STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

RECEIVED
SEP 11 2019
SC 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,

Respondents.

RESPONDENT MERRY LAND PROPERTIES, LLC'S RETURN TO APPELLANT'S PETITION FOR REHEARING

Mary D. Shahid, Esquire
Angelica M. Colwell, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1788
Telecopier: 843.414.8242
E-Mail: mshahid@nexsenpruet.com

Attorneys for the Respondent,
Merry Land Properties, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Case Decisions

Books, Learned Treatises, and Other Authority

I. INTRODUCTION

Pursuant to Rules 221 and 240(e) of the *South Carolina Appellate Court Rules* Respondent Merry Land Properties, LLC ("Merry Land") responds to the Petition for Rehearing submitted by the Appellant H. Marshall Hoyler ("Hoyler").

II. RESPONSE TO APPELLANT'S ARGUMENT

A. *This Court Accurately Stated, and Did Not Overlook or Misapprehend, the Law Regarding the State's Presumption of Title in Tidelands*

Hoyler asserts this Court overlooked or misapprehended long-standing South Carolina law regarding a claimant's burden to demonstrate a valid conveyance of tidelands originating with the State. As Hoyler's Petition lacks full explanation, Merry Land is assuming that Hoyler's argument is that no presumption in favor of the State should have applied in this case because of the existence of a grant of the Disputed Marsh[1] from the State.

Hoyler relies on State v. Hardee[2] and McCleod v. Sloan.[3] Hoyler's reliance on Hardee is misplaced. In Hardee, the concurring opinion expresses reservation about the presumption of title because the plat that was referenced by the deed through which the grant at issue in that case was made, *i.e.*, the Frazier grant, contained a legend indicating that the land depicted on the plat had been previously granted by the State to another

---

1 This term has been used in reference to the 95-acre tract of tidelands adjacent to several parcels of land owned by Merry Land, which Merry Land purchased with the specific intention to develop. *See* Merry Land's Appellate Brief, Statement of Facts.

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

3 McCleod v. Sloan, 284 S.C. 491, 328 S.E.2d 84 (1985).

party (prior to Frazier).**4** Hoyler's reliance on McCleod is misplaced as McCleod relates to title to the bed of a freshwater stream, not tidal wetlands

B. *This Court Accurately Stated, and Did Not Overlook or Misapprehend, the Law Concerning Interpretation of the Deed at Issue.*

Hoyler asserts this Court overlooked or misapprehended the law concerning interpretation of a clear and unambiguous deed. Hoyler briefly summarizes his argument that the *deed in the instant case* clearly intended to convey marshland.**5** Merry Land notes that the lower court agreed that the grant reflected an intent to convey tidelands. However, the lower court's decision denying Hoyler's action to quiet title was not based on interpretation of the grant alone but also on the fact the boundary of the grant remained uncertain due to ambiguity in the 1891 Plat:

> 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.

(*R. p. 32, para. 41*).

Hoyler proposes that the lower court and this Court should have relied solely on the language of the land grant since it "clearly intended to convey marshland below the high water mark ... ." Such proposal ignores established South Carolina law that a plat referenced by a deed becomes part of the deed: "[w]hen a deed describes land as shown

---

4 State v. Hardee, 259 S.C. at 545-546, 193 S.E.2d at 502.

5 *See* Petition for Rehearing, p. 5 (emphasis added); Hoyler's reference is to the State Grant dated 28 July 1891, in which the State of South Carolina granted property to Mr. James M. Crofut ("the 1891 Grant"). The 1891 Grant included reference to a plat dated 19 April 1882 ("the 1882 Plat"). There is a later plat, dated 1891 and contemporaneous with the 1891 Grant that was recorded with the 1891 Grant in the Beaufort County Register of Deeds. (*R. pp. 257, line 3-p.258, line 7*).

