STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Beaufort County
Honorable 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 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 Ass'n; 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; and Janet E. Walsh,

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Respondents.

INITIAL BRIEF of the
RESPONDENT, MERRY LAND PROPERTIES, LLC

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I. STATEMENT OF ISSUES ON APPEAL

In accordance with Rule 208 of the *South Carolina Appellate Court Rules* the Respondent, Merry Land Properties, LLC ("Merry Land"), is satisfied with the *Statement of Issues on Appeal* as identified by the Appellant, H. Marshall Hoyler ("Mr. Hoyler") as to Arguments A through E. Nevertheless, Merry Land would add the following issue related to additional sustaining grounds as contemplated by Rule 220(c), *SCACR*.

ADDITIONAL SUSTAINING GROUNDS

Regardless of the ultimate disposition of ownership of the disputed marsh, Mr. Hoyler is barred from preventing Merry Land's construction of the permitted marina based upon the well-established principles of estoppel and laches.

II. STATEMENT OF THE CASE

Mr. Hoyler claims title to a parcel of marshlands in Beaufort County, referred to here as the "Disputed Marsh". The Respondent, State of South Carolina (the "State"), asserted title in the disputed marsh based on its presumptive title to all marshland within its borders. Merry Land is a land development company which acquired several parcels of adjoining property (the "Port Royal Property") seeking to construct a multi-family residential development with deep water access across and through the Disputed Marsh.

On 8 November 2007, Mr. Hoyler brought this action seeking a declaration of title to the Disputed Marsh pursuant to the applicable statutory procedures.[1] After learning of this action, Merry Land moved to intervene on 20 November 2007.[2] Merry Land's interest

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1 *See* S.C. Code Ann. § 48-39-220 (Thomson Reuters West 2013).

2 Merry Land also filed its proposed Answer and Counterclaim. (Merry Land Answer and Counterclaim, pp.1-11).

herein was based on (a) its development plans for the Port Royal Property which adjoined the Disputed Marsh and on the issuance of two separate permits3 which authorized construction of a community marina to facilitate deep water access via the Disputed Marsh. (*Def. Ex. 53-54*). Merry Land was granted intervention and in September 2010, the matter was referred to the Master-in-Equity for Beaufort County.

The Master-in-Equity convened the initial hearing on 31 January 2011. (*01/31/11 Tr.____*). During that hearing, the Master-in-Equity recognized there were approximately 36 additional abutting and/or adjoining landowners, including Merry Land, whose respective interests could be significantly adversely affected by a judicial determination in the case.**4** The Master-in-Equity stopped the hearing and orally directed that Mr. Hoyler was required to notify all adjacent property owners of the underlying law suit and allow them an opportunity to respond.**5** After moving for reconsideration, but before the motion was addressed, Mr. Hoyler appealed the joinder order. This Court of Appeals and the Supreme Court denied the appeal and returned the matter to the Master-in-Equity to consider Mr. Hoyler's still-pending reconsideration motion which was denied on 15 February 2013.**6**

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3 The permits were issued by the South Carolina Department of Health and Environmental Control ("DHEC") and by the United States Army Corps of Engineers (the "USACE"), respectively.

4 At least two of the affected adjoining landowners already had docks constructed to deep water through the Disputed Marsh.

5 The Master-in-Equity subsequently issued a written order memorializing his verbal directive. (Joinder Order, pp.1-3).

6 The Master-in-Equity also granted a pending intervention motion from the Respondent, Nancy Deering Casey, at the same hearing.

Mr. Hoyler then filed two additional appeals seeking review of the Master-in-Equity's joinder order. This Court of Appeals dismissed the second appeal, filed on 15 March 2013, on the grounds that the appeal was interlocutory and premature. Mr. Hoyler filed the third appeal while his second reconsideration motion was still pending before the Master-in-Equity. This Court of Appeals dismissed that appeal on 20 August 2013, as well as Mr. Hoyler's subsequent Petition for Rehearing. In 2015, three years after the Master-in-Equity issued the joinder order, Mr. Hoyler identified the adjoining owners and served them with notice of the action. Thirty-six additional parties were joined and the Master-in-Equity reconvened the merits hearing in this case on 19 November 2015.

After taking the matter under advisement, the Master-in-Equity issued a written order on 27 May 2016, denying Mr. Hoyler's asserted title to the Disputed Marsh on the basis that the grant's boundaries could not be properly established due to the vague and incomplete description contained in the form deed and the referenced plats which Mr. Hoyler relied upon to establish his predecessor's interest. This appeal followed.

III. STATEMENT OF THE FACTS

A. Background

The Disputed Marsh is an approximately 95-acre tract of tidelands located in the Town of Port Royal. It is an expansive tract located adjacent to the Beaufort River. The Beaufort County Tax Assessor identifies the disputed marsh as R 120 007 000 0632 0000.[1] Merry Land owns several parcels of land bordering the Disputed Marsh, as do the other named Respondents. The Beaufort County Tax Assessor identifies Merry Land's

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[1] The disputed marsh adjoins Spanish Point - an existing residential subdivision - and several other parcels and/or portions of other residential subdivisions and developments. (*11/19/15 Tr.*89-90; Def. Exhs. 48, 56).

adjoining parcels as R 110 007 000 116A, R 110 009 000 0174, R 110 007 000 116C, and R 110 007 000 116B. (*Def. Ex. 39*).[8] Merry Land purchased the Port Royal Property in 2006, specifically intending to construct a multi-family residential and mixed use development with deep water access on the Beaufort River via the Disputed Marsh. (*11/19/15 Tr.196-197*).

Even though Mr. Hoyler acquired his interest in the disputed marsh in 1979 (*Pl. Ex. 1*), he did not file this quiet title action until 2007, some 28 years later. Moreover, Mr. Hoyler did so only after Merry Land contacted him regarding the Disputed Marsh. (*11/19/15 Tr.223-225*). Mr. Hoyler claims title to the Disputed Marsh based upon a State Grant and two hand-drawn and partially illegible plats. (*Pl. Exhs. 2, 2A, 3, 3A*). On 28 July 1891, the State of South Carolina granted property to Mr. James. M. Crofut, Mr. Hoyler's predecessor-in-interest. The text of the grant is stated in a form deed as follows:

> KNOW YE, That in pursuance of the Acts of the General Assembly in relation to Vacant Lands, for and in consideration of the sum of [N]inety [S]even 27/100 [D]ollars paid to the Secretary of State by James M. Crofut the actual purchaser for value, WE HAVE GRANTED, and by these Presents do grant, unto the said James M. Crofut his heirs and assigns, a Plantation or Tract of Vacant Land, situate in Beaufort S.C. of Beaufort County and State aforesaid containing [N]inety [F]ive (95 27/100) 27/100 acres, more or less, Being a parcel or tract of land on the Beaufort River in County and State aforesaid and **lying between high and low water mark on river above mentioned**.

(Pl. Exh. 2) (Emphasis added). The grant includes reference to a plat on file with the South Carolina Secretary of State. The plat referenced in the grant is dated 19 April 1882 (the "1882 Plat"). The 1882 Plat is recorded with the grant in the South Carolina

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[8] Merry Land owns other parcels on Ribaut Road and Johnny Morrall Circle in Port Royal.

Department of Archives and History. There is a later plat, dated 1891 and contemporaneous with the grant, that was recorded with the grant in the Beaufort County Register of Deeds. (the "1891 Plat"). (*11/19/15 Tr.53-54*). Mr. Hoyler relies on these two plats to establish the Disputed Marsh's location. The 1882 Plat shows a hand-drawn outline of an irregularly-shaped parcel on the Beaufort River, bordering several other parcels. The plat contains several "calls," or stated directions and distances, but several are illegible. The 1891 Plat, recorded in Beaufort County's public records, appears to be a duplicate of the 1882 Plat. Again, many "calls" on the 1891 Plat are illegible.

