

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

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SEP 10 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 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. WalshRespondents

**RETURN OF RESPONDENT STATE OF SOUTH CAROLINA TO
PETITION FOR REHEARING**

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Appellant's Petition for Rehearing should be denied because Appellant does not show that this Court overlooked or misapprehended any point that would warrant rehearing or that would change the result in this case. Rule 221, SCACR.

Appellant cites points of law that are irrelevant to the decision of this Court and fails to show error. That he has a grant to marshland is undisputed. What is in dispute is whether the grant and plat are sufficient to convey identifiable marshland. As this Court stated, "[n]ecessarily, the claimant must show that the language of the conveyance is specific enough to determine a reasonably precise location of its boundaries so that members of the public will not be excluded from property rightfully belonging to them." *Hoyle v. State*, No. 2016-001277, 2019 WL 3678516, at *5 (S.C. Ct. App. Aug. 7, 2019). This grant and plat are not "specific enough."

This Court's analyzed in detail the case law and the Master's findings. Appellant's arguments fail on two overriding grounds as well as others: the deed is construed strictly in favor of the State and against the grantee, and this Court was required to affirm the Master's findings if supported by any evidence as it was here. As stated by this Court:

We consider all of this evidence within the confines of a narrow scope of review, an obligation to defer to the fact finder's assessment of witness credibility, and longstanding precedent requiring construction of the State's purported conveyance of tidelands against the grantee. *Query*, 371 S.C. at 411, 639 S.E.2d at 456–57 ("A deed or grant by [the State] is construed strictly in favor of the State and general public and against the grantee." (quoting *Hardee*, 259 S.C. at 539, 193 S.E.2d at 499)); see also *Lollis v. Dutton*, 421 S.C. 467, 483, 807 S.E.2d 723, 731 (Ct. App. 2017) ("[T]he credibility of testimony is a matter for the finder of fact to judge." (quoting *S.C. Dep't of Soc. Servs. v. Forrester*, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984))); *id.* ("In a bench trial, the judge, as the finder of fact, may believe all, some, or none of the testimony, even when it is not contradicted."); *id.* ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to [circuit] court

findings where matters of credibility are involved.” (alteration in original) (quoting *Forrester*, 282 S.C. at 516, 320 S.E.2d at 42)).

We cannot ignore the testimony of Donald Cook and Jim Gardner supporting the master's finding that the deed to Crofut and the 1891 plat it incorporated were insufficient to convey title to a defined location of marsh bordering the Beaufort River. *See Blake*, 18 U.S. at 362 (“It is undoubtedly essential to the validity of a grant, that there should be a thing granted, which must be so described as to be capable of being distinguished from other things of the same kind.” (emphasis added)); *Brownlee*, 208 S.C. at 261, 37 S.E.2d at 662 (holding a deed will be sustained if “it is possible from the whole description, to ascertain and identify the land intended to be conveyed”); *cf. id.* (noting that the surveyors in that case had no trouble in locating the land).

Therefore, we are compelled to affirm the master's finding. *See Query*, 371 S.C. at 410, 639 S.E.2d at 456 (“In an action at law, ‘[the appellate court] will affirm the master's factual findings if there is any evidence in the record [that] reasonably supports them.’ ” (quoting *Lowcountry*, 347 S.C. at 101–02, 552 S.E.2d at 781)).

2019 WL 3678516, at *9–10. None of Appellant’s arguments overcome this Court’s analysis.

Appellant errs in contending that the deed was sufficient in and of itself to convey marsh. The grant from the State is patently insufficient in stating only that it conveys 95.27 acres of land between “high and low water” on the Beaufort River. *R. v. II*, p. 544. It contains no language whatsoever describing where the land is located on that river. Instead, the grant references the plat. As stated by this Court, “[w]here a deed describes land as it is shown on a certain plat, such plat becomes part of the deed for the purpose of showing the boundaries, metes, courses[,] and distances of the property conveyed.” *Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 397, 252 S.E.2d 133, 136 (1979).” 2019 WL 3678516, at *4.

The problem here is that the plat, as well as the deed, does not provide sufficient guidance as to the location of the property. As this Court stated, “[t]he plat's illegibility effectively made the deed ambiguous as to the precise location of the 95.27 acres in dispute.

Therefore, the master properly considered extrinsic evidence.” 2019 WL 3678516, at *8. Although Appellant seems to argue at times that extrinsic evidence should not have been used, he offered his own expert and argues that the Court should have relied on him and natural boundaries rather than courses and distances. Instead, this Court properly “agree[d] with the master's assessment of [Appellant’s expert’s] testimony as having negligible probative value because he did not use the plat's bearings and distances for all of the boundary lines—rather, he ‘relied on [the] mean high and mean low water mark[s] for the eastern and western boundaries[] and extrapolated the north-westerly property corner.’” 2019 WL 3678516, at *9.

