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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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

H. Marshall Hoyler.....Appellant,

v.

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

REPLY BRIEF OF APPELLANT TO BRIEF OF RESPONDENT, STATE OF SOUTH CAROLINA

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INTRODUCTION

It is uncontroverted that the State of South Carolina introduced no evidence during the Trial of this matter, before the Lower Court.

It is also uncontroverted that the State of South Carolina called no witnesses during the Trial of this matter, before the Lower Court. The only participation by the State, was argument by counsel and the argument of counsel is never evidence. Ex parte Morris, 624 SE 2d 649 (2006).

Improper Argument by the State.

Respondent, State of South Carolina makes its argument as to a failed conveyance for the **first time in its Initial Brief** before this Court, which is improper. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E. 2d 731, 733 (1998), ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

The State Argues for the First Time.

Specifically, Respondent, the State of South Carolina, argued in its Post-Trial [Reply] Memorandum, dated April 11, 2016, to the Trial Court, "The State did have authority to grant land between mean high water and mean low water pursuant to the Crofut deed. [Appellant Hoyler's predecessor in interest]" (R. p. 165).

The State further asserted in its Post-Trial [Reply] Memorandum to the Trial Court, "[Respondent] Merry Land argues that the Crofut deed [Appellant Hoyler's predecessor in interest] was not valid because, in its opinion, the General Assembly must specifically authorize such a conveyance. That [Respondent Merry Land] contends that the statute at the time did not authorize the sale of public trust property. [Respondent] **Merry Land reads the statute and case law at the time too narrowly**." (emphasis supplied), (R. p. 165). In its Post-Trial [Reply] Memorandum to the Trial Court, the State further disagreed with Respondent, Merry Land's position at Trial with the following, "[Respondent] Merry Land also cites a Court of Appeals decision in *Lowcounty Open Land Trust*, 347 SC 96, 552 S.E. 2d 778 (2001) regarding statutory authorization for grants of tidelands, but that Court relied on a quotation from Pacific Guano that applied only to stream beds.", (R. pp. 166-167).

Judicial Estoppel Also Applies.

The State's attempt to take one position before the Trial Court, where the State prevailed, and to take an inconsistent position before this Appellate Court is improper. Carrigg v. Cannon, 347 S.C. 75, 83, 552 SE 2d 767, (S.C. Ct. of App. 2001).

In summary, Respondent, the State supported the validity of the State's conveyance to Crofut, Appellant's predecessor in interest at Trial, but in its Initial Brief before this Court, the State improperly argues to this Court for the first time, and inconsistently, the validity of the State's grant to Crofut, Appellant's predecessor in interest.

Appellant responds *seriatim* hereinafter to the argument provided by the Respondent, State of South Carolina.

I. THE STATE'S REFERENCE TO THE MASTER'S FINDINGS AT TRIAL IS INAPPOSITE.

The State's reference to the Master's Finding is not helpful to this Court and does not control this Court's review of the Trial Court's actions. In Order to reach the conclusion that the State reached in its Initial Brief, that the Master must be affirmed in his findings, **the State has skipped several steps**. First, this Court has the right to decide, *de novo*, what the intention of the Grantor was at the time of the grant without reference or deference to the Trial Court's findings. Proctor v. Steedley, 398 S.C. 561, 730 S.E. 2d 357, 363 (Ct. of App., 2012), (Internal Citations Omitted). Second, this Court has the right to determine if there is an ambiguity in the Grant from the State to Crofut, Appellant's predecessor in interest, *de novo*, without reference or deference to the Trial Court's findings. Proctor, *supra*. A finding in favor of Appellant, Hoyler on either one of those decision points resolves the case in favor of Appellant, Hoyler, without having to review the Trial Court's findings and the State's exception is misleading.

However, if the Appellant's deed is found to have ambiguities in it, then extrinsic facts, *not inconsistent with the Grant*, are allowed into evidence to help the Trial Court determine the intent of the Grantor. "Running through all of the cases is the principle that it is the intention [of the Grantor] which governs and when it is not expressed accurately in the deed, evidence *aliunde* may be admitted to supply or explain it. **The instrument is not thereby varied or contradicted, which would be inadmissible; but it is explained or corrected**." Smith v. Du Rant, 236 S.C. 80, 87-88, 113 S.E. 2d 349 (1960), (Internal Citations Omitted), (Emphasis Added). This Court must review the evidence presented in the light of Smith v. Du Rant case.