Before 2007, Merry Land had no way to know of Mr. Hoyler's ownership claim over the Disputed Marsh even though Merry Land had conducted extensive due diligence before purchasing the adjoining upland tracts. In fact, four of the upland property owners who adjoin the Disputed Marsh requested and received permits from the State of South Carolina and other entities to build docks over and through the Disputed Marsh. At least two of these docks existed in 2007. (*11/19/15 Tr.212-213, Def. Exhs. 5, 9*). In addition, Merry Land had completed very public permitting procedures seeking to build a marina across the Disputed Marsh including published newspaper notices and articles regarding the proposed project. There was no indication of any competing claim of private ownership of the Disputed Marsh during either DHEC's or the USACE's permitting processes. (*11/19/15 Tr.206-213; Def. Exhs. 53-54*). Similarly, no indication of private ownership of the Disputed Marsh was revealed during a title review performed by an experienced real estate attorney who reviewed the available tax records, tax maps, deeds, and Beaufort County's GIS records. (*11/19/15 Tr.230–249*). In addition, Merry Land used a professional engineering firm and licensed professional surveyors to provide

an ALTA survey and boundary surveys. None of these professionals discovered any information and/or documentation to indicate a competing claim of ownership to the Disputed Marsh. In fact, all documents of record reviewed described the Disputed Marsh as "marshes of the Beaufort River" or simply "marsh." (*11/19/15 Tr.250-295, Def. Exhs. 1-13, 16-29, 38-39, 41-43).*

It is well-established in this State that "[t]itle to land between the high and low water marks remains in the State and is held in trust for the benefit of the public."[9] Furthermore, a "grant of tidelands by the State or a predecessor sovereign is construed strictly in favor of the State and the general public against the grantee."[10] Nevertheless, private ownership of marsh and/or tidelands property may be recognized under certain specific circumstances in accordance with South Carolina statutory law[11] which provides:

> **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 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 Secretary of the State Budget and Control Board.
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> (B) Any party may demand a trial by jury in any such action by serving upon the other party(s) a demand therefor in writing at any time after the commencement of the action and not later than ten (10) days after the service

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9 State v. Hardee, 259 S.C. 535, 539, 193 S.E.2d 497,499 (1972).

10 Grant v. State, 395 S.C. 225, 717 S.E.2d 96 (2011).

11 *See* S. C. Code Ann. § 48-39-220 (Thomson Reuters West 2014). Mr. Hoyler filed his "quiet title" action pursuant to this statute.

of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(C) Nothing contained in this chapter shall be construed to change the law of this State as it exists on July 1, 1977, relative to the right, title, or interest in and to such tidelands, except as set forth in this section.

(D) The Attorney General shall immediately notify the department upon receipt of any private suit made under this section, his response to that suit, and the final disposition of the suit. The department will publish all such notifications in the state register.[12]

In addition to the procedures contained in S.C. Code Ann. § 48-39-220, DHEC promulgated a regulatory process to address private claims of ownership of public tidelands.[13] Pursuant to S.C. Code Reg. 30-2(I), the following procedures apply:

I. **Applications Involving Adjoining Landowners Claiming Ownership of Critical Area**

(1) All permit applicants must provide information in writing concerning the ownership of critical area in or over which a project is to be constructed.

(2) The alleged adjoining landowner of critical area must be notified pursuant to the provisions of [S.C. Code Ann. §] 48-39-140(C) and [S.C. Code Ann. Reg. §] 30-2.

(3) If the alleged adjoining landowner of critical area files a written objection to the permit application within the period prescribed in [S.C. Code Ann. §] 48-39-140 (15 days for minor and 30 days for major permits) based upon a claim of ownership and indicates an intention to file a court action pursuant to [S.C. Code Ann. §] 48-39-220, the application will be deemed incomplete and further processing of the permit will not take place until a final judicial decision is rendered by a court of competent jurisdiction. However, written proof of filing a court action pursuant to [S.C. Code Ann. §] 48-39-220 must be received by [DHEC] within 30 days of the date of the expiration of the comment period. If

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12 History of statute: 1977 Act No. 123, Sec. 22; 1993 Act No. 181, Sec. 1235.

13 *See* S.C. Code Ann. Reg. 30-2(I) (Thomson Reuters West 2014).

no such written proof is timely received, the permit will be processed pursuant to law.

(4) If the final judicial decision determines that the critical area in question is owned by the adjoining critical area landowner and that the critical area landowner has a right to exclude others as part of the title, the permit will not be issued unless the applicant presents the Department with a copy of a deed, lease, or other instrument from the adjudicated critical area landowner that would allow construction of the proposed project, or written permission from such owner to carry out the proposal as provided for in [*S.C. Code Ann.* §] 48-39-140(B)(4).

(5) Permit applicants who are vested with the power of eminent domain shall be exempt from the provisions of paragraphs (3) and (4) of [*S.C. Code Ann. Reg.* §] 30-2(I).

Merry Land undertook an extensive inquiry and due diligence investigation to confirm a community marina could be constructed across public trust tidelands presumptively owned by the State of South Carolina. (*11/19/15 Tr.196-204*). Had Mr. Hoyler implemented the procedures set forth in *S.C. Code Ann.* § 48-39-220 prior to 2007, and had Mr. Hoyler prevailed, then Merry Land would have been on notice of Mr. Hoyler's claim of ownership under *S.C. Code Ann.* § 48-39-220(D) which requires immediate notification of such a claim by the Attorney General's office to DHEC. Such notification would have triggered the procedures of *S.C. Code Ann. Reg.* § 30-2(I) during the DHEC permitting processes. Merry Land would have learned of Mr. Hoyler's claim and Merry Land would not have closed on the property purchase or, alternatively, would not have paid a "waterfront access" premium for the parcels purchased.**14**

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14 Merry Land paid $4.5 million for eight acres of waterfront acreage and $1.5 million for ten acres of upland. (*11/19/15 Tr.202,* lines 13-15).

B. Mr. Hoyler's Efforts to Establish the Boundaries of the Land Grant

Mr. Hoyler retained Lorrick Fanning, a professional land surveyor, to locate the land grant's boundaries. Mr. Fanning prepared a plat (*Pl. Ex. 4*) which he described as "a plat ... prepared for M[r.] Hoyler that represents property he owns, Tax Parcel R 1200070000632." R. _____. The Fanning Plat is dated 17 December 2010 (*11/19/15 Tr.71, lines 3-5*) and Mr. Fanning used the 1882 Plat to "recreate" the boundaries of the 1891 grant. (*Pl. Ex. 3; 11/19/15 Tr.73*). As has already been noted, there is also a contemporaneous plat prepared in 1891 (*i.e.*; the 1891 Plat). The Fanning Plat depicts an 89-acre parcel.

Importantly, the land grant refers to a tract of land lying between the high water mark and low water mark on the Beaufort River. (*Pl. Ex. 3A*). Both the 1882 Plat and the 1891 Plat have hand-written bearings and distances, or "calls", establishing the property boundary. A number of the "calls", however are illegible. Both the 1882 and 1891 Plats include a northern boundary line dividing the marsh parcel. That line is deficient in "calls" on either end. While it seems from the 1882 and 1891 Plats that the northern portion of the marsh parcel was cut off and deeded to a separate entity, the Beaufort County GIS information does not indicate the northern boundary line or show any division of the marsh parcel. (*Def. Ex. 48*). If Mr. Hoyler purports to own the entire parcel as it is depicted by Beaufort County, then the total acreage is approximately 113 acres. Alternatively, if Mr. Hoyler purports to own only the lower, larger parcel, the acreage based on the 1882 Plat and the 1891 Plat is 95.27 acres.

Mr. Fanning "recreated" the eastern and western boundaries of the land grant by using mean high water and mean low water at its location in December, 2010. While

rejecting the "bearings and distances" suppled for the eastern and western boundaries Mr. Fanning testified he used the "bearings and distances" to establish the northern and southern boundaries. (*11/19/15 Tr.159, lines 6-25*). Nevertheless, Mr. Fanning had to admit that he "manipulated" the location of the northern and southern boundary lines to get acreage comparable to the land grant.

> I established a mean low water mark and a mean high water mark. And those were the boundaries on the western and eastern side. The mean high water mark on the western side and the mean low water mark on the eastern side. And then the northern and southern boundaries by calls on the plats for **acreage** and bearings and distances and how the land lot and section that is described on this plat fit into the land section network.**15**

Aerial photography of the Disputed Marsh shows multiple tributaries traversing the marsh, with a predominance of tributaries adjacent to Merry Land's several properties. (*Def. Exhs. 48, 55*). Mr. Fanning acknowledged that the Fanning Plat failed to show water courses and/or tributaries. (*11/19/15 Tr.145-146*). When asked if Mr. Hoyler "owned" the tributaries Mr. Fanning replied "[a]s a surveyor I retraced the original plat". (*11/19/15 Tr.147, lines 6-12*). In including the tributaries as Mr. Hoyler's property, Mr. Fanning claimed "they are above the mean low water mark on the Beaufort River side", but admitted he had failed to investigate the interior of the parcel to confirm elevations in the tributaries. (*11/19/15 Tr.149, line 22 – Tr.150, line 1*).

