

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**

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. VonHärten,  
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 REPLY TO RESPONDENTS RETURNS**

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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 followed on August 22, 2019. Thereafter this Court issued correspondence dated August 23, 2019, requesting that the Respondents file Returns to Appellant's Petition for Rehearing of August 22, 2019. Respondent, State of South Carolina's Return to Appellant's Petition was filed with this Court on September 10, 2019 and Respondent, Merry Land Properties, LLC's Return to Appellant's Petition was filed on September 11, 2019. Appellant's Reply to the Respondents' Returns follows.

### ARGUMENT IN REPLY TO RESPONDENT MERRY LAND PROPERTIES, LLC

**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.**

Respondent, Merry Land Properties, LLC's, (hereinafter as "Merry Land") assertions that because the rule was cited in a dissent and was cited in a case involving fresh water that somehow the Rule is not the Rule and is inapplicable to the case at hand is incorrect. The original case on which both of these cases rely is State v. Evans, 33 S.C. 184, 11 S.E. 697 (S.C., 1890). The case draws a distinction between cases in which the State claims by sovereignty or by deed. Here, as the State acknowledges in its' brief, "(t)he grant to the marshland is undisputed." "When the state comes into her own courts to assert a right of property, she is, of course, bound [sic] by all the rules established for the administration of justice between individuals. This is practically an action for the recovery of real estate, and one of the rules of procedure applicable in such case is that the plaintiff must recover upon the strength of his own title, and not the weakness of the defendant's. State v. Evans, 33 S.C. 184, 11 S.E. 697, 697 (S.C., 1890). So, the distinctions that Merry Land draws are ones which do not undermine the Rule that the State must prove its' own title and not rely on a presumption.

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

Merry Land misses the point of the second issue raised by Hoyler. The Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987) case stands for the proposition that the issue of deed interpretation is one of law and not of fact. It also stands for the proposition that “... (t)he construction of a clear and unambiguous deed is a question of law for the court. The terms of an unambiguous deed may not be varied or contradicted by evidence drawn from sources other than the deed itself. When **intention** 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 but is explained or corrected. Gardner v. Mozingo, 293 S.C. 23, 358 S.E.2d 390,392, (S.C., 1987), (Internal citations omitted), (Emphasis added).

In the case *sub judice*, it is acknowledged that the trial court found that the State intended to convey marshland. (R. 47) The trial court, having heard no evidence to the contrary in Appellant’s case in chief that contradicted that intention and even given the very thorough cross examination by Respondent Merry Land’s counsel as well as counsel for the State, there was no ambiguity as to intent or substance found in the deed based on testimony from Appellant’s witnesses. The trial court erred, and this Court overlooked or misapprehended the law, when it relied on witnesses from the Respondent Merry Land to testify and *vary or contradict* the **intention** of the Grantor.

**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.**

Merry Land conflates law and fact in its response to Appellant's third issue. Appellant's position, consistent with the law of South Carolina, is that under the law, the paramount obligation of any court is to carry out the intent of the Grantor. "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." Bennett v. Investors Title Ins. Co., 370 S.C. 561, 570, 635 S.E.2d 660 (S.C. App., 2006) (Internal citations omitted). Merry Land cites no "settled rule of law" that is offended by interpreting the deed in the way that the Grantor intended. Evidence is not "settled law" and should not be allowed to overturn the rule of law cited in the Bennett case that the intent of the grantor be effectuated, especially when the evidence presented by Merry Land should not have been allowed to be admitted in the first instance since it is used to create an ambiguity where none existed. "Where the description on a deed can be related to the land, parole evidence is inadmissible since extrinsic evidence is to be admitted to resolve ambiguities, not create them" Kirven v. Bartell, 223 S.E.2d 597, 599, 266 S.C. 385 (S.C., 1976) (Internal citation omitted).