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."[6] The case cited by Hoyler does not involve a plat referenced by a deed nor does the case address interpretation of a plat.[7] Hoyler cites no authority to refute the long-standing rule that plats referenced by deeds are a part of the deed, or the precedent for the rule discussed thoroughly in the Opinion of this Court. Hoyler fails to note that Gardner v. Mozingo actually requires consideration of the 1891 plat to determine intent: "...the deed must be construed *as a whole and effect given to every part if it can be done consistently with the law.*"[8]

C. ***This Court Properly Followed the Law in Affirming the Lower Court's Finding that the Grant and Plat are Insufficient to Convey Title.***

Hoyler asserts this Court's decision failed to effectuate the intent of the Grantor. While the grant of tidelands was not confirmed by the lower court, Hoyler did not demonstrate that it resulted from any mistake in reasoning by the lower court or that this Court should have reversed the finding. Apparently, Hoyler proposes ignoring the entirety

---

6 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 ...' ")).

7 Gardner v. Mozingo, 293 S.C. 23, 358 S.E.2d 390 (1987).

8 Gardner v. Mozingo, 293 S.C. at 25, 358 S.E.2d 390-391.

of the authority cited in his Petition – that the intention of the grantor must be ascertained and effectuated *if no settled rule of law is contravened.*[9]

This Court's Opinion provides a full explanation of circumstances wherein a grant is considered void, invalid or insufficient to convey title under South Carolina law. Hoyler does not assert that this explanation is incorrect, nor does he explain how the grantor's intent could have been effectuated in this case without contravening settled rules of law regarding deed interpretation. This Court appropriately considered all applicable South Carolina law when it identified the 1891 Plat as part of the deed that required consideration. It would contravene South Carolina law to disregard it.

It was also appropriate for this Court to require a sufficiently full and definite description allowing identification of the property to be conveyed in order to find a valid conveyance of public trust tidelands. To require otherwise would have directly contravened well-settled rules governing alienation of the public trust.

D. ***The Lower Court and this Court Followed Precedent and Appropriately Assigned Weight and Assessed Credibility of the Expert Testimony Presented at the Trial***

Hoyler asserts this Court failed to rely on the appropriate monuments when determining the boundaries indicated on the 1891 Plat. Hoyler claims that if the Court relied on the 1891 Plat, it should have relied on the natural monuments indicated on it,

---

9 *See* Petition for Rehearing, p. 6 (emphasis added).

pursuant to Danley Williams v. Moore, in order to carry out the intention of the Grantor to effectuate the grant. **10**

Danley Williams v. Moore involved a boundary dispute. There the Court of Appeals noted that "the rules for determining disputed boundaries are not inflexible, but are subject to modification depending upon the particular facts of each case." This Court appropriately considered the testimony of Respondent's surveyors regarding the insufficiencies of the 1891 plat, the Supreme Court's emphasis on mathematical certainty in Hobonny Club Inc., v. McEchern**11** and the significance of public trust tidelands. These considerations supported an affirmance of the conclusion that the metes and bounds of the 1891 Plat dictated the boundaries of the conveyance rather than natural boundaries.

This Court provides a full and thorough explanation of the consideration given to the lower court's assessment of the expert witnesses' credibility and opinions.**12** Hoyler does not demonstrate any abuse of discretion or show any prejudice to justify reversal of the lower court's finding by this Court. As with Danley Williams v. Moore, the lower court weighed the conflicting testimony and found one side's experts – Merry Land's – more credible.**13** The record in this case also contains ample evidence regarding the methods used by the parties' experts to analyze the 1891 Plat to determine the boundaries of the Disputed Marsh.**14** While Hoyler may disagree with the weight the lower court assigned to Respondents' witnesses there was reliable and credible evidence to support the lower

---

10 Danley Williams v. Moore, 400 S.C. 90, 799 S.E.2d 224 (Ct.App.2012).

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

12 *See* Opinion, pp. 14-17.

