts that Intervenor Merry Land's testimony is immaterial and irrelevant, because their testimony was intended to create ambiguity, rather than resolve one. Kirven v Bartell, *supra*, at 389.

Even if the Intervenor's witness testimony was admissible, then their testimony is valueless to aid the trier of fact in resolving the Grantor's intent with regard extent of the conveyance. "' In Brownlee v. Miller, 208 S.C. 252, 37 S.E.2d 658, 662, it was contended that a deed should be set aside because of insufficient description and this Court said: 'The rule of law recognized in our courts is well expressed in the following excerpt from the opinion of the Supreme Court in the case of McNair v. Johnson, 95 S.C. 176, 179, 78 S.E. 892: Another maxim of law applicable to this case is: "That is sufficiently certain which can be made certain." Crocker v. Evans, 216 S.C. 305, 57 S.E.2d 754,755 (S.C., 1950).

In the instant case, as was the case in the Crocker case, the original plats could be made certain with the exertion of some surveying effort, which the Appellant's surveyor made and which the Intervenor's surveyors did not make.

Later in the Brownlee case the Court states: "Applying the rule thus laid down to the

case at bar, it is quite clear that the description was sufficient to enable a person of ordinary prudence acting in good faith and making inquiries suggested by the description to enable him to identify the land." Crocker v. Evans, 216 S.C. 305, 57 S.E.2d 754,755 (S.C., 1950).

It is interesting to note that both of Intervenor Merry Land's surveyor witnesses, were limited by Intervenor Merry Land in that they were not asked to go further than a preliminary reading of the original plats, (Cook Transcript P. 268 LL. 6-25, R.____; P. 269 LL. 1-3, and LL. 10-16, R.____); (Gardner Deposition P. 27 LL. 1-9, R.____; P. 30 Paragraph 14, R.____; P. 42 LL. 16-25, R._____; P. 43 LL. 1-22, R.____; P. 49 LL. 1-23, R.____).

A conclusion could be drawn that Intervenor Merry Land was concerned with what it might find were it to ask the surveyors to actually do field work. One of them, Intervenor Merry Land's witness, Jim Gardner indicated field work was the next step to locating the property and overcoming any deficiencies in the plat attached to the deed, (P. 43 LL. 7-22, R.___; P. 49 LL. 20-22, R.___). Intervenor Merry Land's witness Gardner, further acknowledged the difficulty in working with old plats such that there were no tolerance for error in closing a plat at the time the old plats were made, (P. 30 LL. 2-8, R. ___) and the training (P. 30 LL. 9-17, R.___) and equipment available to the surveyors was rather primitive (P. 26 LL. 1-9, R.___).

Additionally, Intervenor, Merry Land's witness Cook, believed that he could generally locate the Property from one of the attached plats in evidence. (P. 268 LL. 1-25, R.___). When asked what information Intervenor, Merry Land's witness Cook would need to recreate a plat like the 1882, plat Mr. Cook responded that he, "Would look at the records of the county. You would look at plats and records that you were given by the

attorneys." (P. 259 LL. 11-25, R.___; P. 260 LL. 1-25, R. ___; P. 261 L. 1, R.___). When asked if he would use the grid system in Beaufort County, he answered that he might or might not, (P. 261, LL. 2-4, R.___).

This is not the work of persons acting with ordinary prudence, and neither of Intervenor, Merry Land's witnesses did any field work, or acting in good faith, being stopped short of the next step to determine the location of the tract in question (Cook Transcript P. 268 LL. 6-25, R.____; P. 269 LL. 1-3, and LL. 10-16, R.____); (Gardner Deposition P. 27 LL. 1-9, R.____; P. 30 Paragraph 14, R.____; P. 42 LL. 16-25, R._____; P. 43 LL. 1-22, R.____; P. 49 LL. 1-23, R.____).

The Trial Court points out that the plat created by Appellant's expert relies on the mean high and low water marks rather than the "calls" on the 1891 plat and finds that as a reason to reject it. (Order p. 30 Paragraph 13, R._____.) The Trial Court's Order, mistakenly rejects the general rule regarding the weight to be given to evidence regarding the location of boundaries (first relying on natural boundaries, next artificial monuments, then to adjacent boundaries and last to courses and distances) and finds that some cases may… require than an inferior means of location be preferred over a higher means of location, Williams v. Moore, 400 SC 90,104, 733 SE2d 224 (Ct. of App. 2012), (Internal Citations Omitted).

There is no reason that the general rule should be rejected under the instant circumstances and the Trial Court mistakenly rejects natural boundaries, the high and low water marks for static boundaries.

