THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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

H. Marshall Hoyler.....Appellant,

v.

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

REPLY BRIEF OF APPELLANT TO BRIEF OF RESPONDENT, MERRY LAND PROPERTIES, LLC

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INTRODUCTION

The Respondent, Merry Land, in its Initial Reply Brief provides argument on the Appellant's "certainty of deeds", but skips some preliminary steps which are necessary for an appropriate analysis of the law with regard to findings by the Trial Judge. (Respondent, Merry Land's Initial Brief P. 14).

This case presents mixed questions of law and equity and the "... [Appellate Court] will apply the appropriate standard of review for a particular issue in a case that contains both legal and equitable issues. Eldridge v. Greenwood, 331 S.C. 398, 417, 503 SE 2d 191 (S.C. Ct. of App. 1998), (Internal Citations Omitted).

The paramount consideration for a reviewing court in interpreting a deed is to determine the intent of the Grantor. "In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. **The intention of the grantor must be found within the four corners of the deed.**" Springob v. Farrar, 334 S.C. 585 590,514 S.E.2d 135, (S.C. Ct. of App. 1999), (Internal Citations Omitted), (Emphasis Added).

I. THE MASTER-IN-EQUITY IMPROPERLY DENIED APPELLANT, MR. HOYLER'S CLAIM TO OWNERSHIP OF THE DISPUTED MARSH.

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

This Court should consider Trial Exhibits, "2", "2-A" and "3", (these Exhibits consist of two copies of the 1891 deed, with attached plat), and determine that the intent of the Grantor, the State of South Carolina is clear; the State of South Carolina intended to sell Mr. Crofut, Appellant's predecessor in interest, 95.27 acres of marshland, subject to the State of South Carolina's retained phosphate mining rights, (R. p. 539-543); (R. p. 544); (R. p. 545-546). The intent of the Respondent, the State of South Carolina was clear, and the Trial Judge correctly reached the conclusion that the Respondent, the State of South Carolina intended to grant the marshland contained within the description of the deed and plat. (R. p. 47).

However, the Trial Court erred when it determined that the plat, and therefore the deed of which it was a part, was ambiguous. This Court should reject the Trial Court's erroneous determination as a matter of law. . "Likewise, the determination of **whether language in a deed is ambiguous is a question of law**." Proctor v. Steedley, 398 S.C. 561 579, 730 S.E.2d 357 (S.C. Ct. of App., 2012), (Internal Citations Omitted), (Emphasis added).

"The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation." Proctor v. Steedley, 398 S.C. 561 579, 730 S.E.2d 357 (S.C. Ct. of App., 2012), (Internal Citations Omitted).

A patent ambiguity is one that arises upon the words of a will, deed, or contract." Beaufort Cnty. Sch. Dist. v. United Nat. Ins. Co., 392 S.C. 506, 526, 709 S.E.2d 85 (Ct. App. 2011), (Internal Citation Omitted). There is no patent ambiguity in the deed under review herein, because the deed describes the property adequately and the plat attached to the Crofut deed provides the necessary detail, (R. p. 539-543); (R. p. 544); (R. p. 545-546).

There was no testimony at Trial showing that there are obvious errors in the 1891 Crofut deed. Instead, the alleged errors were more nuanced, such as no graphic scale and no starting point, wrong "calls" and short distances, (R. p. 468 line 2 – p. 469 line 25); (R. p. 526 deposition p. 20 lines. 1-25); (R. p. 526 deposition p. 21 lines 1-25). Those comments represent Respondent, Merry Land's begging the question of whether or not a latent ambiguity exists.

Is there a latent ambiguity? For the reasons cited below, this Court should determine, as a matter of law, without deference to the Trial Court that, there is not. Proctor v. Steedley, *supra*, p 367.