13 Danley Williams v. Moore, 400 S.C. at 104, 799 S.E.2d at 231.

14 Danley Williams v. Moore, 400 S.C. at 104, 799 S.E.2d at 231.

court's findings.**15** Here, as this Court noted, the lower court found that the deed's "express reference to the 1891 Plat" and the plat's specific directions in express bearings and distances overrode the use of natural monuments to fix the location of the Disputed Marsh, as Hoyler's expert chose to do.**16**

E. *It is Not Necessary for this Court to Consider Precedent Regarding Accretion and Erosion to Determine Whether the Disputed Marsh is Locatable on the Ground by the Description in the Grant.*

Hoyler asserts this Court failed to consider the common law rule regarding erosion and accretion in determining the boundaries of the Disputed Marsh.**17** Hoyler's argument is that the addition or subtraction of land constitutes a change in the boundary that makes natural monuments, which are indicated as the first type of evidence of location (*i.e.*, natural boundaries), evidence that must be referred to when determining boundaries of a property.**18**

The lower court's finding was that the Disputed Marsh could not be accurately located on the ground. The lower court also found that the 1891 Plat's use of express bearings and distances overrode the use of natural monuments (high and low water) and replication of the plat should be based on the surveyed boundary instead of the natural boundary for this reason.**19** Hoyler fails to set forth any reasoning or legal authority to explain how this Court erred in affirming the lower court's finding.

---

15 *See*, Opinion, p. 17.

16 *See*, Opinion, p. 16.

17 *See*, Petition for Rehearing, p. 7.

18 Danley Williams v. Moore, 400 S.C. at 103-104, 799 S.E.2d at 231.

19 *See*, Opinion, p. 16.

Hoyler's argument again illustrates a misunderstanding of Williams, as previously explained. It is simply incorrect to read Williams as establishing an "order of fixing disputed boundaries," as Hoyler asserts. Merry Land agrees that South Carolina recognizes the general common law rule of accretion and erosion.**20** However, Danley Williams v. Moore does not state, and Hoyler cites no other precedent establishing such, that South Carolina has a rule that natural monuments are paramount evidence that must be applied first when determining boundaries. .

F. *This Court Properly Followed Law in Affirming the lower court's Finding that the Grant is Insufficient to Convey Title.*

Hoyler repeats his argument in Section III of the Petition - that this Court should have disregarded the 1891 Plat and relied solely on the language of the grant as being sufficient to convey the Disputed Marsh. Hoyler cites a single case as supportive of his position.**21** This case does not overrule or alter the precedent in South Carolina addressing interpretation of tideland grants upon which Merry Land relies.**22** In *Hobonny Club, Inc. v. McEachern*,**23** 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

---

20 Horry County v. Woodward, 282 S.C. 366, 318 S.E.2d 584 (1984).

21 Lowcountry Open Land Trust v. State of South Carolina, 347 S.C. 96, 552 S.E.2d 778 (2001).

22 *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).

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

> 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.
>
> A licensed professional engineer certified the boundaries to be accurately relocatable on the ground by contemporary engineering methods.24

The Supreme Court concluded "these plats were incorporated into the grants and show with precision where the boundaries of the tracts conveyed lie."**25** In short, Hoyler fails to cite any precedent to justify his argument that it was improper for Court to consider the 1891 Plat in determining the grant in this case.

G. ***This Court Followed Precedent in Affirming the Lower Court's Admission of Extrinsic Evidence to Resolve Ambiguity in the 1891 Plat, Which is Part of the Grant.***

Hoyler asserts that the extrinsic evidence was improperly admitted in this case, and either created ambiguity in the grant or varied or directly contradicted the terms of the conveyance stated in the grant.