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

Merry Land tries to reframe the fourth issue so that it benefits Merry Land's position. Appellant, contrary to Merry Land's interpretation of its issue, raises the question of what the trial court should have done with its considerations when confronted with at least the argument that plat was inaccurate. The trial court was at a decision point about the accuracy of the plat that was incorporated as a part of the deed and being considered as a part of the whole of the deed's description. What should have guided the trial court's consideration? The trial court should have been interpreting the deed so that it gave effect to the Grantor's intent. See Bennett, *supra*. While Appellant believes that the trial court erred in finding that the plat was inaccurate, once he made that determination he should have looked for another source from which to derive the location of the property, namely the natural monuments of high and low water. "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 S.C. 90, 733 S.E.2d 224, 231 (S.C. App., 2012), (Internal citations omitted).

In this case, once the trial court determined that the “inferior means of location” (courses and distances) was inadequate he should have looked for another means to carry out the Grantor’s intent to convey the property. Yet, he failed to, and this Court overlooked the fact the first means of determining boundaries (natural monuments; high and low water) was available to him and this Court. The trial court erred when he failed to use the natural monuments of high and low water marks as described in the deed and as shown on the plat prepared by Appellant’s expert Fanning and introduced as Exhibit 4 and instead chose to thwart the grantor’s intention by taking the drastic step of voiding the deed.

**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.**

Merry Land disputes, by misinterpreting Appellant’s reliance on Horry County v. Woodward, 282 SC 366, 318 SE2d 584 (1984). It is only necessary to rely on Horry County if the plat attached to the deed is found to be unreliable as descriptive of the land the State intended to convey to Mr. Hoyler’s predecessors in title. Since the trial court found the plat to be so, then Hoyler presented a preferred alternative to the plat, natural monuments. In having his expert prepare a plat using natural monumentation, as a matter of accuracy and fairness to the adjacent landowners and to the State, had to take into account the potential for erosion or accretion pursuant to Horry County, *id.*

Contrary to Respondent Merry Land’s Return, natural monumentation is favored over other means of establishing a boundary. However, again Merry Land misses the point of looking at the natural monumentation. Under the guidelines set forth in the Williams case, *supra*, the trial court used an inferior means of locating a boundary. However, under the circumstances of

the case at bar, since a plat was attached to the deed the trial court may have properly chosen to do so. However, once the trial court decided that the plat was inaccurate (erroneously in the view of the Appellant) the trial court should have turned to natural monumentation to locate the high and low water marks and necessarily taken into consideration the erosion or accretion that might have occurred.

**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.**

Merry Land misstates the premise of issue six of Appellant's Petition. Appellant points out that all that is necessary to convey marshland is set forth in the Lowcountry Open Land Trust v. State of South Carolina, 347 SC 96, 552 SE2d 778 (2001) case. Appellant meets the criteria for such a conveyance. Merry Land then overstates and over relies on Hobonny Club v. McEachern 272 SC 392, 252 SE2d 133(1979). While the court in Hobonny draws attention to the very good plats that were presented in the Hobonny case, the plats are evidence of the State's intent to divest itself of the land lying below the high water mark. Indeed, in Query v Burgess, 371 SC 407, 412, 639 SE2d 455 (SC App 2006), this Court stated that "...an exceptionally detailed and mathematically precise plat can rebut the State's presumption of title to marshes." (Emphasis added). In the case at bar, the trial court already determined that the State intended to convey land below the high water mark and the precision of the plat in this case is irrelevant to that issue.

**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 EXTRANEOUS EVIDENCE IS ALLOWED TO RESOLVE THE AMBIGUITY NOT CREATE ONE.**

Merry Land incorrectly states the proposition which the Appellant sets forth in this issue. The deed has a plat annexed and the plat becomes a part of the deed. There has to be some ambiguity in the deed and as a part of the deed the plat. First and foremost the trial court found a chain of title and language sufficient to convey land between the high and low water marks. That is adequate to divest the State of title Low Country Open Land Trust v. State *supra*, 103.

The deed and plat were neither patently nor latently ambiguous and should have been afforded the protections set out in Springob v. Farrar 334 S.C. 585, 590-591, 514 S.E.2d 135 (S.C. Ct. App.1999).