The courses and distances were insufficient as well as the natural boundaries. As stated by the Master:

Due to the shortcomings Mr. Gardner identified on the 1891 plat and the lack of bearings or distance to locate the bisecting line, Mr. Gardner was unable to mathematically close the survey and described the process of locating the northern boundary line as "forced closure" If a survey cannot be mathematically closed based on the calls it prevents the parcel from being locatable on the ground, or, in other words, leaves the parcel "kind of floating out there."

R. v. I, p. 20. The southern boundary was also “ambiguous” *Id.* As the Master further stated:

While the Grant is a valid conveyance, in accordance with the precedent . . . regarding conveyance of public trust tidelands the Grant is strictly construed against the Grantee. Here the 1891 plat is part of the Grant by reference. In strictly construing the Grant, this Court cannot determine the location of the parcel which is the subject of the conveyance. This Court assigns weight to the testimony of two licensed surveyors who testified as Intervener's experts regarding their inability to locate the parcel depicted on the 1891 plat on the ground. This Court rejects Plaintiff s expert's attempt to locate the parcel based on different eastern and western boundaries than shown on the 1891 plat and a sliding northern boundary.

R. v. I, pp. 39 and 40.

Appellant contends that this Court should have considered alluvial action and placed the boundaries based upon the location of the current mean high water and mean low water lines. Petition at page 2. The problem with this argument is that the plat used "specific bearings and distances, some of which are illegible for the boundary lines" rather than mean high water. Opinion, 2019 WL 3678516 at *8. Even if accretion and erosion were considered, the absence of a northern boundary prevents the determination of the location of the property today. *Supra*, and Order at R. v. I, p. 20 (Based on Gardner testimony, "the southern boundary [is] ambiguous, as with the northern boundary:"). Moreover, Appellant does not show how erosion would benefit him. He cites *Horry Cty. v. Woodward*, 282 S.C. 366, 369-70, 318 S.E.2d 584, 586 (Ct. App. 1984), but that case does not hold that eroded property accrues to a private owner of marsh. Instead, as follows *Horry Cty.* addresses the effects on the upland owner:

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. *See Spigener v. Cooner*, 42 S.C.L. (8 Rich.) 301, *370 64 Am.Dec. 755 (1855) (dictum); *State of South Carolina v. Beach Co.*, 271 S.C. 425, 248 S.E.2d 115 (1978) (dictum). Conversely, lands gradually encroached upon by water cease to belong to the former riparian or littoral owner. *See Spigener v. Cooner, supra* (dictum). 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 State would take the position as to this case that it would be the presumptive owner of land below mean high water resulting from erosion, but that point need not be addressed because the plat uses fixed boundaries, and the property cannot be properly located due to the absence of a northern boundary.

CONCLUSION

This Court thoroughly and carefully addressed the issues in this case. It properly applied the law and affirmed because the Master's findings were supported by evidence in the record. Therefore, the State respectfully requests that this Court deny the Petition for Rehearing.

Respectfully submitted,

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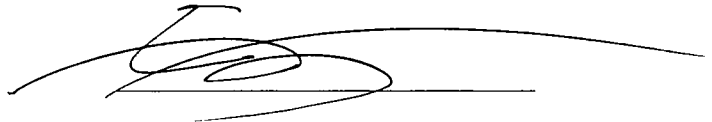
CERTIFICATE OF SERVICE

I certify that I have served the Return of the State to the Petition for Rehearing upon the
other parties by mailing copies to their counsel at the addresses below via the United States Mail
this September 10, 2019:

Stephen P. Groves, Sr., Esquire
Mary D. Shahid, Esquire
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Certificate of Service
September 10, 2019
Page 2

Jefferson D. Griffith, III, Esquire
Richard L. Whitt, Esquire
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401 Western Lane, Suite E
Irmo, SC 29063

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

J. Emory Smith, Jr.
Deputy Solicitor General



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ALAN WILSON
ATTORNEY GENERAL

September 10, 2019

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

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

Dear Ms. Kitchings:

Enclosed for filing with your Office is the Return of the State to the Petition for Rehearing together with a certificate of service. Thank you for your assistance.

Respectfully submitted,

J. Emory Smith, Jr.
Deputy Solicitor General
Counsel for the State

cc: Jefferson D. Griffith, III, Esquire
Richard L. Whitt, Esquire
Mary D. Shahid, Esquire
Stephen P. Groves, Sr., Esquire
Angelica M. Colwell, Esquire