Hoyler misconstrues the evidence in the record for this case. As this Court notes, "[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."**26** As has been discussed herein, the lower court properly considered the plat in this case because it was specifically referenced in the grant at issue and, therefore, became part of the deed. Once the deed is determined to be ambiguous based on the

---

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

25 Hobonny Club, Inc. v. McEachern, 272 S.C. at 397, 252 S.E.2d at 136.

26 *See*, Opinion, p. 14.

deficiencies of the incorporated plat, it was proper for the lower court to consider extrinsic evidence to determine the grantor's intent, which is a question of fact.**27**

Neither case cited by Hoyler establishes that consideration of extrinsic evidence was improper in the context presented by this case. More importantly, neither case may be read for the point that Hoyler keeps trying to advance – that the plat should not have been considered as part of the deed.**28** Because the plat was ambiguous, it rendered the deed *as a whole* ambiguous. As cited in this Court's opinion, the introduction of extrinsic evidence is proper to show the intent of parties to a contract.**29**

H. ***This Court Followed Precedent in Affirming the Lower Court's Finding that the Grant in This Case was Insufficient to Convey Title to Tidelands***

Hoyler restates his argument regarding the effectuation of the grant by claiming that the 1891 plat should be disregarded because of its intrinsic errors. Hoyler relies on authority that can be distinguished from this case.**30** Hogan involved a conveyance but lacked any recorded deed at all, so there was neither a clear land grant nor any contemporaneous plat for consideration in locating the subject property.**31** While a plat was presented at the oral argument of the case, that plat was a blue print having lines superimposed on it on October 17, 1941, which date did not agree with the date of sale

---

27 *See*, Opinion, p. 14.

28 Springbob v. Farrar, 334 S.C. 585, 514 S.E.2d 135 (Ct.App.1999) actually quotes the passage from Gardner v. Mozingo stating that in determining a grantor's intent, the deed must be construed as a whole and effect given to every part ... Springbob, 334 S.C. at 590, 514 S.E.2d 138.

29 *See*, Opinion, p. 14, citing S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 681 S.E.2d 299, 303 (2001).

30 Elliott v. Morrell in re Claim of Hogan, 199 S.C. 274, 18 S.E.2d 871 (1942).

31 Hogan, 199 S.C. at 274, 18 S.E.2d at 871.

of the property or execution of the mortgage containing the description of the land under the consideration of the court in the case.**32**

In addition, it should be noted that the description referred to a lot occupied by a school, which was built in 1924, and the parcel in question was described as bounded by a road.**33** A road and school lot provide static boundaries that are not comparable to boundaries dependent upon the location of the high and low water marks.

Finally, the discrepancy in the parcel in Hogan was a difference between "one square acre" and something "more than an acre," though the exact difference is not identified.**34** Regardless, it did not render the parcel unidentifiable.**35** The description, though not perfect, still allowed identification of the property conveyed.

I. *This Court Properly Considered the 1891 Plat and Followed South Carolina Precedent in Finding that the Property Described in the Plat Must be Able to be Determined in Order to Constitute a Valid Conveyance.*

Hoyler asserts that this Court allowed the 1891 plat to control over the grant, the implication being that this Court should have disregarded the 1891 plat and looked only to the language of the grant.

As is discussed in several of the foregoing sections, this Court was bound, by precedent of South Carolina law, to consider the 1891 plat because it comprised the deed as a whole in this case, per the clear reference to the 1891 plat made in the plain language of the grant. The 1891 plat bears no similarity to the plats discussed in Smith v. DuRant,

---

32 Hogan, 199 S.C. at 274, 18 S.E.2d at 872.

33 Hogan, 199 S.C. at 274, 18 S.E.2d at 872.

34 Hogan, 199 S.C. at 274, 18 S.E.2d at 872.

35 Hogan, 199 S.C. at 274, 18 S.E.2d at 872.

cited by Hoyler, since the discussion in that case concerned plats involving discrete errors that were obvious upon comparison of the plat in question to the descriptions contained in the grants or deeds.**36** Specific examples discussed in Smith were a plat that indicated courses and distances which were the reverse of those described on the grant**37** and a distance stated on a plat as 65 which measured on the ground around 300.**38** But, unlike the instant case, there is no question that the plats in Smith were sufficient to allow location of the parcels of interest on the ground.

Hoyler overlooks the conclusion in Smith that all parts of a description, *i.e.*, included in a grant and in a plat, must be considered when construing a deed.

