

90047

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

Appellate Case No.: 2016-001277

RECEIVED
AUG 22 2019
SC Court of Appeals

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., Shirley Anne 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,Defendants,

Of which The State of South Carolina and
Merry Land Properties, LLC are the, Respondents.

APPELLANT'S PETITION FOR REHEARING

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INTRODUCTION

This Court issued Opinion No. 5676, which was heard March 4, 2019 and filed August 7, 2019. Appellant's timely Petition for Rehearing follows.

ARGUMENT FOR REHEARING

- I. THIS COURT OVERLOOKED OR MISAPPREHENDED THE LAW IN SOUTH CAROLINA WHEN IT STATED THAT THE RESPONDENT, STATE OF SOUTH CAROLINA HAS A PRESUMPTION OF TITLE WHICH CANNOT BE OVERCOME.

This Court overlooked or misapprehended the Law in South Carolina when it stated that the Respondent, State of South Carolina has a presumption of title which cannot be overcome.

"... the State comes into court with a presumption of title, which is the correct rule applicable to land which has never been granted by the sovereign, but which no longer applies [as occurred in the instant case] when land has once been granted, ..." See, State v. Hardee, 259 S.C. 535, 545, 193 S.E. (2d) 497, (1972), (Bussey, J., concurring), McCleod v. Sloan 284 S.C. 491, 499-500, 328 S.E.2d 84, (S.C Ct. of App. 1985).

- II. THIS COURT OVERLOOKED OR MISAPPREHENDED THE LAW IN SOUTH CAROLINA CONCERNING THE INTERPRETATION OF A CLEAR AND UNAMBIGUOUS DEED.

"The interpretation of a clear and unambiguous deed is a matter of law not a question of fact. Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390 (1987). The deed in the instant case clearly intended to convey marshland below the high water mark, and evidence to the contrary should not have been admitted, nor relied upon.

III. THIS COURT OVERLOOKED OR MISAPPREHENDED THE LAW IN SOUTH CAROLINA WHEN THIS COURT FAILED TO INTERPRET THE DEED IN SUCH A MANNER THAT THE INTENT OF THE GRANTOR WAS EFFECTUATED.

This Court overlooked or misapprehended the Law in South Carolina when this Court failed to interpret the Deed in such a manner that the intent of the Grantor, the State of South Carolina, was carried out. "One of the first canons of construction of a deed is that the intention of the grantor must be ascertained and effectuated if no settled rule of law is contravened. As has many times been said, the governing principle in the construction of deeds is that the intention of the grantor, if consistent with law, shall govern." Bennett v. Investors Title Ins. Co., 370 S.C. 561, 570-571, 635 S.E.2d 660 (S.C. Ct. App., 2006), (Internal Citations Omitted).

IV. THIS COURT OVERLOOKED OR MISAPPREHENDED THE LAW IN SOUTH CAROLINA FOR DETERMINING THE BOUNDARIES OF THE GRANT.

This Court overlooked or misapprehended the Law in South Carolina when this Court failed to follow the intent of the grantor when establishing the boundaries set forth in the deed from the State to Hoyler's predecessors in interest. "The rules for determining disputed boundaries are not inflexible, but are subject to modification depending upon the particular facts of each case." "When determining boundaries, resort is generally had first to natural boundaries, next to artificial monuments, then to adjacent boundaries, and last to courses and distances." "This rule, however, merely indicates the weight generally given to each type of evidence of location." "The rule does not provide an order of admissibility, such that evidence of artificial boundaries is admissible only if there is no evidence of natural boundaries." "The facts of a case may therefore require that an inferior means of location be preferred over a higher means of location." Williams v. Moore, 400 SC 90, 104, 799 SE2d 224, (S.C. Ct. App. 2012).