Moreover, Mr. Fanning acknowledged the hand-drawn plats lacked a scale and a directional arrow. (*11/19/15 Tr.150, line 9 - Tr.151, line 6.*) He further acknowledged that a notable shell rake that wasn't submerged was also included in the acreage calculation.

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15 *See 11/19/15* Tr.81, lines 13-21; *11/19/15* Tr.136, lines 1-15 (emphasis added).

(*11/19/15 Tr.166, line 13 – Tr.167, line 17*). Mr. Fanning's acreage determination of 89 acres, which is six acres less than the acreage described in the land grant and referenced plats, includes the tributaries and water courses and shell rake referenced in the testimony and aerial photos.

IV. ARGUMENT AND CITATION OF AUTHORITY

STANDARD OF REVIEW

This Court of Appeals reviews a Master-in-Equity's findings as though the case "was heard by a circuit court without a jury."[16] The nature of the underlying issue controls whether a suit is legal or equitable.[17] The underlying issue in this case is the determination of title to real property - specifically, tidelands - according to the statutory procedures set forth in *S. C. Code Ann.* § 48-39-220. Though an action to quiet title is generally equitable, *id.*, "[t]he determination of title to real property is a legal issue."[18] When an action concerns title to real property, the action is at law.[19] Indeed, "[a]n action to determine ownership of tidelands pursuant to [S]ection 48-39-220 is an action at law."[20]

In an action at law without a jury, this Court of Appeals' review extends only to the correction of errors of law.[21] Because this action is at law, this Court of Appeals must "reaffirm the master's factual findings if there is any evidence in the record which

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16 Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 548 (1989).

17 Lowcountry Open Land Trust v. State, 347 S.C. 96, 101, 552 S.E.2d 778, 781 (Ct.App. 2001).

18 Wigfall v. Fobbs, 295 S.C. 59, 60, 367 S.E.2d 156, 157 (1988) (internal citations omitted).

19 Query v. Burgess, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (2006) (*quoting* Lowcountry Open Land Trust v. State, 347 S.C. 96, 101, 552 S.E.2d 778, 781).

20 Grant v. State, 395 S.C. 225, 228, 717 S.E.2d 96, 98 (Ct. App. 2011); Query v. Burgess, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (2006).

21 Grant v. State, 395 S.C. 225, 228, 717 S.E.2d 96, 98 (internal citation omitted).

reasonably supports them."[22] This Court of Appeals may not disturb the trial court's factual findings "unless a review of the record discloses that there is no evidence which reasonably supports the [lower court's] findings."[23]

To the extend the underlying action is in the nature of a boundary dispute, "[a] a boundary dispute is an action at law and the location of a disputed boundary line is a question of fact." Bodiford v. Spanish Oak Farms, Inc., 317 S. C. 539, 544, 455 S. E. 2d 194, 197 (Ct. App. 1995).

A. THE MASTER-IN-EQUITY PROPERLY DENIED MR. HOYLER'S CLAIM TO OWNERSHIP OF THE DISPUTED MARSH.

The Master-in-Equity concluded the land grant reflected an intent to convey tidelands but denied Mr. Hoyler's action to quiet title due to the fact the property's boundaries remained uncertain. The Master-in-Equity stated:

> While it is evident that the State, by way of Grant, intended to convey public trust tidelands, the location of those tidelands is dependent on the ability to recreate the contemporaneous plat. This Court recognizes that the land conveyed by the Grant lies in the vicinity of the area but ... cannot determine the specific location.

(*Order*, p. 18 para. 41). Mr. Hoyler asserts the Master-in-Equity improperly denied his action to quiet title because "no effort was made by the Trial Court to effectuate the intent of the grantor." (*Mr. Hoyler's Initial Brief*, p.19). Mr. Hoyler alleges South Carolina courts have established a procedure[24] wherein the Master-in-Equity's approach should have been limited to asking "[b]ecause the tract in question involves alienation of State land,

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[22] Query v. Burgess, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (2006).

[23] Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct.App. 2000).

[24] *See* Bennett v. Investors Title Ins. Co., 370 S.C. 578, 635 S.E.2d 649 (Ct.App.2006).

... (i) could the state convey and (ii) did the State convey it?" (*Mr. Hoyler's Initial Brief*, p.20).

The South Carolina Supreme Court established a procedure to be followed in actions involving construction and effect of deeds long ago:

> It is elementary that the cardinal rule of construction is to ascertain and effectuate the intention of the parties, unless that intention contravenes some well settled rule of law or public policy. As we endeavored to point out in the very recent case of Rogers v. Rogers, 221 S.C. 360, 70 S.E.2d 637, 640, 'There is a growing tendency among the court to apply, *not merely to affirm preliminarily*,' this salutary principle. Also, see Glasgow v. Glasgow, 221 S.C. 322, 70 S.E.2d 432. I shall approach the question before us, as was done in the Rogers case involving the construction of a will, by **first undertaking to ascertain the intention of the parties** 'unobscured by the fault of technical learning,' and without reference to the subtle and arbitrary distinctions and niceties of the feudal common law. **After doing so, we can then ascertain whether there are any rules of law or public policy requiring a different conclusion.25**

"When a deed describes land as 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."**26** "In the instant case, a reading of the Deed as a whole reveals the parties used the Plat as a reference to the boundaries, metes, courses and distances of the property conveyed. . . . The intention of the parties in incorporating the Plat, when

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25 Davis v. Davis, 223 S.C. 182, 184-85, 75 S.E.2d 46, 47 (1953) (Italicized in original, bold emphasis added).

26 Bennett v. Investors Title Ins. Co., 370 S.C. 578 at 590, 635 S.E.2d 649, 657 (*citing* Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 397, 252 S.E.2d 133, 136 (1979); Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975); Holly Hill Lumber Co. v. Grooms, 198 S.C. 118, 135, 16 S.E.2d 816, 832 (1941) (" '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 ...' ")).

discerned from the Deed as a whole, ***was to show the boundaries, metes, courses and distances*** of the property conveyed. . . ."**27**

The finding of an intent to convey tidelands did not completely satisfy Mr. Hoyler's burden of proof before the Master-in-Equity. Merry Land has consistently maintained that (a) the form deed lacked specification in the location of the tract of land allegedly being conveyed and (b) the 1882 Plat and the 1891 Plat referenced by the form deed contained insufficient information to ascertain and identify the boundaries of the land intended to be conveyed. The rule of law regarding certainty of deeds in South Carolina is that a description is sufficient if it enables a person of ordinary prudence acting in good faith and making inquiries suggested by the description to identify the land.**28** In *Brownlee*, there was an ambiguity in the deed at issue which described a tract as containing "225 acres, more or less" whereas the actual acreage computed after a survey of described boundaries was much more than 225 acres.**29** The Supreme Court, in *Brownlee*, rested its holding on the elementary position that where land is sold by boundaries, acreage is governed by the boundaries and inaccuracies relating to the area are immaterial.**30** In addition, the Supreme Court also noted in *Brownlee* that the surveyors had no trouble in

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27 Bennett v. Investors Title Ins. Co., 370 S.C. 578 at 595, 635 S.E.2d 649, 658 (Ct.App.2006).

28 Brownlee v. Miller, 208 S.C. 252, 261, 37 S.E.2d 658, 662 (1946).

29 Brownlee v. Miller, *supra* at 255, 659.

30 Brownlee v. Miller, *supra* at 260, 661. *Cf.* Gourdin v. Davis, 31 S.C.L. (2 Rich.) 481 (1846) (recitals of quantity following a particular description are merely descriptive and do not determine the quantity sold).

locating the land and they testified at the hearing that the boundary lines were fairly well established.**31**

In this matter, the expert surveyors admittedly disagreed upon whether the land could be located and the boundary lines depicted in the survey could be re-established, presenting an opposite set of facts from *Brownlee*. First, Merry Land presented Donald Cook, a licensed, professional surveyor, as an expert witness in land surveying. Mr. Cook testified as to certain deficiencies in the both the 1882 Plat and the 1891 Plat which accompanied or were referenced in the land grant. Mr. Cook noted the absence of both a "scale" and of a "point of beginning" or "point of commencement" as "two main deficiencies." (*11/19/15 Tr.*_____). These deficiencies materially impacted Mr. Cook's ability to replicate the parcel reflected in those two plats. (*11/19/15 Tr.263*). According to Mr. Cook:

> [W]ithout a point of beginning you have no part – no point to start to locate the parcel on the ground. Without a scale you can't, you know, tell if they were – what measurement of units they were using. So, therefore, scaling it, you don't know really how big the parcel is or potentially how big it is.