J. ***Extrinsic Evidence Was Admitted After Ambiguity in the Grant Was Identified and, As Such, Did Not Create It.***

Hoyler again asserts, *albeit* by a new reference to parol evidence as opposed to extrinsic or extraneous evidence, that the evidence *itself* introduced ambiguity that should not have been introduced since the grant unambiguously indicated the intent of the Grantor. Hoyler's argument disregards the fact that the 1891 plat could not simply be ignored in this case, since under South Carolina law it became part of the deed pursuant to the grant's specific reference to it. In other words, while the grant may reflect the intent to convey, the 1891 plat it referenced "effectively made the deed ambiguous," as this

---

36 Smith v. DuRant, 236 S.C. 80, 113 S.E.2d 349 (1960).

37 Smith v. DuRant, 236 S.C. at 87, 113 S.E.2d at 353.

38 Smith v. DuRant, 236 S.C. at 92, 113 S.E.2d at 356.

Court notes.**39** It was after that determination of ambiguity, and because of it, that the lower court admitted the extrinsic evidence of expert testimony.

Kirven v. Bartell is easily distinguishable on its facts:

> "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, no create them. ... *In the instant case the description can be applied to the land with no discrepancies or inconsistencies. There is no ambiguity, patent or latent, in the instant deeds* so that the description contained therein is to be taken as conclusive evidence of the intention of the parties."**40**

Here, there was an ambiguity identified within the deed. As such, extrinsic evidence was properly admitted to resolve it.

K. ***The 1891 Plat Could not be Disregarded.***

Echoing prior arguments above, Hoyler reiterates that the 1891 plat should have been rejected by This Court. As previously explained, Hoyler misunderstands and misrepresents Smith v. DuRant as supportive of this position. Instead, that case establishes that the 1891 plat has to be considered to properly construe the deed. Upon doing so, the ambiguity of the 1891 plat was identified and the extrinsic evidence admitted to resolve it revealed that the plat was insufficient to locate the Disputed Marsh. This is in contrast with Smith and the examples discussed therein, in which errors were identifiable in the subject plats but the errors did not prevent the plats from locating the subject land on the ground.

---

39 *See*, Opinion, p. 14.

40 Kirven v. Bartell, 266 S.C. 385, 389, 223 S.E.2d 597, 599 (1976) (emphasis added).

L. *Hoyler Has Failed to Provide Justification for This Court to Overturn the Lower court's Findings, Which Are Reasonably Supported by the Evidence.*

Hoyler flatly asserts with no explanation that "[i]n the instant case the land can be located," which directly contradicts the finding of the lower court, based on all evidence considered.**41**

As this Court notes, the lower court's findings will be affirmed if there is any evidence in the record reasonably supporting them.**42** Hoyler fails to provide any reasoning or legal authority to justify a suggestion that the evidence relied upon by this Court did not reasonably support the lower court's findings.

M. *This Court Properly Considered Evidence Presented By Lorrick Fanning Within the Permitted Scope of Review.*

Hoyler suggests that this Court failed to consider evidence presented by his expert witness, Lorrick Fanning, again referring to his claim that the natural monuments of the high and low water marks, were the primary evidence that should have been considered to determine the boundaries of the Disputed Marsh.

Hoyler's misapprehension of South Carolina precedent regarding the rules for determining disputed boundaries has already been discussed. The rule (for first resorting to natural boundaries, then artificial monuments, the adjacent boundaries and last to courses and distances) "merely indicates the weight generally given to each type of evidence of location" and "does not provide an order of admissibility" ... "the facts of a

---

41 *See,* Opinion, p. 16 ("In reaching his determination that the property could not be accurately located, the mast concluded that Hoyler's "efforts to recreate the 1882 plat and the conveyance to Crofut [were] unreliable.")