"A latent ambiguity exists when there is no defect arising on the face of the instrument, but arising when attempting to apply the words of the instrument to the object or subject described. Id. (offering an example of a latent ambiguity as a named beneficiary in a will that is unambiguous on the face of the will, but creates a latent ambiguity where there are two people with that name). Beaufort Cnty. Sch. Dist. v. United Nat. Ins. Co., 392 S.C. 506, 526, 709 S.E. 2d 85 (S.C. Ct. of App. 2011). No latent ambiguity exists under the facts of this case.

In this instance, the Respondent, the State of South Carolina with deliberate specificity, carved out a parcel of its marshland, using 19th century surveying techniques, reserved the right to mine phosphate from the property granted and deeded it to Mr. Crofut, Appellant, Hoyler's predecessor in title. (R. p. 539-543); (R. p. 544).

There was no Trial testimony provided showing that the Plat attached to the Crofut deed, does not generally fit the area in question, but, there is testimony from Respondent, Merry Land's witness Gardner that the 1882 plat "represented" the conveyance to Mr. Crofut, (R. p. 527 deposition p. 23 lines 3-15); (R. p. 529 deposition p. 30 lines 18-25); (R. p. 529 deposition p. 31 lines 1-25); (R. p. 529 deposition p. 32 lines 1-14). When asked, Respondent Merry Land's witness, Gardner at post-trial "deposition, "What is the tolerance of error that was established when these (19th century plats) were made?" (R. p. 529 deposition p. 30 lines 4-8). Respondent, Merry Land's witness, Gardner stated that he was not sure that there was one. (R. p. 529 deposition p. 30 lines 4-8).

Respondent, Merry Land's witness, Gardner went on to explain: "Used to, you know, the county surveyor was the fellow that could, I guess, do a little bit of trigonometry or something like that and all. You know he ran for the position or whatnot."... "But to be - there wasn't even-licensing wasn't even in effect at the time these (plats) were done, I don't believe." (R. p. 529 deposition p. 30 lines 8-17).

The only person who gave expert testimony about reconstructing the 1882 plat using modern techniques was the Appellant, Mr. Hoyler's expert surveyor witness, Fanning who testified that he had no difficulty in determining the location or the size of the property conveyed in the Crofut deed. (R. p. 276 lines 12-25); (R. p. 277 lines 1-11); (R. p. 279 lines 11-14); (R. p. 290 lines 14-25); (R. p. 291 lines 1-25); (R. p. 292 lines 1-3).

Appellant's expert surveyor witness, Mr. Fanning also presented an Exhibit which showed an overlay between his survey and the original survey and they demonstrably overlapped to a remarkable degree. (R. p. 638).

The facts of this case are highly unusual and telling, in that one of the parties to the original 110 year plus old deed, the State of South Carolina, is also a party to this case. The Respondent, the State of South Carolina did not offer a single witness, nor any evidence before the Trial Court to contest the clarity of the Crofut deed. It seems appropriate to conclude that the Respondent, the State of South Carolina was satisfied with the description in the deed to Crofut, Appellant's predecessor in interest and that Respondent, the State of South Carolina's intent was unambiguously manifested within the four corners of the deed to Crofut, Appellant's predecessor in interest.

If this Court determines that there is a latent ambiguity and the deed must be interpreted, then it is not constrained by the findings of the Trial Court. As noted above, this is a case of mixed law and equity and interpreting a deed is an equitable issue. Eldridge, *supra*, pp. 416-417 "If the action is viewed as interpreting a deed, it is an equitable matter and the appellate court may review the evidence to determine the facts in accordance with the court's view of the preponderance of the evidence." Slear v. Hannah, 329 S.C. 407, 410-411, 496 S.E.2d 633 (1998), (Internal Citations Omitted).

"In the case of Gibbes v. Elliott, 26 S.C. Eq. 327, 5 Rich. Eq. 327, **it was held that a court of equity has no authority, in general, to try questions of title to lands, where the parties claim by distinct titles; but where the whole dispute is upon the construction of a will, or other written instrument, under which both parties claim, the court has jurisdiction to determine the rights of the parties."** Wayburn v. Smith, 263 S.C. 518, 521, 211 S.E.2d 560 (1975), (Emphasis Added).