Appellant's deed conveyed using natural monuments and an attached plat. This Court should have first relied on the natural monuments but instead used "courses and distances", the last preferred method for determining boundaries. Assuming *arguendo* that this Court should rely on the attached plat, once this Court determined that the plat contained errors, this Court should have relied on the natural monuments rather than declare the deed a nullity, thwarting what the trial court found was the clear intention of the Grantor and what precedent says is the primary purpose of interpreting a deed, to carry out the intention of the Grantor.

V. THIS COURT OVERLOOKED OR MISAPPREHENDED THE LAW IN SOUTH CAROLINA WHEN THIS COURT FAILED TO FOLLOW PRECEDENT IN THAT SOUTH CAROLINA RECOGNIZES THAT LAND ADJACENT TO NAVIGABLE TIDAL WATER IS SUBJECT TO ACCRETION AND EROSION.

This Court overlooked or misapprehended the law in South Carolina when this Court failed to follow precedent in that South Carolina recognizes that land adjacent to navigable tidal water is subject to accretion and erosion and that the land boundaries move in relation to those forces of nature. South Carolina follows the common law rule that riparian and littoral landowners are subject to erosion or accretion by the adjacent water. "The rule rests on the impossibility of identifying at any given moment the imperceptible additions to or subtractions from riparian land caused by the constant natural action of water. It ensures that riparian land will remain riparian, whatever changes may take place in the adjacent watercourse or shoreline by accretion or reliction. The law gives the riparian proprietor the benefit of additions to his land caused by accretion or reliction. However, it also requires him to bear the corresponding risk that land will be lost by gradual erosion or submergence. The rule is said to rest on the principle of natural justice that one who sustains the burden of losses imposed by the contiguity of waters

shall be entitled also to whatever benefits they bring” Horry County v. Woodward 282 S.C. 366, 369-370, 318 S.E.2d 584 (SC Ct. App. 1984)..

This makes using a natural monument critical to determining the boundaries of Appellant’s land and emphasizes the need to use the order of fixing disputed boundaries as set forth above in the Williams case above.

VI. THIS COURT OVERLOOKED OR MISAPPREHENDED THE LAW IN SOUTH CAROLINA WHEN THIS COURT FAILED TO FOLLOW PRECEDENT WITH REGARD TO THE REQUIREMENTS TO CONVEY FEE SIMPLE TITLE TO MARSHLAND.

This Court overlooked or misapprehended the law in South Carolina when this Court failed to follow precedent that in order to convey marshland the grantee needs to show that the grantee (1) had a valid grant and that (2) the language of the deed was sufficient to convey land below the high water mark. Lowcountry Open Land Trust v. State 347 S.C. 96,522 S.E.2d 778 (S.C. Ct. of App. 2001). Appellant’s predecessor in interest had a valid grant as found by the trial judge and the language of the deed was sufficient to convey land below the high water mark as described in the words and the plat attached to the deed.

VII. THIS COURT OVERLOOKED OR MISAPPREHENDED THE LAW IN SOUTH CAROLINA WHEN THIS COURT FAILED TO FOLLOW PRECEDENT THAT IF IT FINDS AN AMBIGUITY IN THE DEED THAT EXTRANEIOUS EVIDENCE IS ALLOWED TO RESOLVE THE AMBIGUITY NOT CREATE ONE.

This Court overlooked or misapprehended the Law in South Carolina when this Court failed to follow precedent that if it finds an ambiguity that extraneous evidence is allowed to resolve the ambiguity not create one. “Where the description on a deed can be related to the land, parole (*sic*) evidence is inadmissible since extrinsic evidence is to be admitted to resolve

ambiguities, not create them." Kirven v. Bartell 266 S.C. 385, 389, 223 S.E.2d 597 (1976). " One 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 (SC Ct. App.1999).

