THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas
Marvin H. Dukes, III, Master-In-Equity

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 Ann 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 RESPONDENT STATE OF SOUTH CAROLINA

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STATEMENT OF ISSUES

1. Whether the Court must affirm the Master's factual findings because evidence supports them?
2. Whether the State owns the bottoms of any tidal waterways crossing the property at issue?
3. Whether precedent exists for other abutting landowners participating in the litigation.
4. Whether the Master acted within his discretion in leaving the record open for the taking of the Gardner testimony?
5. Whether Appellant has shown any error, abuse of discretion or prejudice in the Master's not entertaining Post-trial Motions.

ARGUMENT

I

THE MASTER'S FINDINGS MUST BE AFFIRMED BECAUSE THEY ARE SUPPORTED BY SOME EVIDENCE

> An action to determine ownership of tidelands pursuant to section 48–39–220 is an action at law. *See Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct.App.2006). In an action at law, tried without a jury, our scope of review extends to the correction of errors of law. *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct.App.2000). Furthermore, "the trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the [court's] findings."

Grant v. State, 717 S.E.2d 96, 98, 395 S.C. 225, 228 (Ct..App. 2011)(emphasis added); *see also, Lowcountry Open Land Trust v. State*, 552 S.E.2d 778, 781, 347 S.C. 96, 101–02 (Ct. App.,2001). Therefore, this Court must affirm the Master's findings of fact if any evidence supports them. Because evidence supports those findings, they must be affirmed.

II

WHETHER EVIDENCE SUPPORTS THE MASTER'S DETERMINATION THAT THE GRANT AND PLAT ARE INSUFFICIENT TO LOCATE THE PROPERTY CLAIMED

"The State of South Carolina holds presumptive title to all land below the high water mark in trust for the benefit of its citizens. *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E. 2d 116, 119 (2003). To rebut the State's presumptive title, a claimant must show (1) its predecessor in title possessed a valid grant, and (2) the grant's language was sufficient to convey land below the high water mark." *Grant v. State*, *supra,* 717 S.E.2d at 98.

As follows, the Master found the grant and plat at issue in this case insufficient:

1. The Tillman Grant to Crofut 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.

2. However, the boundaries of the grant remain uncertain. 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. This Court would be required to resort to guesswork to accurately find the boundaries of the claimed property.

IT IS THEREFORE ORDERED THAT because of the vague and incomplete survey and description, Plaintiff's request to declare title to tidelands is, hereby, DENIED.

The State does not contest that the grant shows an intent to convey marshland in that it expressly states that it conveys land "between high and low water mark" and references a plat of marsh, but the problem is that the location of the marsh must be precisely determined, and the evidence on its location is insufficient. Appellant states that the Master "already determined the title to be in the Appellant and not the State" (Initial Brief at p. 28), but he misreads the Order. The grant shows an intent to convey, but it does not contain an accurate description of what it is conveying. The grant contains only a general description of the location of the property and the plat it references provides insufficient guidance. As stated by the Master, "[w]hile it is evident that the State, by way of the Grant intended to convey public trust tidelands . . . [and] [t]his Court recognizes that the land conveyed by the Grant lies in the vicinity of the area but . . . [the Court] cannot determine the specific location of the grant." R. p. * (Order at p. 18, ¶ 41).

When, as here, the property conveyed by the grant cannot be accurately located, the

Appellant is not entitled to a declaration of title against the State. "A grant from the sovereign to a subject is construed strictly in favor of the government and against the grantee." *Hobonny Club, Inc. v. McEachern*, 252 S.E.2d 133, 135–36, 272 S.C. 392, 396 (1979); *see also, Lowcountry Open Land Trust v. State*, 552 S.E.2d 778, 782, 347 S.C. 96, 103 (Ct. App. 2001). The Supreme Court has emphasized the importance of accuracy in the deeds and plats in the location of property conveyed. "Where a deed describes land as it is shown on a certain plat, such plat becomes part of the deed for the purpose of showing the boundaries, metes, courses and distances of the property conveyed." *Hobonny Club,* 252 S.E.2d at 136.

Hobonny Club found a high degree of accuracy in the plats at issue in that case which is not present in the instant case:

> It is our opinion that the plats in question speak with a precision not usually attainable by mere words, and they compel the conclusion that the grantor intended to include the tidelands encompassed within the perimeters of the plats. It is difficult to imagine how more precisely to express intent as to the location of boundaries than to incorporate an accurate plat in the description. The plats incorporated in the two grants to Joseph Bryan are exceptional. They are not mere maps on which boundary waterways are drawn in free-hand to represent directions and conformations of boundaries. These plats are carefully scaled and platted so as to delineate the boundaries of the tracts granted with mathematical precision. It is undisputed that the boundaries are accurately relocatable on the ground by contemporary engineering methods. The specificity of the attached plats outweigh, in our judgment, the general terms of the descriptions in the grants in determining the intent of the grantor.