The dispute between the State and Appellant, Mr. Hoyler arises from a common instrument, the 1891 deed.

In reviewing the evidence, this Court is bound to look for reasons to preserve the deed, not for reasons to find it ambiguous. The South Carolina Supreme Court has expressed and affirmed the maxim that, "That is sufficiently certain which can be made certain." Dargan v. Tankersley, 380 SC 480, 488-489, 671 SE 2d 73 (S.C. 2008).

"The rule of law regarding certainty of deeds in South Carolina is that a description is sufficient if it (**i**) enables a person of ordinary prudence (**ii**) acting in good faith and (**iii**) making inquiries suggested by the description to identify the land." (P. 14 of Respondent, Merry Land's Initial Brief), (Romanettes added). Taken separately, the Appellant, Mr. Hoyler, has met each of the criteria.

In the instant case, the Beaufort County tax assessor, Appellant's expert witness and a title examiner for a lender of Respondent Merry Land, were able to identify Appellant, Mr. Hoyler's property from the public records of Beaufort County. These individuals, particularly the independent parties, the Tax Assessor of Beaufort County and the Respondent's lender, had no stake in the outcome of this litigation.

Conversely, the Respondent, Merry Land's witnesses looked only at the 19th century plats. When the Respondent, Merry Land's witnesses encountered difficulty with the 1891 deed's description, due to the plats' age and their claimed inability to read the plats, Respondent, Merry Land's witnesses took no steps to try to locate the plats or recreate the plats. Respondent, Merry Land's witnesses, possessed the education and experience to be registered land surveyors.

However, Respondent, Merry Land's witnesses both failed to satisfy the prong of the test that required Respondent, Merry Land's witnesses to make "...inquiries suggested by the description to identify the land." Brownlee v. Miller, 208 S.C. 252, 261, 37 S.E.2d 658, 662 (1946). Both of the Respondent, Merry Land's surveyors indicated that they needed to, but failed to do any field work, (R. p. 462 lines 15-25); (R. p. 463 lines 1-11); (R. p. 464 lines 5-13); (R. p. 471 lines 1-25); (R. p. 472 lines 1-16). Particularly Respondent, Merry Land's witness Gardner, acknowledged that he needed to complete more field work to accurately locate the property shown on the plat, attached to the Crofut deed, (R. p. 528 deposition p. 27 lines 1-11); (R. p. 530 deposition p. 37 lines 10-17); (R. p. 531 deposition p. 38 lines 1-9); (R. p. 532 deposition p. 43 lines. 2-22). Neither of Respondent, Merry Land's witnesses testified at Trial that locating the 95.27 acres was impossible, given an opportunity to do field work.

If this Court determines that there was a latent ambiguity in the plats, then this Court should rely in on the Testimony of Appellant's expert surveyor witness, Fanning in forming it's own view of the facts, not being bound by the facts found by the Trial Court. Eldridge v. Greenwood, *supra.*

Appellant's expert surveyor witness, Mr. Fanning was able to close the plat without difficulty. (R. p. 276 lines 15-25); (R. p. 277 lines 1-16); (R. p. 279 lines 11-14); (R. p. 339 lines 16-25); (R. p. 340 lines 1-16). Appellant's expert surveyor witness, Mr. Fanning, in adherence to the law of this State testified that (**i**) a mean high and a mean low water mark are dynamic in nature and naturally move over time Horry County v. Woodward, 282 S.C. 366,318 SE 2d 584 (Ct. of App. 1984) and (**ii**) in compliance with the statutory mandate under which the litigation was brought, Section 48-39-220, S.C. Code Ann., (1976, as amended), established a current eastern and western boundary.

Appellant's expert surveyor witness, Mr. Fanning indicated that the 1882 plat reflected the eastern and western boundaries as they existed at the time the 1882 plat was drawn just as the boundaries on his plat reflected the natural conditions as they existed at the time of his survey. (R. p. 379 lines 4-25); (R. p. 380 lines 1-25); (R. p. 381 lines 11-25); (R. p. 382 lines 1-6).