First, the statute, Section 48-39-220, S.C. Code Ann., (1976, as amended), under

which this case was brought, defines the boundaries of tidelands as being between mean high water and mean low water of navigable water.

Second, the State of South Carolina recognizes the dynamic nature of a marshland to gain and lose area due to accretion and erosion. Therefore, the Trial Court's reliance on a static boundary is contrary to South Carolina law. "Significantly, under South Carolina law, wetlands created by the encroachment of navigable tidal water belong to the State. Proof that land was highland at the time of grant and tidelands were subsequently created by the rising of tidal water cannot defeat the State's presumptive title to tidelands." McQueen v. South Carolina Coastal Council, 354 S.C. 142, 150. 580 S.E.2d 116 (S.C., 2003), (Internal Citations Omitted), See also, Horry County v Woodward, *supra.*

Finally, explaining the dynamic nature of the natural monuments, the Appellant's expert witness at Trial, stated that the bearings and distances on the plat in the 1800s represented the location of the mean high and mean low water marks as they existed at that time and his bearings and distances represented the mean high and mean low water marks as they exist today, (Transcript p. 176 LL. 11-19, R.___). **This shows that the plats are the same except for the expected movement of the tidelands adjacent to the Beaufort River**.

This Court should correct the Trial Court's erroneous admission and reliance on the Intervenor Merry Land's witness in Court and late filed surveyor's testimony. The Trial Court should have found it to be inadmissible because it did not support the Grantor's intent. Additionally, none of the evidence submitted by the Intervenor reasonably supports

the conclusions of the Trial Court.

Given the limitations placed on the experts by the Intervenors and the fact that Appellant's expert's boundary survey falls on nearly the exact position of the old plats, and was following the same natural monuments for the eastern and western boundaries, the only reasonable conclusion, that the Trial Court could have reached, is that tract was readily identifiable as being the property that the Grantor intended to convey.

Finally, again assuming that the Trial Court found ambiguity in the deed and plat(s) from the State of South Carolina to Crofut, the Trial Court, based on the resurvey should have rejected the old plat(s) and used the resurvey submitted by Appellant's expert witness at Trial. (R.).

The Supreme Court of South Carolina has previously found, "...'Where, on the face of a deed, the intention to convey a particular tract of land, is clear, but the description, by metes and bounds, is, upon a survey for the purpose of locating the tract, ascertained to be erroneous, the description by metes and bounds will be rejected as surplusage, and the land located so as to cover the tract clearly intended to be conveyed.'" Smith v DuRant, 236 S.C. 80, 87, 113 S.E.2d 349 (1960), (Internal citations omitted).

In summary, this Court should find that the intent of the Grantor was accurately determined by the Trial Court and that, as a matter of law, the deed and plat(s) are sufficient to convey the property intended. This Court should determine as a matter of law that the deed and plat(s) contain no ambiguity and the intent of the Grantor should be carried out. If this Court should determine that there is and ambiguity in the plat then it should not allow any extrinsic evidence which is inconsistent with terms of the deed and plat(s). If this Court allows extrinsic evidence which is inconsistent with the terms of the deed and plat(s)

then it should find that there is not any evidence which reasonably supports the results of the Trial Court's findings of fact.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING INTERVENTION OF ADJACENT UPLAND PROPERTY OWNERS, IN THIS CASE.

"Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the action. See, Black's Law Dictionary 826 (7th ed. 1999). Intervention may be of right or permissive; intervention of right is governed by Rule 24(a), SCRCP, which is modeled after the federal rule. Intervention should be liberally granted, particularly where judicial economy will be promoted by the declaration of rights of all parties who may be affected.

However, this does not mean intervention should always be granted. Instead, "we must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a) (2)." Each case will be examined in the context of its unique facts and circumstances."

> Rule 24(a) provides:
>
> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Obviously, there is no unconditional right to intervene and the Intervenors must necessarily intervene under Rule 24(a)(2) which provides that;

... (A) party seeking intervention under Rule 24(a)(2) must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. In re Horry County State Bank, 361 S.C. 503, 508, 604 S.E.2d 723 (Ct. of App., 2004), (Internal Citations Omitted).

Trial Court's Abuse of Discretion.

It is undisputed that Intervenor Merry Land Properties, LLC filed a Motion to Intervene and that Appellant consented to the intervention reserving his right to object at a later date. When, prior to Trial, after discovery was complete and on a total failure of Intervenor, Merry Land to show any titular claim to the marshland in question, Appellant moved the Trial Court to not allow Intervenor Merry Land's participation in the Trial of the case, it was denied.