(*11/19/15 Tr.264, lines 2-8*).

Merry Land attempted to provide testimony from its engineer, Greg Baisch, regarding his efforts in 2006 to have the surveyors employed with Ward Edwards Engineering to re-create the 1882 Plat and the 1891 Plat. Mr. Baisch testified he worked with his surveyors to attempt to locate the parcel reflected in those two plats relative to Merry Land's property. The Master-in-Equity did not permit Mr. Baisch to testify regarding

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31 Brownlee v. Miller, 208 S.C. 252, 261, 37 S.E.2d 658, 662 (1946).

the actions of the surveyors working at his direction.**32** Nevertheless, the Master-in-Equity "kept the trial record open" and allowed Merry Land to present the deposition testimony of a second surveyor – Jim Gardner.**33** Mr. Gardner, a former Ward Edwards Engineering employee, was the surveyor who initially analyzed the 1882 Plat and the 1891 Plat at Merry Land's request.**34**

After receiving the two plats, Mr. Gardner began his analysis by requesting a computer assisted drafting ("CAD") technician at Ward Edwards, under his supervision, to enter the bearings and distances shown on the plat into a CAD program. When Mr. Gardner reviewed the technician's efforts to plot the bearings and distances into CAD, he concluded that the plat could not be closed. He stated "according to Lori, and what I saw also when we did review it, was that there were some shortcomings in the bearings and distances that we could discern, that just – it didn't close." (*Gardner Depo., p.17*). Mr. Gardner further stated that the degree of uncertainty caused by the inability to close the northern boundary exceeded the allowed tolerance for error. (*Gardner Depo., p.19*). Mr.

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32 The Master-in-Equity sustained Mr. Hoyler's counsel's objection based on hearsay and excluded Mr. Baisch's testimony that his staff was unable to re-create the older plats because they couldn't close the boundary of the parcel. At the end of the hearing, Merry Land's counsel explained she was "caught off guard" when the Master-in-Equity didn't allow Mr. Baisch, an expert, to testify to matters performed by staff personnel he supervised. In turn, the Master-in-Equity allowed the trial record to remain open for the purpose of including the deposition of a then as yet to be identified surveyor. Merry Land's counsel later located Jim Gardner, a former employee of Ward Edwards, and his deposition was taken on 26 February 2016. (Email M. Shahid 2/4/16 and embedded email to Master-in-Equity and all parties concerning efforts to locate surveyor witness and schedule deposition)

33 With the Master-in-Equity's permission, Mr. Gardner's deposition was, as noted, taken after the hearing and then presented for consideration.

34 Mr. Gardner was questioned regarding his qualifications and Appellant's counsel had no objection to Mr. Gardner testifying as an expert. (Gardner Deposition p. 8.)

Gardner created an exhibit which reflected his attempt (along with the technician) to plot the bearings and distances on the plat. (*Gardner Depo. Ex. 3*).

With regard to the import of closure of plat Mr. Gardner opined that "you're bound – in the State of South Carolina, you're bound by a mathematical closure of surveys." (*Gardner Depo., p.14*). He also noted that "if you have a break in the survey, it's not going to close mathematically to any effect, which means you just – it's kind of floating out there.**35** And you can kind of – it – it really corrupts the survey in the fact that you can't continue on with the chain of measurements to see if it closes." (*Gardner Depo., pp.18-19*).

As relates to the eastern corner of the northern boundary line, which was "forced closed" by Mr. Fanning, Mr. Gardner testified that "once you get to this point, you don't have a direction or distance to go. ... All you know, you'd go generally in an easterly direction. And that's -- that's not on there. That's the reasons for bearings and distances, to tell you where the survey goes." (*Gardner Depo., pp.21-22*). "If I can't do a mathematical closure on a survey plat, I can't tell how good the survey is or how good it isn't." (*Gardner Depo., p.26*). Mr. Gardner noted that an inability to close also negatively impacts the certainty of the southern boundary of the parcel:

> [T]he plat not closing, not coming back together, in other words, if you started at a point, you're supposed to come around and end at the starting point. . . . . This survey, if it didn't do that, then everything could be shifted one way or the other. And you wouldn't know where these corners were, truly, without you know, other surveys specifying adjoining corners or adjacent boundaries. (*Gardner Depo., p.35*)

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35 Merry Land's witness Ray Cook was asked what it meant if a parcel doesn't close and he replied that "[i]t means the that the points are just kind of hanging out there in space." (*11/19/15 Tr.*264, lines 14-17).

This Court has previously rejected a "forced closure" of a boundary line.**36** Respondent Young claimed that that the property line was represented by a "tie line which was established by a previous action for the purpose of a partition sale." Importantly the surveyor testified that "he created a tie line on his plat ... which simply extended a line from another parcel of property ... that he never actually surveyed the line. He created it as a matter of convenience in order to complete the partition." This Court held that "a compiled line, created merely for the convenience of presently avoiding a dispute, is unacceptable as a basis for an order establishing a true boundary line."**37**

Regarding the inability to discern all the "calls", Mr. Gardner opined:

> if one thing is not discernable, that's limiting your directional accuracy. So, I mean, even though you might could read this bearing and distance, if you have a bearing and distance that's close to it, that you can't read, depending on whether the surveyor – if he started down here and came all the way around, should have wound up back at this point. Then, still, no you can't.

(*Gardner Depo., p.27-28*). Mr. Gardner indicated multiple areas of uncertainty and ambiguity on the 1891 Plat (which he described as a copy of the 1882 Plat) which impaired the ability to recreate the marsh parcel. (*Gardner Depo.* ____; *Gardner Depo. Ex. 1*). These uncertainties and ambiguities included multiple unreadable bearings and distances despite the CAD technician's efforts to magnify the plat. In addition, a "call" on the 1891 Plat as "1.55 chains" would be much shorter than the line which was reflected on the 1891 Plat. Mr. Gardner testified that the northern boundary included no bearings or distances and, consequently, no direction nor distance to locate the boundary line. The

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36 Clements v. Young, 310 S. C. 73, 425 S. E. 2d 63 (1992).

37 Clements v. Young, *supra* at 64-65.

bearings and distances which purported to create points for the southern boundary were also illegible. (*Gardner Depo., pp.17-22. Gardner Depo. Ex. 1*).

Mr. Gardner relied on the bearings and distances on the plat as the surveyor's intent in defining and locating the 95.27 acres referenced in the grant:

> Well, the information on the plat would have been bearings and distances that were measured in some form or fashion by a surveyor. And since he didn't say, you know, or show mean high water or mean low water on here, I would say this would be what – you know, this is what the surveyor intended. And from the 1882 survey, this is what they were intended to be this 95 and 27-hundredths of an acre.

(*Gardner Depo., p.30*). Mr. Gardner described the process of locating the northern boundary line as a "forced closure." (*Gardner Depo., p.30*).

Neither Mr. Fanning nor Mr. Gardner could recreate a survey or plat, as defined in South Carolina, in their efforts to locate the boundaries of the 1891 land grant. "A survey, the primary purpose of which may include but is not limited to, determination of the perimeters of a parcel or tract of land by establishing or reestablishing courses, monuments, and boundary lines for the purpose of describing or platting or dividing the parcel."**38** A "plat" is defined as "an accurate graphical representation, neatly lettered and properly dimensioned report of a survey made by a surveyor of a finite piece of real property, including pertinent data and appropriate information.**39** These regulations, governing the practice of surveying and engineering in this State, distinguish between compiled maps, where "partial or no actual surveying has been performed" from "plats"

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38 S. C. Code Ann. Reg. 49-430(C)(14) (Thomson Reuters West 2014).