As to the Northern and Southern boundaries of his Plat, Appellant's expert surveyor witness, Mr. Fanning, used the available data by looking at the "... 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." (R. p. 285 lines 17-21). The land section network referred to by Appellant's expert surveyor witness, Mr. Fanning is the nearly unique system in Beaufort County in which a grid network covers the land in the county making it mathematically possible to locate land by doing mathematical calculations. Appellant's expert surveyor witness, Mr. Fanning, referenced the grid points on the highland property from the 1882 plat (R. p. 373 lines 8-25); (R. p. 374 lines 1-25) and then used them, as well as the bearings and distances on the old plats to recreate it and overlay it on Appellant's expert surveyor witness' Plat, (R. p. 290 lines 14-25); (R. p. 291 lines 1-25); (R. p. 292 lines 1-3).

The Trial Court's decision under Appeal, fails to effectuate the intent of the Grantor as it is required to do under South Carolina law. This Court should correct that error as a matter of law, due to the manifested intent of the State of South Carolina in the deed to convey the 95.27 acre property to Crofut, Appellant's predecessor in interest and the clarity with which it did so. Springob, *supra*, pp. 590-591. Additionally, this Court should find as a matter of law that there is no ambiguity in the plat and hence the deed from the State to Crofut confirming the deed in Appellant Hoyler. Springob, *supra*, pp. 590-591.

Finally, should this Court feel compelled to interpret the deed if it finds that it is ambiguous, Smith v. Du Rant, *supra*, pp. 88-92, then the issue before it becomes an equitable one Eldridge v. Greenwood, *supra*, p. 416 and it should make its on determination of the facts based on a preponderance of the evidence , it should find that in its review of the evidence that the preponderant facts favor Mr. Hoyler and it should reverse the Trial Court and confirm his deed, Smith v. Commissioners of Public Works, 312 S.C. 460, 441 S.E.2d 33, 334-335 (Ct. App. 1994) citing with approval, Townes Assoc., Ltd. v. City Council of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

"Where, on the face of a deed, the intention to convey a particular tract of land, is clear, but the description, by metes and bounds, is, upon a survey for the purpose of locating the tract, ascertained to be erroneous, the description by metes and bounds will be rejected as surplusage, ***and the land located so as to cover the tract clearly intended to be conveyed.***" Smith v. Du Rant, 236 S.C. 80, 88, 113 S.E.2d 349 (1960) (internal citations omitted), (emphasis added).

II. THE MASTER-IN-EQUITY IMPROPERLY ORDERED JOINDER OF ADJACENT UPLAND PROPERTY OWNERS.

Respondent, Merry Land continues to rely on a purported interest that Respondent, Merry Land has in the adjacent upland and the marshland in question because it had permits from the Office of Coastal Resource Management and the US Army Corps of Engineers.

An examination of the Statute set forth below, pursuant to which Appellant sued the State of South Carolina to establish his title against the state, is necessary to show that the Respondent, Merry Land is an improper party.

> "Section 48-39-220 (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 State Fiscal Accountability Authority." (Emphasis Added).

"In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation" Palmetto Princess v. Edisto Beach, 369 S.C. 50,54, 631 SE 2d 76 (2006), (Internal citations omitted). It is clear that the Respondent, Merry Land, assuming *arguendo* has some right title or interest in the marshland, must sue the State. It is not appropriate to intervene in litigation based on the Statute described hereinabove, which was specifically designed to determine rights to real property between purported owners of marshland against the State. The Statute cited above, is not designed to protect the interests of adjacent highland owners who have no interest in title to the adjacent marshland.

"It is perhaps unnecessary to say that courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. " Laird v. Nationwide Ins. Co., 243 SC 388, 395, 134 SE 2d 206 (1964), citing with approval Creech v. South Carolina Pub. Serv. Auth., 200 S.C. 127, 20 S.E.2d 645 (S.C., 1942).