Over objection, Merry Land was allowed to introduce testimony in an attempt to create ambiguity into the deed through purported errors in the plat. While both witnesses stated that they had difficulty reading the plat and recreating it on CAD machines neither witness was asked to go into the field and try to locate the property. Both acknowledged further field work was necessary and that the plat attached to the deed from the State either could be generally located R. 470 LL. 1-9, or represented the property R. 529, p. 32, LL. 8-14; R. 533, P. 47, LL. 21-24. "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). The law is clear that the testimony of Merry Land's witnesses should not have been admitted given their ability to relate the land to the deed.

**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.**

Merry Land, in trying to distinguish the case cited in the exception accidentally, makes Appellant's point. Elliott v. Morrell (In re Claim of Hogan) 199 SC 274, 18 SE2d 871 (1942) stands for the rule that once the intent of the parties to the instrument is ascertained even a strict rule such as the instrument must be construed most strongly against the grantor must give way to the intent of the parties. The instrument in question in the Elliott case supra was a mortgage but Merry Land creates a distinction without a difference. An instrument may be a mortgage or deed or maybe a contract but the result is the same, the intent of the parties to the instrument are to be carried out. And as Merry Land says in its Return, "The description (in the mortgage in the Elliott case), though not perfect, still allowed the identification of the property conveyed." (Merry Land's Return p. 10). Just as in the case at bar, assuming the description is imperfect, having determined the parties' intent, it still allows the identification of the property.

**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.**

Merry Land overlooks the point of the next exception, that being that the language in the conveyance, including the plat should be considered equally, and no part allowed to control the other. In the instant case, the trial court allowed a disputed description in a plat to void the entirety of a deed, which also contained a written description and upland references which at a minimum could have been used to generally locate the land. (See "VII." above for ability to generally locate using the Beaufort grid system) "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. Du Rant, 236 S.C. 80, 113 S.E.2d 349,353, (S.C., 1960), (Internal citations omitted).

Additionally, the trial court erred in allowing the extrinsic, parol evidence from Merry Land’s witnesses to contradict the terms of the deed. In fact, it is the testimony of the of Merry Land’s witnesses that they were not asked to try to clarify the purportedly ambiguous terms in the deed but were only asked to try to read the words on the attached plat and draw it on a CAD machine which they were unable to do creating the ambiguity which not allowable under the law of this state. “When an instrument is ambiguous, parol testimony is admissible to remove the ambiguity; ... subject to the limitation that it must be consistent with the instrument, and therefore that it must not tend to contradict or vary its terms.” Smith v. Du Rant, , 236 S.C. 80, 113 S.E.2d 349, 354 (S.C., 1960) What Merry Land’s witnesses failed to do was try to find a way to determine if the plat itself were reproducible, consistent with the instrument, since they were never asked to make the effort to determine if the plat was actually wrong or just difficult to work with. R. 463 LL. 19-25; R. 464 LL. 1-13; R. 471 LL. 1-25; R. 472 LL. 1-16; R. 528, p. 27, LL. 1-7; R. 533, p. 49, LL. 4-23.

**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.**

Merry Land again overlooks the guiding principle for interpreting a deed, to effectuate the parties' intentions. Appellant points out through his witnesses that the deed and plat were adequate to describe the property and locate it on the ground based on the testimony that he presented. The grantor, the State of South Carolina presented no evidence to the contrary and it was only strangers to the deed and plat that tried to introduce controversy into the transaction. The testimony from Merry Land was designed to create an ambiguity, not resolve one, particularly in the sense that the testimony from Merry Land's witnesses was limited by Merry Land to the extent that the witnesses purportedly discovered a problem but were not asked to even make the effort to resolve it. See Record cited in "IX." above.

Therefore the only purpose in the introduction of the testimony and parol evidence was to create an ambiguity where none existed between the parties to the deed and it was error to do so. "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 (S.C. Ct. App.1999).

**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.**

Merry Land states in its' response to this exception that somehow Appellant has misrepresented or misconstrued Smith v. DuRant. The opposite is in fact true. The quotation from Smith v. DuRant is a direct quote from the case. "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, 113 S.E.2d 349, 353 (S.C., 1960). That is precisely what happened in this case.