Id. The appellate Courts have rejected plats that did not meet these standards. *See eg., Query v. Burgess,* 639 S.E.2d at 457 ("[t]he plat contains the bare bones of a survey and is neither precise nor detailed;") *Grant v. State*, 717 S.E.2d at 102 (Ct. App. 2011)("in contrast to the plats in *Hobonny Club*, Grant's expert land surveyor, Bessent, testified the 1786 plat is poorly drawn and not capable of being relocated on the ground.").

The Crofut grant and plat do not meet the above standards for reasons discussed in the Court's Order including the multiple deficiencies identified by Mr. Gardner, Merry Land's surveyor, such as illegibility bearings and distances . R. p * (Order at p. 18 ¶41 – p. 20, ¶ 50.). Appellant contends that the deed and plat are unambiguous and that expert testimony was admissible only to aid in determining location. He argues that the "Trial Court erred in allowing in any extrinsic testimony to dispute the clear language of the deed and plat." Brief at p. 29. "Extrinsic evidence is admissible to resolve ambiguities, not to create them where none exists." *Bellamy v. Bellamy*, 355 S.E.2d 1, 3, 292 S.C. 107, 111 (Ct. App. 1987). In *Bellamy*, "there was no ambiguity in the description of the realty conveyed by the deed." *Id.* In the instant case substantial ambiguity is present. The Crofut grant provided no guidance as to the location of the tract conveyed, and the plat it referenced failed to provide sufficient clarity as to the location of the property on the ground.

As recognized by the Master regarding Mr. Gardner's testimony:

> [t]he CAD [computer aided drafting] tech[nician] referred to the 1891 plat for bearings and distances but was unable to read all of the "calls" even after using a magnifying glass and creating large copies of the plat in an attempt to better see the handwriting. The CAD tech also created enlarged copies of the 1882 plat but still was unable to discern the calls. As a result of this initial review, the CAD tech was only able to create a drawing of the parcel lacking any boundary at the top (northern end).

R. p. * (Order at p. 17, ¶ 39); *see also,* R. p. * (Gardner deposition, p. 24, l. 14 – p. 26, l. 25). These deficiencies in the plat led to some other shortcomings noted above by the Master. All of these deficiencies are ambiguities properly addressed by Mr. Gardner, and all provide evidence supporting the Master's decision. In contrast to *Brownlee v. Miller*, 37 S.E.2d 658, 662, 208 S.C. 252, 261–62 (1946), cited by Appellant, in which "it [was] quite clear that the description was

sufficient . . . [and] the surveyors had no trouble in locating the land . . . ," the surveyor Gardner in the instant case did have trouble locating the land. .

Appellant contends that "the plat adds nothing to the western boundary determination because the boundary is always the high water mark." Initial Brief at p. 23. This point overlooks that the evidence does not demonstrate where the marsh grant is located to determine its western extent and alignment. The plat's use of bearings, although sometimes illegible, and the grant of specific acreage, show that that the grant had a fixed western boundary that may not be where the current high water mark is located. "Significantly, under South Carolina law, wetlands created by the encroachment of navigable tidal water belong to the State." *McQueen v. South Carolina Coastal Council*, 580 S.E.2d 116, 120, 354 S.C. 142, 150 (2003). Therefore, the Court correctly found that Appellant could prove "no more than a rough approximation" of the location of the western boundary. R. p. * (Order at p. 33).

III

THE STATE OWNS THE BOTTOMS OF ANY TIDAL NAVIGABLE WATERWAYS

If any of the property at issue in this case is crossed by or bound by navigable waters, the waters remain public highways and subject to a public trust. S.C. Const. art XIV, §4; *State v. Head*, 330 S.C. 79, 498 S. E. 2d 389 (Ct. App. 1997). The State owns the beds of any such navigable tidal rivers absent express legislation. *Heyward v. Farmers' Min. Co.*, 19 S.E. 963, 973 (1894).

Appellant does not concede that such watercourses traverse the property at issue, but contends that if they are present, the State conveyed them. He asserts that waterways were conveyed because of boilerplate, form language in the Crofut deed referring to "water courses."