Respondent complains that Appellant, Mr. Hoyler was not vigilant enough in pursuing his claim and filed it after the permits were issued to the Respondent and in fact that is the real reason Respondent needed to intervene. (Respondent, Merry Land's Initial Brief p. 25, Paragraph 2).

There is no obligation on behalf of Mr. Hoyler found either in the Statute, Section 48-39-220 (A) S.C. Code Ann., (1976, as amended), or any of its subordinate regulations (see below), to bring an action at all. Respondent, Merry Land was obligated to provide Appellant, Mr. Hoyler's name to the Office of Coastal Resource Management, a division of the Department of Health and Environmental Control (hereinafter "OCRM") as an adjoining landowner or an affidavit stating that such information was not readily available.

"23A S.C.Code Ann. Regs OCRM Rules 30-2 Applying for a Permit

(5) **A list of all adjoining landowners and their addresses** or a sworn affidavit that with due diligence such information is not ascertainable. When considered appropriate by the Department, additional information may be required concerning affected landowners.

Permit Application C. Notification: The Department shall within thirty days of receiving either a Joint Public Notice or SCDHEC-OCRM permit application, notify in writing interested agencies, **all adjoining landowners**, local government units in which the land is located and other interested persons. This notice shall indicate the nature and extent of the applicant's proposal.

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 Section 48-39-140(C) and R.30-2.**

(3) If the alleged adjoining landowner of critical area files a written objection to the permit application within the period prescribed in Section 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 Section 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 Section 48-39-220 must be received by the Department within 30 days of the date of the expiration of the comment period. If no such written proof is timely received, the permit will be processed pursuant to law." (Emphasis Added).

Because the Respondent failed to notify Appellant, Mr. Hoyler of Respondent, Merry Land's application, Respondent, Merry Land's application is rendered incomplete and it has no property interest to complain of or protect.

The other Defendants were improperly joined by the Trial Court. The statutory authority under which the Appellant brought his case does not provide for the joinder of any party who does not have an interest in the marshland. It is exclusively to determine ownership of that property.

Under Rule 19 of the South Carolina Rules of Civil Procedure, none of the upland owners meet its test for permissive joinder. Under prong one, there is no need for their presence, because complete relief for the other parties to the lawsuit can be achieved without them. In fact their absence from the case is anticipated by the plain language of the statute in that no provision is made for their participation. The second prong of the test is not met because as noted above the additional joined parties have no rights in the marshland and could not obtain a permit to cross the land until a decision had been rendered as to the marshland's ownership.

III. THE RESPONDENTS WHO INTERVENED AND /OR WERE JOINED BY THE TRIAL COURT, LACKED LEGAL STANDING TO PARTICIPATE.

Respondent, Merry Land in its Initial Brief identifies the three-pronged test for standing and then Respondent, Merry Land states that the Respondent meets them all. The party seeking to establish standing carries the burden of demonstrating each of the three elements." Powell ex rel. Kelley v. Bank of Am., 665 S.E.2d 237, 379 S.C. 437 (S.C. Ct. of App., 2008), (Internal Citations Omitted), (Emphasis Added).

First, Respondent, Merry Land claims that it has actual damage caused by Appellant, Mr. Hoyler for failing to timely file his claim, (Respondent, Merry Land's Initial Brief, p. 28 Paragraph 2).

As noted above, Appellant, Mr. Hoyler had to be notified by the Respondent Merry Land, pursuant to statutory and regulatory schemes that it intended to seek a permit which would cross his land. Until that time, Appellant, Hoyler was under no obligation to bring a suit to determine title as between Appellant, Hoyler and the State of South Carolina, to the marshland. Also notably, neither the statute nor the regulation requiring notice gives any indication of any right that the permit applicant has to join in the suit between the individual landowner and the state. Second, there must actually be an injury to establish a causal connection to the injury and the legally protected interest. Because the permits were issued based on wrong information provided by the Intervenor to the permitting bodies, the permits are void as being incomplete. 23A S.C.Code Ann. Regs OCRM Rules 30-2 (I)(3). Here there is no legally protected interest in the marshland which the joined parties were trying to protect and there is no real property interest in a potential permissive use permit issued by the State of South Carolina.