Later on, during the Trial and shortly after the presentation of Appellant's first witness, the trial court, *sua sponte*, stopped the Trial and ordered that, at Appellant's expense, have all of the adjacent upland property owners be made party defendants to this litigation (R.).

All of which was an abuse of discretion. [21]

"An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Sundown v. Intedge Industries, 383 S.C. 601 681 S.E.2d 885, 888 (S.C. 2009), (Internal Citations Omitted).

Appellant does not dispute that Merry Land made a timely request to intervene. However, he does submit that neither Merry Land nor any of the other Intervenor have any ability to "...assert an interest relating to the property or transaction which is the subject of the action; ..." The litigation is based on South Carolina's methodology for establishing title to marshland as between the State of South Carolina, which holds presumptive title, and a citizen or entity claiming title to the same property through a sovereign grant of title which is set forth in S.C. Code, Section 48-39-220, (1976, as amended).

It reads in pertinent part,

"Section 48-39-220. Legal Action to Determine Interest in Tidelands.

(A) Any person **claiming an interest in tidelands** which, for the purpose of this section, means all lands except beaches in the Coastal zone ***between the mean high-water mark and the mean low-water mark of navigable waters*** without regard to the degree of salinity of such waters, may institute an action against

[21] Appellant twice appealed the Trial Court's ruling on Intervention but the appeals were dismissed as being

the State of South Carolina *for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State*. Service of process shall be made upon the State Fiscal Accountability Authority." (Emphasis added).

The Trial Court, in order to include any of the Intervenor/Defendants in Trial had to interpret the statute to read that they had "...an interest in tidelands which ... (lie)...between the mean high-water mark and the mean low-water mark of navigable waters...(and were engaged in) an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State." There is not only no evidence that any of the Intervenors had any interest in the tidelands and there is *no claim* that they did.

"It is perhaps unnecessary to say that courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. *They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret.* The

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premature, (see Appellant Court Orders, R. ___, and R.___).

responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws. *There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction,* ***while the latter is judicial legislation,*** forbidden by the constitutional provisions distributing the powers of government among three departments, the legislative, the executive, and the judicial."[22] (Emphasis added).

The Trial Court abused its discretion in allowing the permissive Intervention of all of the Intervenors by misconstruing the plain meaning of the statutory language set out in S.C. Code, Section 48-39-220, (1976, as amended), which only allows parties claiming a "right, title or interest" below the high-water mark, which in this case are the Appellant and the State of South Carolina.

Those are the only necessary parties to the action because the Statute specifically includes only individuals or entities that have a dispute over any right title or interest in the 95.27 acres of tideland, and by its plain language, excludes those that do not.

Alternatively, assuming *arguendo*, that by abutting the 95.27 acres, somehow the adjacent property owners are able to meet the second prong of the permissive joinder test, the Intervenor/Defendants must fail on the third prong of the test. The Intervenors cannot "demonstrate that ... (they are) in a position such that without intervention, disposition of the action may impair or impede ... (their) ability to protect that interest". Whether the

[22] Laird v. Nationwide Ins. Co., 243 SC 388, 395, 134 SE 2d 206 (1964) citing with approval Creech v. South

Respondent, State of South Carolina or the Appellant own the 95.27 acres, neither own beyond the mean high-water mark which is the boundary between the Intervenor/Defendants and either the State of South Carolina or the Appellant. Applying the plain meaning of the Statute, the Law, the Intervenors have no interest in the outcome, because their border with either the Appellant or the State of South Carolina does not change, neither, "impairing or impeding", their ability to protect their interest which is establishing a border, already established by Statute and *stare decisis,* with an, as of the time of the Trial, undetermined, adjacent marshland property owner.

Finally, the fourth prong of the test is not adequately met by the Intervenors. Since the State of South Carolina is the defendant of record under the statute and seeks to protect its interest, and therefore the public's interest in the ownership of the marshland. It is difficult to think of a more capable representative to protect the interests of the Intervenor's rights and have those interests be more aligned than the entity charged with overseeing the public trust in marshland. Low Country Open Land Trust, *supra,* at p. 111 footnote 6.

Appellant submits that the Trial Court abused its discretion in allowing the Intervenors into the case and therefore their testimony and evidence should be disregarded.[23]

III. THE TRIAL COURT ERRED IN FINDING THAT THE INTERVENORS HAD STANDING IN THIS CASE.

Carolina Pub. Serv. Auth., 200 S.C. 127, 20 S.E.2d 645 (S.C., 1942).

[23] Ironically, the Trial Court, after requiring the Appellant to pay the cost of notifying and adding all of the Intervenors but Merry Land, yet did not make a determination of the boundary between them and the State, thus proving the Appellant's point that the Intervenors were not necessary for a determination of the location of the high water boundary between them and the owner of the marshland.