As the trial judge found, the clear intention of the parties was to convey "tidelands between high water and low water was clearly expressed." R. 47, A survey was done by Appellant's expert who found no errors in the original plat. However, witnesses on behalf of Merry Land were erroneously allowed to testify and create an ambiguity in the plat resulting in an ambiguity in the deed as a whole. Assuming *arugendo*, the ambiguity had merit, then DuRant requires that the plat should have been rejected as surplusage and the land located "... so as to cover the tract clearly intended to be conveyed." Mr. Fanning had no trouble locating the property and both of Merry Land's witnesses were not asked to do the work necessary to see if the property could be located.

**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.**

Merry Land states that Appellant flatly asserts that “(i)n the instant case the land can be located.” The record is replete with testimony from Mr. Fanning, Appellant’s expert that he was able to find the parcel described in the deed and plat. R. 341 L. 1 – R. 344 L. 8; R. 351 LL. 11-20; R. 282 LL. 25-R. 286 LL. 24; R. 363 LL. 5- R. 370 LL. 6; R. 514 LL. 16-25; R. 515 LL. 1-25; R. 516 LL. 1-6. Even Merry Land’s experts acknowledged that the plat represented the parcel described in the deed R. 529 p. 32 LL. 8-14; R. 533, p. 47 LL. 21-24 and that the general location of the parcel could possibly be located using the 1882 plat, surface features and other landmarks.

Again directly quoting 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, “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.” Appellant asserts that sufficient evidence exists to “... render certain the *locus in quo*...”

Appellant also asserts that while it is correct for Mr. Fanning to have used mean high and mean low as the boundaries, he redrew the 1882 plat and that was enough to locate the plat on the ground.

Appellant also asserts that the Court of Appeals overlooked the law that it owed deference to the trial court. The Court of Appeals is interpreting a deed which is an equitable matter and under those circumstances the appellate court interprets the facts in accordance with its own view of the preponderance of the evidence. “The interpretation of a deed is an equitable

matter. In any event, because the predominate issues involved in this appeal are equitable, we review the evidence to determine the facts in accordance with our view of the preponderance of the evidence. Heritage Federal Sav. and Loan v. Eagle Lake and Golf Condominiums, 318 S.C. 535, 458 S.E.2d 561, 564 (S.C. App., 1995), (Internal citations omitted).

**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.**

The Appellant points out to the Court in this exception that Mr. Fanning used mean high and low water as natural monuments to establish the eastern and western boundaries of the property. While not the only technique used by Mr. Fanning to determine the location and boundaries of the property it was an appropriate one to use given the dynamic and fluid nature of the tidal river which established the eastern and western boundaries of the property. The use of the terms high and low water mark have been used to show the intent of the state to convey property below the high water line. Hobonny Club *supra* p. 396.

The Court in Hobonny also recognizes that the high water and low water mark is not a mark that exists on any given day but the "...lands lying between the **usual high water line and the usual low water line** on tidal navigable watercourses enjoy a special or unique status, being held by the State in trust for public purposes Hobonny Club, *supra* p. 396. (Emphasis added) Merry Land's witness Gardner testified that mean high and low water was the average where high and low was where the water was located on a given day. R. 534 p. 50 L 1 – p. 51 L 10.

Using the appropriate “usual high and low water line(s)” Mr. Fanning reconstructed the plat attached to the deed. This Court, under the Williams v. Moore, *supra* decision, should have used the natural monuments either as the preferred method of determining the eastern and western boundaries or, having considered the plat and found it wanting, should have used the Fanning plat as a secondary means of carrying out its primary obligation, carrying out the intent of the grantor.

**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.**

Appellant in this portion of the Petition for Rehearing merely points out to the Court that it overlooked a good portion of the testimony of the Appellant’s expert’s testimony with regard to location of the plat to the ground. Mr. Fanning in his testimony set forth in the Petition for Rehearing Paragraph XIV gave a number of instances in which he used the plat attached to the deed to locate the property on the ground.