Third having no real interest in the property, assuming a permit gives a protected interest (see, Army Navy Bingo, Garrison# 2196 v. Plowden, 281 S.C. 226, 229, 314 SE 2d 339 (S.C. 1984 in which the Supreme Court found no property right in a bingo license calling the license a "permit") if there is no injury, there is no outcome favorable or not which could address it.

IV. THE TRIAL COURT IMPROPERLY LEFT THE TRIAL RECORD OPEN AFTER THE MERITS HEARING.

Appellant has addressed the failure of the Trial Court to comply with Rule 40(i)(2), South Carolina Rules of Civil Procedure in holding the record open for a surprise witness that was not even listed on the pretrial list of witnesses in his initial brief and the Court's attention is called thereto.

Neither Respondent has found, or provided a citation to a South Carolina case, that allows the Trial Court to hold the record open for a witness that was needed when a party could not get evidence into the record at Trial. Respondent, Merry Land provides a citation to, Seabrook Island Property Owners' Association v. Berger, 365 S. C. 234, 616 S. E. 2d 431 (2005). That was a case in which a witness, post appeal, was not allowed to testify at a hearing to determine attorney's fees but required to submit his testimony by Affidavit. The case cited by Respondent, Merry Land is a far cry from a surprise witness being allowed to testify after Trial because evidence could not be elicited in the manner satisfactory to the Respondent, as was done in the case *sub judice*.

V. THE TRIAL COURT IMPROPERLY REFUSED TO HEAR APPELLANT, MR. HOYLER'S POST-TRIAL MOTIONS.

Appellant Hoyler was prejudiced by the Trial Court not honoring the Trial Court's earlier promise concerning Post-Trial Motions. Appellant's counsel on March 1, 2016, informed the Trial Court that Appellant, Hoyler would, "...like the opportunity to make [Appellant, Mr. Hoyler's] post-trial motions for the record." (R. p. 721).

The Trial Court replied that, "[Trial Judge] 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 [Trial Judge] happy to do whatever the group would prefer." (R. p. 727). No opportunity was provided for Post-Trial Motions and counsel for Appellant, Mr. Hoyler persisted by counsel's email of March 28, 2016, "**Please 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." (Emphasis in original), (R. p. 728). Based on the foregoing, Appellant, Hoyler was prejudiced by the Trial Court's actions.

VI. RESPONDENT, MERRY LAND FAILED TO SUPPORT ITS TRIAL COURT ARGUMENTS, AS TO ESTOPPEL AND LACHES.

This Court's attention is called to the discussion of the Regulations regarding obtaining a permit to cross State owned marshland. The onus of notifying adjacent landowners is on the entity seeking the permit. 23A S.C.Code Ann. Regs. OCRM Rules 30-2, Applying for a Permit *supra*. It is only after being notified of the pending permit application that an individual is required to file a lawsuit to preserve the owner's title against the State and until that suit is resolved the permit is incomplete. 23A S.C. Code Ann. Regs. OCRM Rules 30-2 Applying for a Permit Subsection I. Applications Involving Adjoining Landowners Claiming Ownership of Critical Area Subsections (1-3) [Therefore, it is disingenuous and erroneous for the Respondent, Merry Land to refer to the permits, obtained through negligently misinforming the OCRM that there were no adjacent property owners, when quite clearly, there were.

Witness Houston, principal with the Respondent Merry Land, testified that although Respondent, Merry Land was required to notify Appellant, Mr. Hoyler, their title examination failed to find Appellant, Mr. Hoyler's property. (R. p. 424 lines 8-19); (R. p. 425 lines 3-10). Respondent, Merry Land's witness Houston also acknowledged that after Respondent, Merry Land closed on the upland property an examination of the property records by an individual revealed Appellant, Mr. Hoyler's GIS tax information, and that information was publicly available to anyone prior to Merry Land's purchase of the property. (R. p. 429 lines 14-25); (R. p. 430 lines 1-8).