The Intervenors Lack Standing.

The Trial Court abused its discretion by allowing Intervenor/Defendants to remain in the Trial because they lacked standing.[24] "Standing refers to a "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right. Standing is ... that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims. It concerns an individual's sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court. Standing is comprised of three elements:

Injury in Fact.

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not `conjectural' or `hypothetical.'

Causal Connection

"Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court."

Likely that the purported injury will be redressed by a favorable decision.

Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Burden on party seeking to establish standing

The party seeking to establish standing carries the burden of demonstrating each of the three elements." Powell ex rel. Kelley v. Bank of Am., 665 S.E.2d 237, 379 S.C. 437 (Ct. of App., 2008), (Internal Citations Omitted), (Emphasis Added).

Factually, none of the Intervenor/Defendants have standing. Under the first prong, there is no threat to any legally protected interest. Their interests are protected by S.C. Code, Section 48-39-220(A), (1976, as amended) the Statute which sets their boundaries as the mean high water mark whomsoever owns the marshland. Under the second prong, because there is not threat or an invasion of legally protected interest there is no causal connection.

Finally, there is no injury to redress, because the outcome of the Trial between Appellant and the State of South Carolina doesn't affect the boundary, only the ownership of their neighboring property.[25] Having failed to meet any of their burdens under the three prong test for standing, Intervenors should be dismissed from this case and their evidence stricken.

IV. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN GRANTING A CONTINUANCE FOR FURTHER TESTIMONY.

At the close of Intervenor, Merry Land's case and after testimony could not be

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[24] "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Sundown v. Intedge Industries, 383 S.C. 601 681 S.E.2d 885, 888 (S.C. 2009), (Internal Citations Omitted).

[25] Ironically, the Trial Court, after requiring the Appellant to pay the cost of notifying and added all of the Intervenors but Merry Land did not make a determination of the boundary between them and the State proving the Appellant's point that the Intervenors were not necessary for a determination of the location of the high water boundary between them and the owner of the marshland.

elicited from one of Merry Land's witnesses. Intervenor, Merry Land's attorney asked that the record be left open so that new testimony could be elicited from another witness, (P. 304 LL. 24-25, R.____; P. 305 LL. 1-24, R.___). Over Appellant's objection, the Trial Court allowed deposition testimony to be taken and made a part of the record. (P. 307 LL. 1-10, R.___; P. 308, LL. 12-25, R.___; P. 309, LL. 1-25, R.____). At the deposition of Jim Gardner, Appellant's attorney renewed the objection, (P. 8 LL. 6-8, R.___).

Rule 40(i)(2), SCRCP

(i) Continuance.

(2) For Absence of Witness. No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action or defense of the party moving; that the motion is not intended for delay; but is made solely because the party cannot go safely to trial without such testimony; that there has been due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that the motion is not intended for delay. ... A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matters what fact or facts he believes the witness if present would testify to, and the grounds for such belief."

The Trial Court improperly allowed Intervenor, Merry Land to delay the case, mid-trial, not prior to trial as the Rule anticipates, to locate a cumulative surveyor witness, not because the witness couldn't be present at Trial, but because Intervenor Merry Land's

counsel realized that they had not provided enough testimony before the Trial Court, to be persuasive.

Rule 40(i)(2), SCRCP is very clear in its language that no *pretrial* motion for continuance of trial shall be granted on account of the absence of a witness without the oath contemplated in the Rule. Additionally, Rule 40 contemplates *pretrial* motions for a continuance "...made solely because the party cannot go safely to trial without such testimony..." Obviously, from the record the Motion for Continuance was made too late, i.e., mid-trial, and none of the requirements of Rule 40(i)(2), SCRCP were met was only after Intervenor, Merry Land was concerned that it had not produced enough evidence or could get adequate evidence into the record that it made the Motion for a Continuance to add the testimony of the surveyor witness. By granting it the Trial Judge abused his discretion and the testimony of this witness should be excluded.[26]

V. THE TRIAL COURT ERRED IN REFUSING TO HEAR POST-TRIAL MOTIONS IN A TIMELY MANNER.

The Trial Court's Order **misapprehended or overlooked** Plaintiff's right to make Post Trial Motions. After allowing the Intervenor Merry Land to add a witness at the close of Trial and directing the filing of Post Trial Briefs the Court did not reconvene the parties as this Court ordered at the end of the Trial in November.[27]

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[26] Sundown v. Intedge Industries, 383 S.C. 601 681 S.E.2d 885, 888 (S.C. 2009), (Internal Citations Omitted).