VIII. THIS COURT OVERLOOKED OR MISAPPREHENDED THE LAW IN SOUTH CAROLINA WHEN THIS COURT FAILED TO FOLLOW PRECEDENT THAT THE INTENT OF THE GRANTOR, ONCE DETERMINED, AND THE WORDS USED IN THE DEED SHOW INTENT TO CONVEY, THE GRANTOR'S AND GRANTEE'S INTENT SHOULD CONTROL ERRORS IN THE DESCRIPTION.

This Court overlooked or misapprehended the Law in South Carolina that the intent of the grantor, once determined, and the words used in the deed show the intent, that the Court will construe it in such a manner that the intent of the Grantor and the Grantee is carried out even if it is not mathematically accurate and not within the parameters of general court rules. "... (A) deed is to be construed generally against the grantor, and, therefore, the exception carried out in his favor, is to receive no larger construction than the words will naturally import. But here the words are susceptible of the construction put upon them, because, by the parties' measurement, this was a square acre. It is true, by mathematical rule, it afterwards turns out to be not exactly correct. The location made by the parties may be regarded as a square acre, and as thus coming within the words used, and, therefore, within the meaning of the grantor or grantee. When we ascertain thus the intent, the rule that the deed should be construed most strongly against the grantor, is subordinate to that." Elliott v. Morrell (In re Claim of Hogan), 18 S.E.2d 871 (S.C., 1942), (citing Altman v. McBride, 4 Strob. 208).

IX. THIS COURT OVERLOOKED OR MISAPPREHENDED THE LAW IN SOUTH CAROLINA WHEN THIS COURT ALLOWED THE PLAT TO CONTROL THE PLAIN LANGUAGE OF THE DEED.

This Court overlooked or misapprehended the Law in South Carolina when this Court failed to follow precedent in that it allowed the plat to control the plain language of the deed, allowing one part of the conveyance to absolutely control the other rather than looking at the language in the conveyance as a whole. "The rule of construction of a deed is that all parts of a description should be taken together and no part suffered to control absolutely the others. ... So it often happens that facts outside of the deed, not inconsistent with its terms, may have a powerful effect." Smith v. DuRant 236 SC 80, 87-88, 113 SE2d 349 (1960).

X. THIS COURT OVERLOOKED OR MISAPPREHENDED THE LAW IN SOUTH CAROLINA WHEN THIS COURT USED PAROL EVIDENCE TO CREATE AN AMBIGUITY IN AN UNAMBIGUOUS DEED.

This Court overlooked or misapprehended the Law in South Carolina when this Court allowed testimony to create an ambiguity where none existed after the trial court determined that the intent of the Grantor was to convey marshland it allowed testimony in to contradict that intention. "Where the description on a deed can be related to the land, parole (*sic*) evidence is inadmissible since extrinsic evidence is to be admitted to resolve ambiguities, not create them." Kirven v. Bartell, 266 S.C. 385, 389, 223 S.E.2d 597 (1976).

XI. THIS COURT OVERLOOKED OR MISAPPREHENDED THE LAW IN SOUTH CAROLINA THAT, WHERE METES AND BOUNDS ARE CLEARLY ERRONEOUS, THEY WILL BE REJECTED AND THE LAND LOCATED WHICH WAS INTENDED TO BE CONVEYED.

This Court overlooked or misapprehended the Law in South Carolina that, "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, 87, 113 S.E.2d 349 (1960) quoting Norwood v. Birch 1 Rich 135, (1844).

XII. THIS COURT OVERLOOKED OR MISAPPREHENDED THE PRECEDENT THAT EVEN IF A BOUNDARY IS MISDESCRIBED, IF THE LAND CAN BE LOCATED THE ERRONEOUS BOUNDARY WILL BE REJECTED.

This Court overlooked or misapprehended the precedent set forth in Smith v Du Rant 236 S.C. 80, 89, 113 S.E.2d 349 (1960) citing Scates v. Henderson, 44 S.C. 548, 22 S.E. 724, 725, stated that, "The first question to be considered in a case of this kind is: If the boundary alleged to be erroneously set forth in the description of the property is rejected, does enough remain to render certain the *locus in quo*? When this can be done, the law permits the rejection of such erroneous boundary." In the instant case the land can be located, even if the plat is in error.