Respondent, Merry Land's witness Houston further acknowledged, that knowing that the Beaufort County GIS (geographic information system) was being changed out at the time of that Merry Land was having its title examined, that had someone gone to the paper documents in Beaufort County and found Appellant, Mr. Hoyler's property referenced. (R. p. 433 lines 1-13). The failure of Respondent, Merry Land to follow the OCRM Regulations with regard to the permitting process did not require Appellant, Mr. Hoyler to act and so he cannot be estopped from doing something that he had not yet been require to do.

Second, South Carolina is a "race notice" state, as set forth in Section 30-7-10, S.C. Code Ann., (1976, as amended). "The basic purpose of the rule normally followed is to assure stability of title. Any other rule would make title searching hazardous. A title searcher must live by the record." Burnett v. Holliday Brothers, Inc., 279 S.C. 222, 227, 305 SE 2d 238 (SC 1983).

Because Appellant, Mr. Hoyler indisputably had record title, the responsibility for finding his title, if it was going to adversely affect Respondent, Merry Land fell squarely on Merry Land's title examiner's. The assumptions that they made and their failure to find Appellant, Mr. Hoyler's properly recorded title is their error and their attempt to somehow blame Appellant, Mr. Hoyler, who no one claims did anything wrong is not only legally wrong but unconscionable. Factually, Respondent, Merry Land's witness Houston testified at Trial that Appellant, Mr. Hoyler had done nothing wrong. (R. p. 422 lines 11-17).

Third, Respondent, Merry Land's assertion that somehow Appellant, Mr. Hoyler wants to use his land adverse to the interest of Respondent, Merry Land is not supported by the evidence. Appellant, Mr. Hoyler did not testify and his motives are a matter of speculation. However, Appellant, Mr. Hoyler would be within his rights to exercise dominion over Appellant's property just as does any other property owner in this State. The Record does not indicate that Respondent, Merry Land offered any of its adjacent landowner's unfettered access across its property. Does Respondent, Merry Land intend to charge them for access to its property or allow them access at all? Respondent, Merry Land's unsupported attempt to demean Appellant, Mr. Hoyler's right to exercise his rights over his property, is inappropriate. .

"While the doctrine of waiver or equitable estoppel may be invoked as affirmative defenses to counterclaims, they may not be asserted in a complaint as offensive weapons." Janasik v. Fairway Oaks Villas Horizontal Property Regime 307 SC 339, 345, 415 SE 2d 384 (S.C. Ct. of App. 1992), (Internal citations omitted).

The doctrine of estoppel applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury."

The elements of equitable estoppel as to the party estopped (Hoyler) are: (1) conduct amounting to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention or expectation that such conduct will be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. This claim must fail because the Appellant made no representations to anyone.

Appellant, Mr. Hoyler acted as any other individual that owns real property in South Carolina. Appellant, Mr. Hoyler relied on his real estate professionals to properly acquire and record title to his property in the public records in the county files in the county in which the real estate is located, which they did. Appellant, Mr. Hoyler also paid his taxes on the property conveyed by the State which is another public statement of ownership, easily obtainable to anyone caring to look closely enough. Appellant, Mr. Hoyler did not know Respondent, Merry Land or its officers and could make no representation to them. Absent affirmative conduct intending to mislead, the other two elements are superfluous. Frady v. Smith 247 S.C. 353, 359-360, 147 S.E.2d 412 (1966).

The elements as to the party (Respondent, Merry Land) claiming the estoppel, are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) a prejudicial change in position. Here, the Respondent, Merry Land again fails to make its case on the first element, because the information which would have informed it that Appellant, Hoyler owned the property was publicly available to it. Respondent, Merry Land's failure to find the publicly available information does not equate to not having the means of acquiring the knowledge which would have prevented Respondent, Merry Land's predicament. Frady v. Smith 247 S.C. 353, 359-360, 147 S.E.2d 412 (1966).

Furthermore, because Respondent, Merry Land and Appellant, Mr. Hoyler didn't know about each other, it was impossible for Respondent, Merry Land to rely on Appellant, Mr. Hoyler's conduct. This Court should find that the Respondent, Merry Land has not proven this affirmative defense at Trial.