Much of the discussion in the Opinion with regard to interpretation of the deed and plat in question discusses the interpretation of an instrument once it is found to be ambiguous. Assuming, arguendo that the plat and therefore the combined instrument is ambiguous then the “... 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. See Santoro, 384 S.C. at 272, 681 S.E.2d at 908 (“If this [c]ourt decides that the language in a deed is ambiguous, the determination of the grantor's intent then becomes a question of fact.”); See also McClellanville, 345 S.C. at 623, 550 S.E.2d at 303 (applying rules of contract construction to a restrictive covenant in a deed); *id.* at 623, 302–03 (“A contract is ambiguous when the terms of

the contract are reasonably susceptible of more than one interpretation. It is a question of law for the court whether the language of a contract is ambiguous. Once the court decides the language is ambiguous, evidence may be admitted to show **the intent** of the parties. The determination of the **parties' intent** is then a question of fact." (emphasis added) (citations omitted)). need to locate the plat." Shearouse Advance Sheet, Opinion Number 5676, Page 118 (Emphasis added).

However, in this case the **intent** of the parties was already decided by trial court, which was to convey the property described in the instrument. R. 47. Once intent was determined the interpretation of the deed and attached plat became an equitable matter and this Court was able to make its own determination of the facts in accordance with its own view of the preponderance of the evidence. Heritage Savings and Loan, supra.

**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.**

The Appellant, in this paragraph, merely points out that the Court overlooked the precedent that the courts in South Carolina are bound to carry out the intent of the parties to an deed. In doing so they are bound to make certain that the interested parties have made the effort that "...a person of ordinary prudence acting in good faith and making inquiries suggested by the description (would have made) 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).

Appellant intended to show that the Appellant's expert had not only used mean high and low water marks but had recreated the plat attached to the deed by other means, CAD drawing, field work, use of contemporaneous plats, and use of the Beaufort County grid system. (See references to Fanning testimony in the Record in Paragraph "XII." above) This was the work that a person of ordinary prudence acting in good faith would have taken. The purported defect referenced in Paragraph "XV." of the Petition for Rehearing was conjured by two witnesses that did nothing beyond working with a machine in their respective offices. Both would have ordinarily done field work but did not. Cook ordinarily used field work as a resource. R. 462 LL. 15-25 – R. 463 LL. 1-3, but was not asked to re-create the tract in question. R. 472 LL. 1-3. Gardner would ordinarily have used field work to try to close the plat but was not asked to. R. 528 p. 27 LL. 1-7; R. 528 p. 29 LL. 6-25, R. 533 p. 49, LL. 4-25. Gardner in fact says that he was never asked to do field work but that would have been the only way to determine what went on.

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**ARGUMENT IN REPLY TO RESPONDENT STATE OF SOUTH CAROLINA**

Appellant does not address the Respondent, State of South Carolina's Return in detail, because the State of South Carolina's Return (i) simply rehashes the contents of the Lower Court's Order, which is not helpful for this Court's review of Appellant's Petition for Rehearing and (ii) the State's argument, to the extent they are substantive, simply rehash the arguments made by Merry Land Properties, LLC.

## 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. Appellant submits that the intent of the grantor was to convey the property sold to Crofut by grant from the State. The intent of the grantor has been established by the Lower Court, namely, to sell the tideland property. This Court should find the plat and deed unambiguous and not in need of interpretation. If the Court determines that it must interpret the deed and plat then it should review the deed and plat as a whole, based on its own view of the preponderance of the evidence and confirm the property in Appellant.

**WHITT LAW FIRM, LLC**



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**As Counsel for Appellant/Petitioner.**

September 16, 2019

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

SEP 16 2019

SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

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

**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., 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,

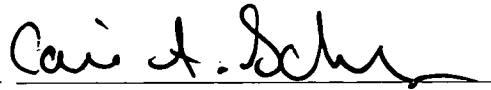
Of which The State of South Carolina and  
Merry Land Properties, LLC are the..... Respondents.

**AFFIDAVIT OF SERVICE**

I, Carrie A. Schurg, an employee of Whitt Law Firm, LLC, certify that I have served  
copies of the Appellant's Reply to Respondents Returns to Petition for Rehearing and this  
Affidavit of Service, via, U.S. Mail on September 16, 2019, as indicated on the following page.

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Carrie A. Schurg

September 16, 2019