XIII. THIS COURT OVERLOOKED OR MISAPPREHENDED LAW AND THE EVIDENCE PRESENTED WHEN THIS COURT FAILED TO CONSIDER CERTAIN EVIDENCE PRESENTED BY APPELLANT'S WITNESS LORICK FANNING.

This Court overlooked or misapprehended the Law in South Carolina when this Court failed to consider evidence that the plat attached to the deed represented the high and low water marks as they existed at the time of its creation and that subsequent changes caused by the alluvial action of the water caused the Eastern and Western boundaries to be as described in the plat offered by the Appellant's witness Fanning (R. p. 377 L. 25 – R. p. 379 L. 22). South Carolina recognizes the general common law rule that accretions by natural alluvial action to riparian or littoral lands become the property of the riparian or littoral owner whose lands are added to. Conversely, lands gradually encroached upon by water cease to belong to the former riparian or littoral owner. Horry County v. Woodward 282 S.C. 366, 369-370, 318 S.E.2d 584 (1984) (Internal Citations Omitted).

XIV. THIS COURT OVERLOOKED OR MISAPPREHENDED THE EVIDENCE THAT HOYLER'S EXPERT WITNESS RECREATED THE PLAT FOR USE IN EXHIBIT "5" BY REDRAWING THE ORIGINAL PLAT ON AN AUTO CAD DEVICE.

This Court overlooked or misapprehended the Law in South Carolina when this Court failed to consider evidence that Appellant's witness created an overlay of the plat attached to the deed from the State to Hoyler's predecessors in title and the plat that the witness created and the two were nearly the identical. (R. p. 638).

Additionally, this Court failed to consider evidence that Appellant's witness recreated a copy of the plat attached to the deed from the State to Hoyler's predecessors in title by using an Auto Cad and the bearings and distances on the original plat. (R. p. 289 L. 20 – p. 292 L. 3).

Later in his testimony Mr. Fanning stated that he had **no trouble closing the plat** (R. p. 338 L. 18 - p. 339 L. 24).

XV. THIS COURT OVERLOOKED OR MISAPPRENDED THE LAW IN SOUTH CAROLINA WHEN THIS COURT FAILED TO FOLLOW PRECEDENT WITH REGARD TO DEFECTS IN A PLAT.

This Court overlooked the Law in South Carolina when this Court failed to follow precedent in that it allowed a purported defect in a plat to overcome the intent of the grantor rather than use evidence that showed the location of the real estate after an actual survey and recreation of the plat on an Auto Cad., "That is sufficiently certain which can be made certain." Later in the Brownlee case the Court states: " 'Applying the rule thus laid down to the case at bar, it is quite clear that the description was sufficient to enable a person of ordinary prudence acting in good faith and making inquiries suggested by the description to enable him to identify the land' ". Kirven v Bartell 266 S.C. 385, 388, 233 SE 2d 597 (1976), citing Brownlee v. Miller, 208 S.C. 252, 37 S.E. 2d 658 (1946).

CONCLUSION

Based on the foregoing, this Court should rehear this case, reverse its decision of August 7, 2019, and remand this case to the Lower Court.

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August 22, 2019

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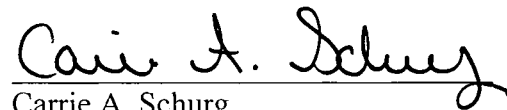
Of which The State of South Carolina and
Merry Land Properties, LLC are the..... Respondents.

AFFIDAVIT OF SERVICE

I, Carrie A. Schurg, an employee of Whitt Law Firm, LLC, certify that I have served
copies of the Appellant's Petition for Rehearing and this Affidavit of Service, via, U.S. Mail on
August 22, 2019, as indicated on the following page.

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August 22, 2019