LACHES

The Respondent, Merry Land next asserts laches as an Appellant asserts that as an equitable defense laches may not be used offensively and must therefore fail. Therefore, Respondent, Merry Land may not use laches offensively.

The Respondent, Merry Land has also failed to meet its burden of proof in establishing a claim of laches. Laches is the negligent failure to act for an unreasonable period of time.

"Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay suffers his adversary to incur expenses or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce these rights. Delay alone in the assertion of a right does not constitute laches." Provident Life and Acc. Ins. Co. v. Driver, 451 SE 2d 924,929 (S.C. Ct. App. 1994), (Internal citations omitted), (Emphasis added).

The Respondent, Merry Land, as the party asserting laches, must also satisfactorily show negligence, the opportunity to have acted sooner, and material prejudice before the bar in equity is complete. As with waiver, laches arises upon the failure to assert a known right under circumstances indicating that the lached party has abandoned or surrendered the right. The lached party [Appellant Hoyler], must have had actual knowledge or inquiry notice of the facts forming the basis of Intervenor's [Respondent, Merry Land's] claim, and its failure to assert its right is irrelevant until there is a reason or situation that demands assertion. The burden of proof is upon the person claiming laches." (Emphasis added).

First, Respondent, Merry Land's position turns laches on its head. It is an equitable doctrine in a law case.

Next, Respondent, Merry Land essentially says that Appellant, by failing to assert its claim against a third party (the State) has caused Respondent, Merry Land to change its position. Laches is a theory that exists between two parties who may have had some interaction where there may be some rights between them. Respondent, Merry Land's position is that a failure to assert a right against a third party somehow affects the rights of the world as to individual or entity.

Second, delay alone does not constitute laches. The Respondent has not shown neglect in failing to act. There is no neglect in failing to pursue the action against the Respondent, the State of South Carolina. Respondent, Merry Land's witness Houston acknowledged, when shown the actual language of the Statute, that Appellant, Mr. Hoyler had done nothing wrong. Finally, as shown in the emphasized language above, the Appellant must have had actual knowledge or inquiry notice of the facts forming the basis of Respondent's claim. Respondent, Merry Land has proved none. Respondent's attempt to do so by showing that it gave public notice of its intent to build a marina in the general area of the Appellant's property does not show any actual notice to Appellant.

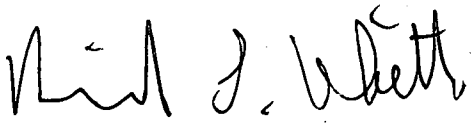
Additionally, the Respondent, Merry Land, under the terms of the dock permit application must give individual notice to adjacent property owners. Respondent, Merry Land, admittedly failed to do that. However, even if Appellant, Mr. Hoyler had received an individual notice he would have not been required to file a claim against the Respondent, the State of South Carolina.

CONCLUSION

Based on the foregoing, this Court should Reverse the decision of the Trial Court and Remand this case to the Trial Court, for entry of an Order consistent with this Court's Findings and ruling herein.

[Signature Page Follows]

AUSTIN & ROGERS, P.A.

By: 

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April 17, 2017
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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

H. Marshall Hoyler.....Appellant,

v.

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

RULE 211, SCACR CERTIFICATION, REPLY BRIEF OF APPELLANT TO BRIEF OF RESPONDENT, MERRY LAND PROPERTIES, LLC

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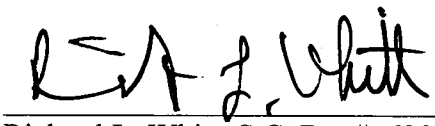
I, Richard L. Whitt hereby certify that the Reply Brief of Appellant, H. Marshall Hoyler, to Brief of Respondent, Merry Land Properties, LLC, complies with the requirements set forth in Rule 211 of the South Carolina Appellate Court Rules.

AUSTIN & ROGERS, P.A.

By: 

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