39 S.C. Code Ann. Reg. 49-450 (Thomson Reuters West 2014).

and "surveys".[40] Based on Mr. Fanning's testimony his attempt to recreate the disputed marsh parcel resulted in, at best, a compiled map, and not a survey or plat.

There is considerable precedent regarding the conveyance of public trust tidelands. "Because the State is presumed to hold title to tidelands in trust for the benefit of the public, a grant of private ownership must contain specific language in the grant or on the plat demonstrating an intent to convey land below the high water mark."[41] While the sovereign's intent to convey public trust tidelands may be demonstrated by either the Grant or the Plat, the precedent in South Carolina consists predominantly of cases where the Grant is silent or ambiguous as to tidelands and the claimant relies on the accompanying Plat to establish alienation of tidelands.[42] In *Hobonny Club, Inc. v. McEachern*,[43] which is included in that category of tidelands cases where the land grant was vague and the intent to convey marsh was based on the accompanying plat, the South Carolina Supreme Court indicated the extreme importance of specificity of the plats, noting:

> The annexed plat is drawn to a scale of one inch to twenty chains. The southern boundary of the platted property is shown in magnetic courses and distances, and both corner and line points on this boundary are identified by marked and described trees. On the other boundaries, calls or boundary points are located and identified on the plat as marked points on the ground.

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40 S. C. Code Ann. Reg. 49-430(C)(17) (Thomson Reuters West 2014).

41 Grant v. State, 695 S. C. 225, 229, 717 S. E. 2d 96, 98 (2011).

42 *See e.g.*, State v. Holston Land Company, 272 S. C. 65, 248 S. E. 2d 922 (1978), Query v. Burgess, 371 S. C. 407, 639 S. E. 2d 455 (2006), State v. Hardee, 259 S. C. 535, 193 S. E. 2d 497 (1972), State v. Yelsen Land Company, 265, S. C. 78, 216 S. E. 2d 876 (1975), Lowcountry Open Land Trust v. State of South Carolina, 347 S. C. 96, 552 S. E. 2d 778 (2001), Coburg Dairy v. Lesser, 318 S. C. 510, 458 S. E. 2d 547 (1995).

43 Hobonny Club, Inc. v. McEachern, 272 S. C. 392, 252 S. E. 2d 133 (1979).

> A licensed professional engineer certified the boundaries to be accurately relocatable on the ground by contemporary engineering methods.[44]

The Supreme Court concluded that "these plats were incorporated into the grants and show with precision where the boundaries of the tracts conveyed lie."[45]

Consequently, Mr. Hoyler's analysis falls well short. Even though there may be intent to convey a tract of land "lying between high and low water mark" on the Beaufort River (*Pl. Exh. 2A*), the location of the property is dependent upon the referenced plat and the 1891 Plat (*Pl. Ex. 3)* suffers from a clear lack of precision. The Master-in-Equity relied on the testimony of two professional licensed surveyors, namely Messrs. Cook and Gardner, who testified they were unable to locate the precise boundaries of the Disputed Marsh absent a resort to significant speculation and guess work. While Mr. Fanning had an "easier time" locating the boundaries, his success was based on his:

> (a) ignoring the bearings and distances along the expansive eastern and western borders and relying on locating mean high and mean low water;
>
> (b) forcing closure of the northern boundary without being guided by the actual bearings and distances on the plats;
>
> (c) using "discretion" in setting both the northern and southern boundaries in order to accomplish sufficient acreage to justify the re-created plat; and
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> (d) including a notable shell rake that was above mean high water based on the Master-in-Equity's observations that portions of the shell rake were never submerged.

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44 Hobonny Club, Inc. v. McEachern, 272 S. C. 392, 396, 252 S. E. 2d 133, 135 (1979).

45 Hobonny Club, Inc. v. McEachern, *supra* at 397, 136.

Importantly, Mr. Fanning paid no attention to the multiple tributaries located within the Disputed Marsh and those particularly abutting Merry Land's upland parcels and included these tributaries in acreage calculations associated with re-creating the Disputed Marsh parcel. There was no dispute that these tributaries are navigable. *11/19/15* Tr. pp. 284-285, Int. Ex. 50. Mr. Fanning apparently "assumed" these tributaries were above mean low water and considered to be part of the conveyance to Mr. Hoyler, but did not establish the tributaries' respective elevations. It is well-settled that "all navigable waters shall forever remain public highways free to the citizens of the State and the United States."**46** And, "[a]ll streams which have been rendered or can be rendered capable of being navigated . . . and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State as to the citizens of the United States . . . "**47** "The state had in the beds of these tidal channels not only title as property, the *jus privatum*, but something more, the *jus publicum* ... which she held in a fiduciary capacity for general and public use; in trust for the benefit of all citizens of the state".**48**

The Master-in-Equity's analysis in determining intent, but still requiring proof of the location of the tidelands which were the subject of the grant, is consistent with precedent and legal principles governing boundary disputes in this State. Merry Land's experts' testimony sufficiently supported the Master-in-Equity's factual determination that, despite the State's intent to convey a parcel lying between the high and low water marks on the

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46 *See* S.C. Const. Art. 14 Sec. 4 (Law. Co-op 1976).

47 S.C. Code Ann. § 49-1-10 (Thomson Reuters West 2014).

48 State v. Pacific Guano Co., 22 S.C. 50, 83-84 (1884).

Beaufort River, the exact boundary of the marsh tract portrayed on the 1882 Plat and the 1891 Plat cannot be determined with sufficient certainty, particularly in the vicinity of Merry Land's waterfront parcels.

> As to question of boundary location, a purchaser is bound by a reference in his deed to a certain plat present when the deed was made. ... When maps, plats, or field notes are referenced in the grant or conveyance, they are incorporated into the instrument, bind the grantor and his successors and are usually held to furnish the true description of the boundaries of land. ... A plat is more exact and precise than any description by metes, bounds or title deeds can be. A plat is like a picture of the land; and it should be no more unsettled by erroneous reference to title than by mistaken boundaries specified in a deed but corrected in the annexed plat. ... A description by a plat, is so much easier and certain than any other which can be employed, that its use should not be discouraged.**49**

B. THE MASTER-IN-EQUITY PROPERLY ORDERED JOINDER OF ADJACENT UPLAND PROPERTY OWNERS AS THE LITIGATION REASONABLY IMPACTED THEIR PROPERTY INTERESTS

Relying on *S.C. Code Ann.* § 48-39-220, Mr. Hoyler asserts that the Master-in-Equity should not have allowed the participation of all other parties herein other than the State. Mr. Hoyler asserts *S.C. Code Ann.* § 48-39-220 sets forth a "methodology for establishing title" and further asserts that the Master-in-Equity misinterpreted the statute by allowing Merry Land to intervene and in joining all the adjoining property owners. According to Mr. Hoyler, "[t]here is not only no evidence that any of the Intervenor had any interest in the tidelands and [sic] there is *no claim* that they did." (*Mr. Hoyler's Initial Brief*, p.39) (emphasis in original).

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49 L. Kimble Carter, Esquire, South Carolina Boundary Law Compendium, Second Edition, pp.22-23 (S.C. Bar 20___).

Mr. Hoyler ignores the different methods by which Merry Land and the adjoining property owners became involved in the case. Merry Land sought and was granted intervention specifically to protect Merry Land's interests in the Disputed Marsh as (1) the owner of adjacent upland property and (2) possessor of DHEC and USACE permits authorizing construction of a marina over the Disputed Marsh. There were also other property owners who had already constructed docks across the Disputed Marsh and, like Merry Land, risked the loss of the right to water access if Mr. Hoyler prevailed on his title claim.**50** Other property owners adjacent to the Disputed Marsh who had not yet constructed docks were also facing the loss of potential water access and of their rights of access into and through the Disputed Marsh.

Merry Land actively sought to participate based on this claim of interest relating to the Disputed Marsh. This is exactly the type of party that the plain language of *S.C. Code Ann.* § 48-39-220 contemplates – "[a]ny person claiming an interest in tidelands ..." Merry Land had no reason to bring an action against the State since DHEC had ***already*** granted Merry Land the authorization to construct a walkway through the Disputed Marsh which was, in turn, presumptively State-owned. Nevertheless, Merry Land was compelled to intervene when Mr. Hoyler filed this case against the State. Since Mr. Hoyler sued the State only after Merry Land contacted him and advised him of its development plans, it seems likely that a great part, if not all, of Mr. Hoyler's motivation for instituting the suit was to prevent Merry Land from implementing its plans.