42 *See,* Opinion, p. 6, citing Query v. Burgess, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct.App.2006) (internal cite omitted).

case may therefore require that an inferior means of location be preferred over a higher means of location."**43** In short, the lower court was not bound to impose a preference for the high and low water marks only when considering the expert testimony presented at the hearing regarding determination of the boundaries of the Disputed Marsh. As this Court notes, the lower court did consider Mr. Fanning's testimony but discounted it based on a conclusion that Mr. Fanning erred in relying on mean high water and mean low water when the deed only referred to high and low water without identifying these as the parcel's boundaries.**44**

N. *Hoyler Does Not Establish that this Court Failed to Consider Lorrick Fanning's Re-Creation of the 1891 Plat.*

Hoyler asserts that this Court failed to consider evidence presented by his expert witness but provides no explanation for this assertion. Mr. Fanning did create a plat dated 17 December 2010 (*R. p. 275, lines 3-5*) ("the Fanning Plat"). Mr. Fanning used the 1882 Plat to "re-create" the boundaries of the 1891 grant. (*R. pp. 545-547; R. p. 277, line 19-p. 278, line 9*). The Fanning Plat depicts an 89-acre parcel.

Mr. Fanning "re-created" the eastern and western boundaries of the grant by using mean high water and mean low water at its location in December 2010. While rejecting the "bearings and distances" supplied for the eastern and western boundaries, Mr. Fanning testified he used the "bearings and distances" to establish the northern and southern boundaries. (*R. 363, lines 6-24*). Nevertheless, Mr. Fanning admitted that he

---

43 Danley Williams v. Moore, 400 S.C. 90, 104, 733 S.E.2d 224, 231 (2012).

44 *See*, Opinion, p. 16.

"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.**45**

Hoyler does not explain why he believes his witness' use of Auto CAD (computer assisted drafting) was significant to re-creation of the1891 plat. Regardless, Merry Land's expert witness Jim Gardner also attempted (with a CAD technician) to re-create the plat by plotting the bearings and distanced into a CAD program. After doing so, he reached an exact opposite conclusion as Mr. Fanning that the plat could not be closed. (*R. p. 525 (page 17), lines 3-6*). Mr. Gardner, testifying by way of deposition, further stated that the degree of uncertainty caused by the inability to close the northern boundary exceeded the allowed tolerance for error. (*R. p. 526 (page 19), line 20*). Mr. Gardner also created an exhibit which reflected his attempt (along with the technician) to plot the bearings and distances on the plat. (*R. p. 525 (page 15), line 23-page 16, line 3*).

This evidence was considered by the lower court, who subsequently found the efforts of re-creation unreliable. This Court indicates that it also considered the evidence presented by Mr. Fanning but agreed with the lower court's assessment of Fanning's testimony.**46** While Hoyler may not agree with this assessment, the record confirms that

---

45 *R. p. 285, lines 13-21; R. p. 340, lines 1-15* (emphasis added).

46 *See*, Opinion, p. 16.

the lower court and this Court did, in fact, consider evidence presented by Mr. Fanning but determined Merry Land's experts to be more reliable.

O. *This Court Followed Precedent Regarding Determination of Boundaries Based on Reference to a Plat.*

Hoyler asserts that this Court should have found the Disputed Marsh locatable based on the survey and re-created plat provided by his expert witness, Lorrick Fanning. The lower court did not find the survey, re-created plat or testimony of Mr. Fanning reliable and this Court found these conclusions reasonably supported by evidence showing that Fanning erred in re-creating the plat based on mean high water and mean low water rather than "high" and "low" as noted in the grant.[47] Merry Land's expert witness Jim Gardner used the same method as Mr. Fanning in an attempt to re-create the plat and ultimately concluded that the plat could not be closed. This Court properly considered Mr. Gardner's testimony as well as the testimony of Merry Land's other expert witness, Donald Cook, in affirming the lower court.[48]

The lower court's analysis in determining intent but 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 lower court's factual determination that, despite the State's intent to convey a parcel lying between the high and low water marks on the Beaufort River, the exact boundary of the marsh tract portrayed on the 1882 Plat and the 1891 Plat

---

47 *See,* Opinion, p. 16.

48 *See,* Opinion, p. 17.