If this Court follows the rule stated in the Smith v. Du Rant case, then the only evidence properly before it can only lead to the conclusion that the Trial Court erred in its rulings and findings and this Court should reverse and remand the decision of the Trial Court. Even if this Court deems the evidence admissible, it cannot be used to vary the intent of the Grantor, which was to convey 95.27 acres to Mr. Crofut, Appellant, Hoyler's predecessor in interest. "[O]ne of the most valuable safeguards thrown around a deed is that parol evidence is not admissible to vary or contradict the terms of a written contract, and this applies in all its strictness to actions involving deeds." Springob v. Farrar, 334 S.C. 585, 590-591, 514 S.E. 2d 135 (S.C. Ct. of App. 1999).

II. THE EVIDENCE DOES NOT SUPPORT THE MASTER'S DETERMINATION THAT THE GRANT AND PLAT ARE INSUFFICIENT TO LOCATE THE PROPERTY CLAIMED.

The State reaches an erroneous legal conclusion in its second argument. Throughout the Trial and subsequent Memoranda, the State has consistently taken the position that the State had the authority to enter into the Grant with Crofut, Appellant, Hoyler's predecessor in interest, (R. pp. 165-167).

The Trial Court determined that the State intended to convey the marshland to Mr. Hoyler's predecessor in interest and had the authority to do so, (R. p. 47), (See Appellant's argument on this issue in the "Introduction", to this Reply Brief). The State thus divested itself of the property described in the deed, but now takes the remarkable position that because the State did not adequately describe the property that the State tried to convey, the, 95.27 acres belongs to the State because real property must be vested somewhere. Abrams v. Templeton, 320 S.C. 325, 465 S.E. 2d 117,121 (S.C. Ct. of App., 1995), (Internal Citations Omitted).

The State is not clothed in a presumption of title, because title passed in 1891 and the State has not proved that it regained title. State ex rel McLeod v. Sloan Const. Co., 284 S.C., 491,494, 328 SE 2d 84 (S.C. Ct. of App. 1985). Additionally, as stated hereinabove, the State called no witnesses and produced no evidence that the State regained title. Second, the cases that the State provides a citation to, focus on whether or not the State intended to divest itself of marshlands, not the adequacy of the description of property the State intended to convey. Third, as noted above in Issue "I" herein, determining the intent of the Grantor is a matter of law, and only extrinsic evidence of adequacy of the description, **not inconsistent with the deed**, may be allowed into evidence. "[O]ne of the most valuable safeguards thrown around a deed is that parol evidence is not admissible to vary or contradict the terms of a written contract, and this applies in all its strictness to actions involving deeds." Springob v Farrar, 334 S.C. 585, 590-591, 514 S.E. 2d 135 (S.C. Ct. of App. 1999). Two of the cases the State relies on, Grant v. State (the plats involved there were not locatable on the ground); Brownlee v. Miller cited in Crocker v. Evans, (the surveyors had no trouble locating the property on the ground). In the case at bar, the ONLY evidence is that the plat is relocatable on the ground and with a high degree of accuracy. It was created and introduced into evidence by the Appellant's surveyor, (R. p. 282). The Respondent's Merry Land's fact witnesses, Cook and Gardner having not done any field work made no effort to reproduce the 1891 plat. (R. p. 471 lines 6-25); (R. p. 472 lines 1-3); (R. p. 472 lines 10-16); (R. p. 528 deposition page 27 lines 1-9); (R. p. 532 deposition page 42 lines 16-25); (R. p. 532 deposition page 43 lines 1-22); (R. p. 533 deposition page 49 lines 1-23).

Finally, the State misapprehends the argument on high and low water mark boundaries that Appellant makes. Appellant's point being, not that the Appellant could prove nothing more than a rough approximation of the western (landward) boundary but that the boundary is dynamic and moves due to the natural forces of accretion or erosion. Horry County v. Woodward, 282 S.C. 366, 369-370, 318 SE 2d 584 (Ct. of App. 1984). No one can know from day to day where the precise high water mark is located and so the South Carolina Legislature, in statutorily describing the suit that must be brought against it, uses a mean high and mean low water standard. Section 48-39-220 S.C. Code Ann., (1976, as amended).