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50 In short, the owners who had already built docks were facing the possibility of removal and Merry Land was facing loss of the authorization to construct the marina it had considered a key feature of its multi-family residential development and mixed use project.

Mr. Hoyler fails to cite any legal authority which shows that S.C. Code Ann. § 48-39-220 applies only to the party or parties asserting an ownership interest in a parcel. The language of the statute broadly recognizes the right of "*[a]ny* person claiming *an interest* in tidelands" to institute an action ". . . for the purpose of determining the existence of *any* right, title *or* interest . . . ."**51** This language plainly ***does not limit*** potential parties to those claiming ownership by color of title only.

In all actuality, it is Mr. Hoyler's failure to invoke the procedures of S.C. Code Ann. § 48-39-220 at any point since 1979 which has given rise to the need for Merry Land's involvement. Had Mr. Hoyler brought this action at or near the time of his conveyance, both DHEC and the South Carolina Attorney General's office would have had a record of his ownership claim.

Mr. Hoyler has repeatedly argued that the lower court improperly joined the adjacent upland property owners in the case and now argues that doing so was error and an abuse of discretion. Joinder is different from intervention and is governed by different rules.**52** The Master-in-Equity, upon learning the Disputed Marsh adjoined several upland properties besides Merry Land's, properly recognized that questions of law and/or fact arising from this case would be common to the adjoining landowners. Mr. Hoyler fails to explain how such circumstances should and/or would not be considered sufficient justification for joinder of all the adjoining landowners who are, admittedly, significantly at

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51 S.C. Code Ann. § 48-39-220 (Emphasis added).

52 Rules 18-21, SCRCivP, address joinder of parties. Rule 21, SCRCivP, specifies that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

risk of losing their rights to access the Disputed Marsh and the navigable waters adjacent to their properties should Mr. Hoyler prevail on his claim of ownership.

Moreover, prior to verbally ordering the joinder, the Master-in-Equity discussed with the parties present at the initial hearing "the [Master-in-Equity's] belief as to the necessity of joining [the adjoining landowners]" before announcing the decision to hold the hearing in abeyance pending their notification.

South Carolina law provides, in pertinent part, as follows:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair of impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of his claimed interest. If he has not been so joined, the court shall order that he be made a party.**53**

The Reporter's Notes to Rule 19, SCRCivP, explain that the principle behind Rule 19 is that *whenever possible* persons materially interested in the action *should be* joined so that they may be heard and a complete determination may be accomplished.**54** Joinder should be considered "possible" anytime the requirements of Rule 19, SCRCivP, are met. While Rule 19, SCRCivP, does not guarantee participation of any of the joined parties in the litigation, it certainly provides an opportunity for anyone with a material interest in the

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53 Rule 19, SCRCivP.

54 Reporter's Notes to Rule 19, SCRCivP (Emphasis added).

subject matter of the action the opportunity to participate in order to ensure a complete, fair, and reasonable determination.

A successful claim establishing private ownership of the marsh would not only allow Mr. Hoyler to prohibit any current adjoining landowner from entering onto the Disputed Marsh, but would also negatively affect the property values of the adjoining parcels by eliminating the ability to access the navigable waters. As a result of evidence presented during the initial hearing, the Master-in-Equity quickly realized that a favorable ruling for Mr. Hoyler could injure the adjoining landowners who were not yet parties. Moreover, Rule 19, *SCRCivP*, places the burden on Mr. Hoyler to justify any reasons for non-joinder of the adjoining landowners. Mr. Hoyler has provided no reasonable justification for non-joinder other than his assertion *S.C. Code Ann.* § 48-39-220 simply does not allow it. More importantly, Mr. Hoyler has failed to present any legal authority to support this interpretation. The Master-in-Equity implemented the appropriate procedures and exercised the appropriate discretion in allowing Merry Land to intervene and, more importantly, in ordering joinder of the then-missing adjoining landowners to the action.

C. ALL OF THE RESPONDENTS WHO INTERVENED AND/OR WERE JOINED HEREIN CLEARLY ESTABLISHED THEIR LEGAL STANDING TO PARTICIPATE.

Mr. Hoyler asserts the Master-in-Equity abused his discretion by allowing intervenor Merry Land and the joinder Respondents "to remain in the Trial because they lacked standing." (*Mr. Hoyler's Initial Brief*, p.____). Notwithstanding Mr. Hoyler's assertions, Merry Land and the other participating Respondents clearly had standing to participate in the case.

Axiomatically, legal standing requires the satisfaction of three elements. As the Supreme Court of South Carolina recently discussed in *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*,**55**, first, a party must show an injury-in-fact which is a concrete, particularized and actual or imminent invasion of a legally protected interest has been suffered by the party.**56** Secondly, there must be a causal connection shown to exist between the injury and the challenged conduct.**57** Finally, it must be likely that a favorable decision will redress the injury.**58**

It cannot be reasonably argued that Merry Land did not sustained an injury-in-fact due to Mr. Hoyler's claim of ownership over the Disputed Marsh, given the fact Merry Land has, heretofore, been completely prevented from moving forward with the development of the 18 acres of property in which Merry Land made a significant investment, including construction of the permitted marina to be used by the residential and mixed-use development. If Mr. Hoyler had successfully established ownership of the Disputed Marsh, it most likely would result in the permanent loss of all rights held by all adjacent landowners, including Merry Land, to use the Disputed Marsh for deep water access to the Beaufort River. Mr. Hoyler sought a declaration from the Master-in-Equity

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55 Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 753 S.E.2d 846 (2014).

56 Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 72, 753 S.E.2d 846, 850 (*citing* Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 600-601, 550 S.E.2d 287, 291-92 (2001)).

57 Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 72, 753 S.E.2d 846, 850 (*citing* Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 600-601, 550 S.E.2d 287, 291-92 (2001)).

58 Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 72, 753 S.E.2d 846, 850 (*citing* Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 600-601, 550 S.E.2d 287, 291-92 (2001)).

that he had the right to ***exclude*** others from the Disputed Marsh. (*Summons and Complaint, Intervenor Answer and Counterclaim, Reply to Counterclaim, pp.*_____). Consequently, a causal connection exists since all the injuries-in-fact would directly result from Mr. Hoyler's successful resolution of his ownership claim. Finally, the parties who participated in this litigation did so with the goal of obtaining a favorable decision from the Master-in-Equity (*i.e.*; a denial of title to Mr. Hoyler) which would immediately redress their injury.

Mr. Hoyler has failed to address any of these points. Instead, Mr. Hoyler asserts only that Merry Land and the joined Respondent-parties cannot demonstrate any legally protected interest at risk because *S.C. Code Ann.* § 48-39-220 "sets their boundaries as the mean high water mark whomsoever owns the marshland." Aside from the obvious fact Merry Land and the other Respondents all have a significant interest in preserving public trust tidelands for public use, this argument glosses over the actual reason for which Mr. Hoyler invoked *S.C. Code Ann.* § 48-39-220: to establish ownership of the Disputed Marsh in order to prohibit Merry Land (and all of the other Respondents) from using the Disputed Marsh pursuant to the previously issued DHEC and USACE permits. Clearly this constitutes an injury-in-fact to all Respondents.

D. THE MASTER-IN-EQUITY PROPERLY LEFT THE TRIAL RECORD OPEN AFTER THE MERITS HEARING TO ALLOW THE TESTIMONY OF AN IMPORTANT ADDITIONAL WITNESS.

Mr. Hoyler challenges the Master-in-Equity's ruling at the conclusion of the hearing that the trial record could remain open to allow Merry Land to locate the surveyor who had worked under the direction of Greg Baisch to review the 1882 Plat and the 1891 Plat. The Master-in-Equity stated that "what I'm going to do is to hold the record open for 45

days to permit [Merry Land] to depose a yet to be named surveyor with regard to fact matters only, not as an expert[59]. And 15 days after that I would like post-trial briefs from everyone." (*11/19/15 Tr.309*).