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**

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**

---

49 L. Kimble Carter, Esquire, South Carolina Boundary Law Compendium, Second Edition, pp. 22-23 (S.C. Bar 20___).1

are any rules of law or public policy requiring a different conclusion.[50]

"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."[51] "In the instant case, a reading of the Deed as a whole reveals the parties used the 1891 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 discerned from the Deed as a whole, ***was to show the boundaries, metes, courses and distances*** of the property conveyed.

III. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Respondent, Merry Land Properties, LLC, respectfully requests that this Court deny the Petition for Rehearing.

---

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

51 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 1description of the boundaries of the land ...' ")).

Respectfully submitted,

NEXSEN PRUET, LLC

By: 

Mary D. Shahid, Esquire
Angelica M. Colwell, Esquire
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1788
Telecopier: 843.414.8242
E-Mail: mshahid@nexsenpruet.com

Attorneys for the Respondent,
Merry Land Properties, LLC

Charleston, South Carolina

10 September 2019

NPCHAR1:2704585.1-BR-(AMC) 048740-00001

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,

Respondents.

PROOF OF SERVICE

Mary D. Shahid, Esquire (SC Bar No. 001794)
Angelica M. Colwell, Esquire (SC Bar No. 73188)
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206
E-Mail: sgroves@nexsenpruet.com

Attorneys for the Respondent,
Merry Land Properties, LLC

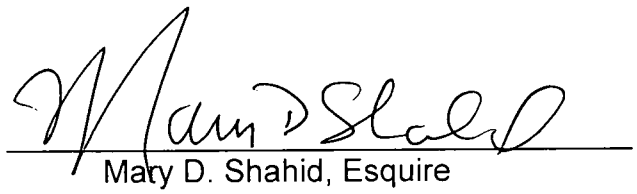
I, Mary D. Shahid, Esquire, hereby certify that on **10 September 2019**, I served one copy of the ***Respondent's Return to Appellant's Petition for Rehearing***, submitted by the Respondent, Merry Land Properties, LLC, on counsel for the Petitioner and the Respondents via the United States Mail, postage pre-paid, and addressed as follows:

Jefferson D. Griffith, III, Esq. and Richard L. Whitt, Esq.
Whitt Law Firm, LLC
401 Western Lane, Suite E
Irmo, South Carolina 29063

Attorneys for the Appellant

J. Emory Smith, Jr., Esquire
SOUTH CAROLINA OFFICE OF
THE ATTORNEY GENERAL
1000 Assembly Street
Columbia, South Carolina 29201
Counsel for the State of South Carolina

Attorneys for the Respondent,
State of South Carolina



Mary D. Shahid, Esquire

Charleston, South Carolina

10 September 2019

NEXSEN|PRUET

Mary D. Shahid
Member
Admitted in SC

September 10, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: H. Marshall Hoyler v. Merry Land Properties, LLC, et al.
Appellate Case No. 2016-001277

Dear Ms. Kitchings:

Please find enclosed an original and six copies of Respondent Merry Land Properties, LLC's Return to Petition for Rehearing. One additional copy is provided, along with a self-addressed stamped envelope, for you to stamp and return.

Please note that this Return was due on September 3, 2019. I contacted your office on September 3, 2019, and spoke with the assistant clerk managing this appeal. I advised that my office had closed that morning in anticipation of the arrival of Hurricane Dorian. My office remained closed until Monday, September 9. Between Wednesday evening, September 4 and Saturday, September 7, I was without power or internet and was unable to enter my office (due to storm-related security policies) or utilize my computer and unable to access my documents at home.

Monday, September 9, was the first opportunity available to me to finalize this Return and prepare it for delivery to the Court. I appreciate the Court's acceptance of this late filing.

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

205 King Street
Suite 400 (29401)
PO Box 486
Charleston, SC 29402
www.nexsenpruet.com

T 843.720.1788
F 843.414.8242
E MShahid@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

Very truly yours,

Mary D. Shahid

Enclosure

cc: Jefferson D. Griffith, III, Esq.
Richard L. Whitt, Esq.
J. Emory Smith, Jr., Esq.
Angelica Colwell, Esq.