The deed from the State to Crofut, Appellant's predecessor in interest, is unusual in that one of the parties to the original deed is a party to this lawsuit. The State's intent (which is what this Court strives to determine Bennett v. Investors Title Ins. Co., 635 S.E. 2d 649 (Ct. of App., 2006), to convey 95.27 acres of marshland was, according to the Trial Court, "...clearly expressed." (R. p. 47). Having found a clear expression of the grantor's intent, the State takes the remarkable position that the plat, and hence the deed, was unclear and therefore it didn't convey anything, (R. pp. 165-167). Therefore, because real property must be vested somewhere the State owns the property which the State had previously intended to convey. The stilted logic, adopted by the Trial Court, flies in the face of legal logic stated by the Supreme Court of S.C. in Smith v. Du Rant, 236 S.C. 80, 88, 113 S.E. 2d 349 (1960), which stated, "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." (Internal citations omitted), (emphasis added).

It is abundantly clear from the deed and plat, that the Trial Court erred in finding the description of the 95.27 acre tract to be inadequate. Smith v Du Rant *supra*, at p. 88.

There are watercourses that cross the property in question. Appellant does not concede that the watercourses that cross the property were conveyed by the State to Crofut, Appellant, Hoyler's predecessor in interest. There was no engineering proof submitted to the Trial Court that navigable watercourses were extant at the time of the conveyance and if they were where they are located. Should this Court rule the watercourses belong to the State, the Appellant asserts that they are subject to, appearing and disappearing, due to the natural forces that cause the adjacent upland to erode and accrete. Horry County v. Woodward, 282 S.C. 366, 369-370, 318 SE 2d 584 (Ct. App. 1984), (Internal Citations Omitted). There is evidence in the record that the "shell rake" was man made, and thus still belongs to the Appellant. (R. p. 370 lines 21-24). To the extent that this Court finds the watercourses belong to the State, the Appellant asserts that they do not affect Appellant Hoyler's title to the marshland property that surrounds the watercourses and should not distract this Court from deciding the main issue before it, the title to the surrounding marshland described in the Appellant's deed. Appellant concedes that the property is subject to the phosphate mining rights of the State as set forth in the deed, but also that fact does not affect Appellant's argument, nor should it distract this Court from deciding the main issue before it, title to the 95.27 acres of marshland.

III. THE ASSERTION THAT THE STATE OWNS THE BOTTOMS OF ANY TIDAL NAVIGABLE WATERWAYS, IS IRRELEVANT.

The deed from the State of South Carolina includes the 95.27 acres, "... together with all woods, trees, **watercourses**, profits...", (Emphasis supplied); (R. pp. 539-543); (R. p. 544).

However, the intention of the parties to the deed, to convey the marshland, is not adversely affected by this contention. The deed may simply be interpreted to read that the State of South Carolina conveyed those watercourses that were not navigable and which the State had clear authority to convey and those watercourses which were navigable, the State never intended to convey as against settled law and public policy. It is of course, impossible to know what navigable watercourses existed at the time of the conveyance and which have arisen as a result of the natural ebb and flow of property inundated by the Beaufort River, twice daily. Watercourses appear on the plat but don't indicate whether or not they are navigable. However, if this Court finds that the State's intention to convey navigable watercourses is not compatible with South Carolina law, then the navigable watercourses would be exempted from that portion of the marshland that surrounds them, which is the majority of the property conveyed by the State of South Carolina to Mr. Crofut, Appellant, Hoyler's predecessor in interest.

IV. THE PARTICIPATION OF RESPONDENT, MERRY LAND AND THE OTHER ABUTTING PROPERTY OWNERS, WAS IMPROPER.

The Respondent, the State in its Initial Brief asks this Court to remand this case to the Trial Court, if Appellant is correct in objecting to Respondent, Merry Land's participation. Appellant vigorously opposes such a "second bite at the apple" notion. Appellant will respond to the arguments made by the State of South Carolina in more depth in its Reply Brief to the Respondent, Merry Land's Initial Brief. However, Appellant, can find no case law and the State cites none, for allowing the State to retry the case after it has already done so and on matters that the State did not plead.

V. THE MASTER IMPROPERLY LEFT THE RECORD OPEN FOR THE SUBMISSION OF ADDITIONAL TESTIMONY.

The State misapprehends Appellant's argument, with regard to pretrial notice of the failure to be able to produce a witness for Trial. Respondent, Merry Land did not list the additional and new witness on its pretrial list of potential witnesses. Respondent, Merry Land did not ask for a continuance, based on the absence of this new witness, but proceeded to Trial. It was only after Respondent, Merry Land's attorney was unable to obtain specific evidence from another witness to support Respondent, Merry Land's allegations, that she asked the Trial Court allow a continuance to submit additional testimonial evidence, (R. p. 507 lines 24-25); (R. p. 508 lines 1-24).