The Master-in-Equity did not abuse his discretion by allowing Merry Land an additional 45 days in which to submit very important deposition testimony into the record. Clearly, a trial court has wide latitude to rule on evidentiary matters. It is well-established that the "decision to admit or exclude evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of discretion."[60] "An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support."[61] Moreover, an "appellate court will generally make all reasonable presumptions to the effect that the discretionary powers of the trial court have been exercised properly, correctly, or without abuse, and ***will not presume, or assume***, that there has been an abuse of discretion."[62] Most importantly, "[g]reat weight is given to the judgment of the trial court on discretionary matters."[63]

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59 Counsel for both parties forgot the Master-in-Equity's admonishment to limit Mr. Gardner to a fact witness and Merry Land's counsel elicited testimony reflecting Mr. Gardner's qualifications to be considered an expert witness. (Gardner Depo., p.8.). Mr. Hoyler's counsel did not object to Mr. Gardner testifying as an expert, but preserved his overall objection to Mr. Gardner's deposition. (Gardner Depo., p. 8.)

60 Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 201, 207, 609 S.E.2d 838, 842 (Ct.App. 2005) (*citing* Gamble v. Int'l Paper Realty Corp. of S.C., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996)).

61 Osborne v. Adams, 338 S.C. 82, 90, 525 S.E.2d 268, 273 (Ct.App. 1999).

62 Osborne v. Adams, 338 S.C. 82, 90, 525 S.E.2d 268, 273 (*quoting* 5 C.J.S., Appeal and Error, § 773 (West 1993)).

63 Osborne v. Adams, 338 S.C. 82, 90, 525 S.E.2d 268, 273.

The Master-in-Equity, in allowing the submission of additional testimony via deposition, specifically agreed with Merry Land's argument that adding minimal additional time would not significantly affect the parties, given the fact the case had already been pending a very long time (*i.e.*; since 2007) and, moreover, much of the delay was caused by Mr. Hoyler's three dismissed interlocutory appeals. (*11/19/15 Tr.303, line 24 – Tr.305, line 6*). Moreover, the Master-in-Equity limited the deposition testimony to facts only as the proposed witness was the surveyor initially asked by Merry Land's engineer to analyze the 1882 Plat and the 1891 Plat. (*11/19/15 Tr.309, lines 14-15*).

The Master-in-Equity did not abuse his broad discretion by keeping the record open. Depositions are, of course, appropriate tools to present evidence.**64** Furthermore, this case had already been pending for a very long time due in large part to Mr. Hoyler's multiple, albeit, unsuccessful appeals. The delay between the filing of this action and the actual hearing on the merits contributed to Merry Land's difficulty in locating Mr. Gardner.**65** Other courts have kept the record open for additional testimony after hearings. For example, in *Seabrook Island Property Owners Ass'n v. Berger*,**66** the trial

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64 S.C. Code Ann. § 14-11-120 (Thomson Reuters West 2014) (stating that a deposition "may be read in evidence at the hearing, subject to the right of either party upon good cause shown to require the personal attendance and viva voce examination of the witness at the hearing."); Smith v. Smith, 308 S.C. 492, 497, 419 S.E.2d 232, 235 (Ct. App. 1992) (finding that post-hearing depositions were appropriate evidence for the trial court to consider because they "could have a bearing on the matters before [the trial judge]"—namely, wife's motion for retroactive alimony).

65 Mr. Gardner, the "missing" surveyor from Ward Edwards Engineering had been laid off from that surveying company in 2006, shortly after completing Merry Land's work due to adverse economic conditions.

66 Seabrook Island Property Owners' Association v. Berger, 365 S. C. 234, 616 S. E. 2d 431 (2005).

court allowed the defendant to submit a post-hearing affidavit setting forth his arguments and testimony against the POA's claim for attorneys' fees.[67]

Mr. Hoyler also argues that Mr. Gardner's deposition was cumulative evidence. (*Mr. Hoyler's Initial Brief*, p.44). Notwithstanding Mr. Hoyler's meritless argument, Mr. Gardner's testimony was not cumulative since he was the licensed professional surveyor who was first asked by Merry Land to examine the deeds and plats and, in turn, Mr. Gardner's testimony specifically pertained to the facts of this examination. Moreover, even if, *arguendo*, Mr. Gardner's testimony was somehow cumulative to that of Mr. Baisch[68] the mere admission of such testimony cannot be considered reversible error. In order "[t]o warrant a reversal based on the admission of evidence, [Mr. Hoyler] must show both error and resulting prejudice."[69] Furthermore, "[w]hen improperly admitted evidence is merely cumulative, no prejudice exists, and therefore, the admission is not reversible error."[70]

Mr. Hoyler has failed to demonstrate that he suffered any prejudice due to the Master-in-Equity's decision to allow the inclusion of Mr. Gardner's deposition testimony. Mr. Hoyler participated in the deposition and later filed a Post-Trial Brief. Mr. Hoyler neither argued nor demonstrated prejudice in the Post-Trial Brief or in his Initial

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67 Seabrook Island Property Owners' Association v. Berger, 365 S. C. 234, 616 S. E. 2d 431.

68 Mr. Baisch was the engineer Merry Land presented during the hearing. The Master-in-Equity prohibited Mr. Baisch's testimony as to the very matters Mr. Gardner addressed in his deposition as Mr. Baisch, although with supervisory authority, did not himself perform the evaluation of the 1882 Plat, the 1891 Plat, *etc.* Mr. Gardner, of course, performed those tasks.

69 Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 307, 609 S.E.2d 838, 842 (Ct.App. 2005) (Internal citation omitted).

70 Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 307, 609 S.E.2d 838, 842 (Internal citation omitted).

Appellant's Brief. (*Hoyler Post Trial Brief, pp.____; Hoyler Initial Brief, pp.____*). Mr. Hoyler has merely asserted, absent any proof or authority, that Mr. Gardner's testimony was cumulative.

The Master-in-Equity properly allowed the trial record to remain open for a short period of time so as to allow Merry Land to locate and depose an important witness. Depositions are appropriate tools to present testimony. In any case, Mr. Hoyler has failed to demonstrate he sustained any prejudice as a result.

E. THE MASTER-IN-EQUITY PROPERLY CONSIDERED MR. HOYLER'S POST-TRIAL MOTIONS.

Mr. Hoyler claims that the Master-in-Equity refused to timely hear his post-trial motions. However, Mr. Hoyler cites no authority for this proposition. Appellant is also ignoring the fact that he actually filed a post-trial motion before the court issued its Final Order in the case. Moreover, the Trial Court did provide Mr. Hoyler opportunity to present post-trial issues through the post-trial brief that the court requested both parties to file. Finally, Mr. Hoyler has failed to establish any prejudice sustained as a result of the Trial Court's alleged failure.

Mr. Hoyler claims he twice requested the Master-in-Equity to afford him an opportunity to orally make post-trial motions. In an e-mail dated 1 March 2016, Mr. Hoyler's counsel stated he would "like the opportunity to make [Mr. Hoyler's] post-trial motions for the record."[71] In response, Judge Dukes stated that he "agree[d] that so much time has passed [since the merits hearing] that at least a follow-up conference call if not a supplemental hearing should be held for summation. I'm happy to do whatever the

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[71] *See3* E-Mail from Carrie Schurg to the Hon. Marvin Dukes dated 1 March 2016, at 1:57 p.m. EST.

group would prefer."[72] Later, on 28 March 2016, Mr. Hoyler asked the Master-in-Equity to "[p]lease provide guidance as to Post-Trial Motions, because ***we have now completed the Trial by deposing Mr. Gardner***. I believe that we will need to make them to complete the record."[73]

Mr. Hoyler fails to cite any authority for his proposition that the Master-in-Equity was ***required*** to hear any post-trial motions. (*Mr. Hoyler's Initial Brief*, pp.45-46). Furthermore, Mr. Hoyler fails to clearly establish the Master-in-Equity's refusal to consider any of Mr. Hoyler's requests. The correspondence exchanged between the parties does not reflect any refusal. Moreover, the Master-in-Equity gave both parties the opportunity to raise any issues in their respective post-trial briefs which the Master-in-Equity directed to be submitted once Mr. Gardner's deposition had been taken. Mr. Hoyler has failed to present any evidence which establishes Mr. Hoyler was prevented from making post-trial motions or that the Master-in-Equity refused to afford Mr. Hoyler a hearing.