[27] "JUDGE DUKES: All right. So what I'm going to do is hold the record open for 45 days to permit the Defendant to depose a yet to be named surveyor with regard to fact matters only, not as an expert. And 15 days after that I would like post-trial briefs from everyone. And then I would like when you submit those post-trial briefs please coordinate with Heather and let's set a conference call. Heather my assistant. And let's set a conference call roughly two weeks, 15 days, three weeks from the date of submission of the post-trial briefs so we can talk about the post-trial briefs and where we go from then. And we will try to see what we can do." (Trial Transcript, P. 310, LL. 11-24, R.____).

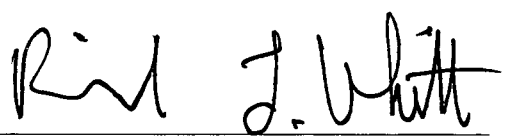
Additionally, the Court agreed in electronic mail to Plaintiff's assistant dated March 1, 2016, that "...I agree that so much time has passed that at least a follow-up conference call if not a supplemental hearing should be held for summation." (R.___).

Factually, Plaintiff's counsel specifically asked the Court to allow Post Trial Motions, by electronic mail to the Court, dated **March 1, 2016** at 1:57 p.m., and **March 28, 2016**, at 3:35 p.m., both of which are incorporated herein, by reference, (R. ___ and R. ___).

CONCLUSION

The Trial Court's decision, that takes title from Appellant/Landowner Hoyler and returns it to the State of South Carolina ,runs directly contrary to "...the salutary principle that the law abhors forfeitures and will seize on slight evidence to prevent one..." [28]. The Trial Court did everything in its power to create a forfeiture from the Crowfut deed back to the State and this Court should rule as a matter of law that the Trial Court committed error and this Court should reverse and remand to the Trial Court with appropriate instructions.

AUSTIN & ROGERS, P.A.

By: 

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28 Wimberly v Sovereign Camp W.O.W., 190 SC 158, 2 SE2d 532, 537 (1939).

December 2, 2016
Columbia, South Carolina

Austin & Rogers, P.A.

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December 2, 2016

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings,
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re:
- H. Marshall Hoyler v. The State of South Carolina, *et al.*
- Appellate Case No.: **2016-001277**
- Appellant's Initial Brief and Designation of Matter

Dear Ms. Kitchings:

Enclosed for filing, please find the following:

1. Appellant's Initial Brief;
2. Designation of Matter to be Included in Record on Appeal; and
3. Proof of Service.

Please accept these documents for filing and acknowledge receipt of the same by file-stamping the copies enclosed and returning them to me, via our courier. If you have any questions or need additional information, please don't hesitate to contact the undersigned. With best regards, I am,

Respectfully,
AUSTIN & ROGERS, P.A.

Richard L. Whitt,
Jefferson D. Griffith, III,
Attorneys for Appellant.

Enclosures
cc: J. Emory Smith, Jr., Esquire, via U.S. Mail
Mary D. Shahid, Esquire, via U.S. Mail

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-In-Equity

Civil Action No. 2007-CP-07-3212
Appellate Case No.: 2016-001277

H. Marshall Hoyler.....Appellant,

v.

The State of South Carolina, Merry Land Properties, LLC,
Sherbert Living Trust, Supan Living Trust, Elizabeth R. Levin,
Edward McCray Wise Revoc. Living Trust,
Carol Ann Devries Wise Revoc. Living Trust,
Amelie Cromer, Philip Cromer, Robert Chiavello, Tocharoen Living Trust,
Helen M. Olesak, Lesley Anne Glick a/k/a Lesley Anne Glick,
Shirley G. Lackey, Patricia Banfield, Bertrand Cooper, Jr.,
NHP SH South Carolina I, LLC n/k/a CCP Bayview 7176 LLC,
Oyster Cove Homeowners Assn., Shirley Ann Moyer,
Barry D. Malphrus, Garry D. Malphrus, Donnie Malphrus,
Rita Brown, Houston Family Partnership, Joan Taylor Trustee,
Michael Bull, Nancy Bull, Marny H. VonHarten, Dianne M. Donaldson,
Brian R. Evans, Stephen Durbin, Valerie Durbin, Phillip Marti,
Jane Marti, Michael Woodworth, Georgiana M. Cooke, Daniel B. Walsh,
Janet E. Walsh.....Respondents.

PROOF OF SERVICE

I, Carrie A. Schurg, an employee of Austin & Rogers, P.A., certify that I have caused Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal and this Proof of Service, to be served via U.S. Mail, on December 2, 2016, as addressed on the following page.

ORIGINAL

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December 2, 2016
Columbia, South Carolina