Such language was rejected as indicative of an "intent to include tidelands" in *State v. Fain*, 259 S.E.2d 606, 609, n. 1, 273 S.C. 748, 754 (1979) and by *Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.*, 146 S.E. 434, 440 (1928), as cited in *Fain*. As stated in *Heyward*:

> If the plaintiff can trace title back to a grant from the state to land covered by tidal, though not navigable, waters, the state would be estopped by its grant. The principle, however, is different when the land granted is covered by navigable waters, as shown by Mr. Justice McGowan in *State v. Pacific Guano Co.*, [22 S.C. 50, 84 (1884)] to wit: "The absolute rule heretofore referred to, limiting landowners bounded by such streams to the high-water mark, unless altered by law or modified by custom, accords with the view that the beds of such channels below low-water mark are not held by the state simply as vacant lands, subject to grant to settlers in the usual way through the land office. There seems to be no doubt, however, that the state, as such trustee, has the power to dispose of these beds as she may think best for citizens; but, not being, as it seems to us, subject to grant in the usual from, under the provisions of the statute regulating vacant lands, it would seem to follow that, in order to give effect to an alienation which the state might undertake to make, it would be necessary to have a special act of the legislature, expressing in terms and formally such intention.

The above authority makes absolutely clear that the Crofut deed did not, and could not, convey land below mean low water such as creek bottoms because a specific statute would be necessary to do so.

IV

THE STATE HAS NO OBJECTION TO THE PARTICIPATION OF MERRY LAND AND THE OTHER ABUTTING OWNERS AND SIMILARLY SITUATED OWNERS HAVE PARTICIPATED IN TIDELANDS LITIGATION IN THE PAST

The State assumes that Merry Land will address these issues. The State has no objection to the participation of those parties. Similarly situated parties have participated in tidelands litigation in the past. In *Query, supra,* a claimant to marshland brought suit against the State and another landowner abutting the marsh who wanted to build a dock across those tidelands. The

Master in Equity in *Query* ruled with the State and the abutting landowner that the State owned the marsh; however, should this Court, *arguendo,* determine that Merry Land should not have been allowed to intervene, the State requests that this case be remanded to the Master so the State may be given the opportunity to introduce the evidence submitted by Merry Land.

V

THE MASTER PROPERLY LEFT THE RECORD OPEN FOR THE SUBMISSION OF MR. GARDNER'S TESTIMONY

Appellant argues that the trial was improperly continued mid-trial for the taking of the deposition of Mr. Gardner citing Rule 40(i), SCRCP, as to pre-trial continuances. The Gardner testimony was not the result of a pre-trial continuances, but judges may leave the record open in trials for the submission of additional testimony. *See eg, Martin v. Rapid Plumbing,* 631 S.E.2d 547, 552, 369 S.C. 278, 287 (Ct. App. 2006)(noting party failed to move to leave record open); *State v. Vickery*, 732 S.E.2d 218, 220, 399 S.C. 507, 512 (Ct. App. 2012)(Trial court "would leave the record open" on an evidentiary issue); *Greene v. Griffith*, 2004 WL 6248971, at *4 (Ct.App. 2004)(Trial judge left the record open for ten days).

"The conduct of trial, including the admission and rejection of testimony, is largely within the trial judge's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion or the commission of legal error that results in prejudice for the appellant." *South Carolina Dept. of Highways and Public Transp. v. Galbreath*, 431 S.E.2d 625, 628, 315 S.C. 82, 85 (Ct.App. 1993). Appellant has shown no abuse of discretion in the Master's leaving the record open for Mr. Gardner's deposition testimony.

VI

THE MASTER DID NOT IMPROPERLY OVERLOOK ALLOWING POST TRIAL MOTIONS

Appellant shows no error of law, prejudice or abuse of discretion in the Judge's not entertaining post-trial motions. The parties were allowed to file post-trial briefs, and Appellant filed a Motion to Alter or Amend under Rule 59, SCRCP.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the Orders of the Master under appeal.

Respectfully submitted,

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December 29, 2016

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CERTIFICATE OF SERVICE

I certify that I have served the Initial Brief and Designation of the State upon the other parties by mailing copies to their counsel at the addresses below via the United States Mail this December 29, 2016:

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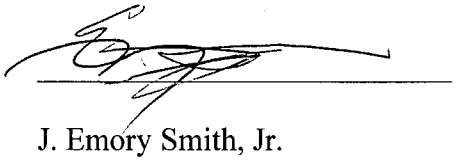

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
HAND DELIVERED

Re: Hoyler v. State of SC, et al et al Appellate Case No. 2016-001277

Dear Ms. Kitchings:

Enclosed for filing with your Office are the State's Initial Brief, Designation of Matters for the Record including a Rule 209(c) Certificate and a Certificate of Service. Please stamp the extra copy of the Brief and Return it via our couriers. Thank you for your assistance.

Respectfully submitted,

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