Even if it the Master-in-Equity should have conducted an in-court post-trial motions hearing, Mr. Hoyler has failed to show that he was prejudiced in any way as a result. "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it."[74] Mr. Hoyler has not identified any issues raised to the Master-in-Equity

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72 *See* E-Mail from the Hon. Marvin Dukes to Carrie Schurg (dated 1 March 2016, at 2:02 p.m. EST.

73 *See* E-mail from Carrie Schurg to the Hon. Marvin Dukes and Heather McLeod dated 28 March 2016, at 3:35 p.m. EST. (Emphasis added).

74 Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (Internal citation omitted).

upon which the Master-in-Equity failed rule. (*Mr. Hoyler's Initial Brief*, pp.45-46). Mr. Hoyler was not prejudiced and the Master-in-Equity's actions were proper and correct.

F. REGARDLESS OF THE DISPOSITION OF THE DISPUTED MARSH'S OWNERSHIP, MR. HOYLER IS BARRED FROM PREVENTING MERRY LAND'S CONSTRUCTION OF THE PERMITTED MARINA BASED ON THE PRINCIPLES OF ESTOPPPEL AND LACHES.

In this State "[e]stoppel arises when a party, relying upon what another has said or done, changes his position to his detriment."[75] Consequently, "if a party stands by, and sees another dealing with property in a manner inconsistent with his right, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interests are affected. His silence is acquiescence and it estops him."[76] It is a well-established principal in South Carolina that *estoppel by silence* arises when one party observes another dealing with his property in a manner inconsistent with his rights and makes no objection while the other party changes his position based on the party's silence.[77]

The elements of estoppel as to the estopped party are:

(1) a misrepresentation or nondisclosure;

(2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and

(3) actual or constructive knowledge of the true facts.

As to the party claiming estoppel:

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[75] Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct.App.2006) (*citing* Gibbs v. Kimbrell, 311 S.C. 261, 268, 428 S.E.2d 725, 729 (Ct.App.1993)).

[76] Southern Railway Co. v. Day, 140 S.C. 388, 138 S.E. 870 (1926).

[77] Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 358, 628 S.E.2d 902, 911.

(1) lack of knowledge or means of acquiring knowledge of the true facts;

(2) reasonable reliance; and

(3) prejudicial change of position.[78]

Mr. Hoyler has "claimed" ownership of the Disputed Marsh since 1979, but he failed to utilize the remedy provided by S.C. Code Ann. §48-39-220 to confirm and memorialize such ownership. In the decades between 1979 and 2007 the property adjacent to the Beaufort River and the Disputed Marsh has been subdivided, developed, and sold. Docks and other structures have been constructed in the Disputed Marsh adjacent to the Beaufort River.[79] Had Mr. Hoyler instituted his claim against the State at any time prior to 2006, when Merry Land first received its marina permit (*Def. Exhs. 52-54*), the South Carolina Attorney General's Office would have provided DHEC notice of the lawsuit and the final disposition. Had that information existed, DHEC would have been able to stop Merry Land's permit at the application stage had Mr. Hoyler been successful in the litigation. Moreover, the law[80] required that notice of the final disposition of Mr. Hoyler's claim and his lawsuit (had it been filed earlier) would have been published in the State Register. While Mr. Hoyler may argue these procedures are discretionary and not mandatory, Merry Land asserts that when Mr. Hoyler, as the purported owner of tidelands, intends to assert ownership to block waterfront access of adjacent upland

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78 *See* Provident Life & Acc. Ins. Co. v. Driver, 317 S.C. 471, 451 S.E.2d 924 (Ct.App.1994); O'Cain v. O'Cain, 322 S.C. 551, 473 S.E.2d 460 (Ct.App. 1996).

79 Merry Land's member Tennent Houston testified the presence of these already in-place docks and other structures indicated to him that the Disputed Marsh was owned by the State of South Carolina for the benefit of the public and that a waterfront property owner could gain access through the Disputed Marsh to the Beaufort River. (*11/19/15 Tr.* 213, lines 6–14).

80 *See* S.C. Code Ann. § 48-39-220(D) (Thomson Reuters West 2014).

properties to the Beaufort River, then Mr. Hoyler's failure to timely invoke the available procedures constitutes concealment. Absent an action having been filed by Mr. Hoyler, there was no way for Merry Land or anyone else to obtain notice of Mr. Hoyler's claim. This is especially true in this situation where the public records which did exist were, at best, misleading. There was simply nothing in the chain of title of Merry Land's various properties which could have been routinely discovered to provide Merry Land the required notice of Mr. Hoyler's claim to the Disputed Marsh.

Merry Land would never have purchased the Port Royal property if Mr. Hoyler had taken any action between 1979 and 2007 to alert adjoining property owners of his claim to the Disputed Marsh. The evidence shows that it wasn't until Beaufort County updated the parcel data on its GIS system that information regarding Mr. Hoyler's claim was actually readily available. Tennent Houston, a member of Merry Land, testified regarding when Merry Land first learned of Mr. Hoyler's claim. Mr. Houston stated that "[a]fter we closed the purchase and the permit was issued, we contacted our bank to refinance the loan. And they had an appraiser who in his analysis noticed on the local Beaufort County GIS system, the computers, that there seemed to be a tax parcel there." (*11/19/15 Tr.*223-226). Consistent with the testimony of David Tedder, Esquire, the real estate attorney who represented Merry Land in the closing, Mr. Houston noted the parcel information was not available at the time when Merry and acquired the Port Royal property. Mr. Tedder testified that regarding Defendant's Exh. 56 was a "screen shot" of the parcel information available on Beaufort County GIS at the time of the closing. (*Def. Ex. 56*). There was no indication whatsoever that the Disputed Marsh was a separate parcel of land with a separate and distinct tax identification number.

Merry Land relied on the legal presumption that the Disputed Marsh was public trust property. Merry Land suffered a prejudicial change in position by purchasing the eight acres of waterfront property for $4.5 million and the ten acres of additional high ground property for $1.5 million after obtaining a community marina permits from DHEC and USACE. After the real estate transactions had closed Marry Land learned that the Disputed Marsh, over which the marina walkway crossed to access the Beaufort River, was the subject of a private claim of ownership.

Additionally, the facts of this case and the arguments herein also support reasonable findings and conclusions Mr. Hoyler is barred by laches from asserting his ownership of the Disputed Marsh so as to block construction of the marina. "Laches is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.' "[81]

It is clear from S.C. Code Ann. § 48-39-220 that the possession of a deed to a marsh parcel does not rebut the presumption of State ownership unless the deed or grant has been adjudicated by a court of competent jurisdiction. Mr. Hoyler took no action for ***28 years*** to have his claim known or determined in accordance with S.C. Code Ann. § 48-39-220's procedures. Mr. Hoyler's failure to pursue his ownership claim to the Disputed Marsh while the upland property abutting the large disputed marsh tract is being subdivided and developed is unreasonable. Interestingly, Mr. Hoyler has failed to offer

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81 Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 359, 628 S.E.2d 902, 921 (Ct.App.2006) (*citing* Gordon v. Drews, 358 S.C. 598, 612, 595 S.E.2d 864, 871 (Ct.App.2004) (*quoting* Muir v. C.R. Bard, Inc., 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct.App.1999)).

even a meager explanation to justify his action and/or inaction. Such inaction, particularly in light of the size of the Disputed Marsh parcel and its location in a rapidly developing community, constitutes neglect by Mr. Hoyler.

V. CONCLUSION

While a demonstration of sovereign intent to alienate public trust tidelands is necessary to support Mr. Hoyler's claim, Mr. Hoyler must also be able to establish the location of the Disputed Marsh in relationship to the multiple properties adjoining the marsh. Assuming for the sake of argument that the Disputed Marsh is bounded on the east and west by "low water" and "high water," Mr. Hoyler cannot properly establish the Disputed Marsh's northern and southern boundaries without forcing closure and sliding these boundaries to approximate the acreage depicted in the two plats. Moreover, the inclusion of multiple navigable tributaries therein as private property, particularly those tributaries adjacent to Merry Land's waterfront parcels, contradicts existing law. The Master-in-Equity appropriately concluded that the 1882 Plat and the 1891 Plat were insufficient to establish the boundaries of the Disputed Marsh. The Master-in-Equity's factual determination is supported by the overwhelming evidence. Merry Land respectfully requests Master-in-Equity's decisions be affirmed in all respects.

Respectfully submitted,

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