Rule 40(i), SCRCP.

Rule 40(i), South Carolina Rules of Civil Procedure deals with continuances for either cause, or absence of a witness. In the case of cause, those Motions are generally taken up at a Roster Meeting immediately prior to Trial. Presumably, the same would be true for the absence of a witness. Because there was no Roster Meeting and the matter was set for Trial on a date certain for the convenience of the Trial Court and all of the Parties who would participate, there was ample opportunity for Respondent, Merry Land to make a formal Motion to Continue for the absence of a Witness. No such Motion was made by Respondent, Merry Land pretrial and the Respondent, Merry Land's Motion made at the end of the Trial to hold the Trial in abeyance to obtain testimony from a surprise witness should not have been granted, (R. p. 507 lines 24-25); (R. p. 508 lines 1-25); (R. p. 509 lines 1-6).

Appellant, Mr. Hoyler was placed at an extreme disadvantage in that he was forced to take a deposition which was to be used as Trial testimony, without the benefit of discovery. The improper and late testimony, according to the Respondent, Merry Land's representation and the Trial Court's mandate from the bench, was to be fact only, (R. p. 512 lines 6-12); (R. p. 513 lines 11-16). There was no opportunity to have the Trial Court Rule on objections and there was no opportunity for rebuttal. Finally, there was no opportunity to make these arguments to the Trial Court, because the Trial Court had entered an Order without the benefit of these arguments (R. p. 729-A).

The cases cited by the State are inapposite in relation to this Motion. The first is a Worker's Compensation case and deals with a Regulation, not the South Carolina Rules of Civil Procedure and newly discovered evidence; not an unknown and unavailable witnesses. The Motion in, Martin v. Rapid Plumbing, 631 S.E. 2d 547, 552, 369, S.C. 278, 287 (Ct. of App. 2006), case was denied and the State relies on *dicta* to try to make its points in this case. The second case, State v. Vickery, 732 S.E. 2d 218,220,399 S.C. 507,512 (Ct. App. 2012), cited by the State is a criminal magistrate's court case. This is a completely different type case and different procedural Rules apply. Additionally, **the case cited by the State,** to support its argument was to allow a retrieval of documents not a witness. Greene v. Griffith, is an unpublished Court of Appeals Opinion in which the record was left open for ten days for one of the parties to file a brief, not to go find a witness. Greene v. Griffith, Op. No. 2004-UP-056 (S.C. Ct. App. filed Jan. 29, 2004).

Finally the State provides a citation to, South Carolina Dept. of Highways and Public Transp. v. Galbreath, 431 S.E.2d 625, 628, 315 S.C. 82 (S.C. App., 1993), which allows the Trial Court much leeway in the conduct of the Trial, absent some abuse of discretion, which results in prejudice to the Appellant. The facts of the Galbreath Trial did not include allowing a surprise witness to testify post-trial.

Here the Trial Court abused its discretion by (i) violating Rule 40(i)(2) SCRCP, and allowing a continuance so that a surprise witness, (not listed on the pretrial brief to the Court and not listed on the Answers to Interrogatories submitted by Respondent, Merry Land to the Appellant before Trial), be heard by deposition over the objection of Appellant's counsel, (R. p. 511 lines 18-25); (R. p. 512 lines 1-5), and (ii) not affording the Appellant the opportunity to rebut the testimony, both of which are highly prejudicial to the Appellant. "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Sundown v. Intedge Industries, 383 S.C. 601 681 S.E. 2d 885, 888 (S.C. Ct. of App. 2009), (Internal Citations Omitted).

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]

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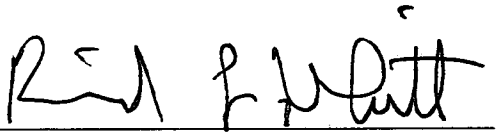
By: 

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April 17, 2017
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RULE 211, SCACR CERTIFICATION, REPLY BRIEF OF APPELLANT TO BRIEF OF RESPONDENT, STATE OF SOUTH CAROLINA

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

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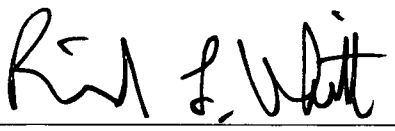
By: 

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