

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas
Marvin H. Dukes, III, Master-in-Equity

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S.C. SUPREME COURT

Order, of the S.C. Court of Appeals, filed, August 22, 2019
(Rehearing Denied, October 17, 2019)

H. Marshall Hoyler, ...Petitioner,

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.

APPENDIX
Volume Four

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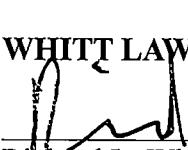
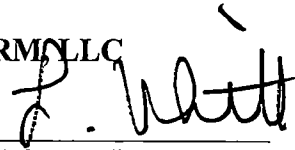
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November 14, 2019
Irmo, South Carolina

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

RECEIVED

APR 17 2017

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

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'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.

**FINAL BRIEF of the
RESPONDENT, MERRY LAND PROPERTIES, LLC**

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I. STATEMENT OF ISSUES ON APPEAL

In accordance with Rule 208 of the South Carolina Appellate Court Rules the Respondent, Merry Land Properties, LLC ("Merry Land"), is satisfied with the Statement of Issues on Appeal as identified by the Appellant, H. Marshall Hoyler ("Mr. Hoyler") as to Arguments A through E. Nevertheless, Merry Land would add the following issue related to additional sustaining grounds as contemplated by Rule 220(c), SCACR.

ADDITIONAL SUSTAINING GROUND

Regardless of the ultimate disposition of ownership of the disputed marsh, Mr. Hoyler is barred from preventing Merry Land's construction of the permitted marina based upon the well-established principles of estoppel and laches.

II. STATEMENT OF THE CASE

Mr. Hoyler claims title to a parcel of marshlands in Beaufort County, referred to here as the "Disputed Marsh". The Respondent, State of South Carolina (the "State"), asserted title in the Disputed Marsh based on its presumptive title to all marshland within its borders. Merry Land is a land development company which acquired several parcels of adjoining property (the "Port Royal Property") seeking to construct a multi-family residential development with deep water access across and through the Disputed Marsh.

On 8 November 2007, Mr. Hoyler brought this action seeking a declaration of title to the Disputed Marsh pursuant to the applicable statutory procedures.¹ After learning of this action, Merry Land moved to intervene on 20 November 2007.² Merry Land's interest

¹ See S.C. Code Ann. §48-39-220 (Thomson Reuters West 2013).

² Merry Land also filed its proposed Answer and Counterclaim. (R. pp. 57-67).

herein was based on (a) its development plans for the Port Royal Property which adjoined the Disputed Marsh and (b) the issuance of two separate permits³ which authorized construction of a community marina to facilitate deep water access via the Disputed Marsh. (*R. pp. 684-704*). Merry Land was granted intervention and in September 2010, the matter was referred to the Master-in-Equity for Beaufort County.

The Master-in-Equity convened the initial hearing on 31 January 2011. (*R. p. 192*). During that hearing, the Master-in-Equity recognized there were approximately 36 additional abutting and/or adjoining landowners, including Merry Land, whose respective interests could be significantly adversely affected by a judicial determination in the case.⁴ The Master-in-Equity stopped the hearing and orally directed that Mr. Hoyler was required to notify all adjacent property owners of the underlying law suit and allow them an opportunity to respond.⁵ After moving for reconsideration, but before the motion was addressed, Mr. Hoyler appealed the joinder order. This Court of Appeals and the Supreme Court denied the appeal and returned the matter to the Master-in-Equity to consider Mr. Hoyler's still-pending reconsideration motion which was denied on 15 February 2013.⁶

³ The permits were issued by the South Carolina Department of Health and Environmental Control ("DHEC") and by the United States Army Corps of Engineers (the "USACE"), respectively.

⁴ At least two of the affected adjoining landowners already had docks constructed to deep water through the Disputed Marsh.

⁵ The Master-in-Equity subsequently issued a written order memorializing his verbal directive. (*R. pp. 4-7*).

⁶ The Master-in-Equity also granted a pending intervention motion from the Respondent, Nancy Deering Casey, at the same hearing.

Mr. Hoyler then filed two additional appeals seeking review of the Master-in-Equity's joinder order. This Court of Appeals dismissed the second appeal, filed on 15 March 2013, on the grounds that the appeal was interlocutory and premature. Mr. Hoyler filed the third appeal while his second reconsideration motion was still pending before the Master-in-Equity. This Court of Appeals dismissed that appeal on 20 August 2013, as well as Mr. Hoyler's subsequent Petition for Rehearing. In 2015, three years after the Master-in-Equity issued the joinder order, Mr. Hoyler identified the adjoining owners and served them with notice of the action. Thirty-six additional parties were joined and the Master-in-Equity reconvened the merits hearing in this case on 19 November 2015.

After taking the matter under advisement, the Master-in-Equity issued a written order on 27 May 2016, denying Mr. Hoyler's asserted title to the Disputed Marsh on the basis that the grant's boundaries could not be properly established due to the vague and incomplete description contained in the form deed and the referenced plats which Mr. Hoyler relied upon to establish his predecessor's interest. This appeal followed.

III. STATEMENT OF THE FACTS

A. Background

The Disputed Marsh is an approximately 95-acre tract of tidelands located in the Town of Port Royal. It is an expansive tract located adjacent to the Beaufort River. The Beaufort County Tax Assessor identifies the disputed marsh as R120 007 000 0632 0000.⁷ Merry Land owns several parcels of land bordering the Disputed Marsh, as do the other named Respondents. The Beaufort County Tax Assessor identifies Merry Land's

⁷ The disputed marsh adjoins Spanish Point - an existing residential subdivision - and several other parcels and/or portions of other residential subdivisions and developments. (R. pp. 293-294; R. p. 674, 707).

adjoining parcels as R110 007 000 116A, R110 009 000 0174, R110 007 000 116C, and R110 007 000 116B. (*R. p. 666*).⁸ Merry Land purchased the Port Royal Property in 2006, specifically intending to construct a multi-family residential and mixed-use development with deep water access on the Beaufort River via the Disputed Marsh. (*R. pp. 400, line 22–p. 401, line 13*).

Even though Mr. Hoyler acquired his interest in the disputed marsh in 1979 (*R. pp. 536-538*), he did not file this quiet title action until 2007, some 28 years later. Moreover, Mr. Hoyler did so only after Merry Land contacted him regarding the Disputed Marsh. (*R. pp. 427, line 20–p. 429, line 20*). Mr. Hoyler claims title to the Disputed Marsh based upon a State Grant and two hand-drawn and partially illegible plats. (*R. pp. 539-636*). On 28 July 1891, the State of South Carolina granted property to Mr. James M. Crofut, Mr. Hoyler's predecessor-in-interest. The text of the grant is stated in a form deed as follows:

KNOW YE, That in pursuance of the Acts of the General Assembly in relation to Vacant Lands, for and in consideration of the sum of [N]inety [S]even 27/100 [D]ollars paid to the Secretary of State by James M. Crofut the actual purchaser for value, WE HAVE GRANTED, and by these Presents do grant, unto the said James M. Crofut his heirs and assigns, a Plantation or Tract of Vacant Land, situate in Beaufort S.C. of Beaufort County and State aforesaid containing [N]inety [F]ive (95 27/100) 27/100 acres, more or less, Being a parcel or tract of land on the Beaufort River in County and State aforesaid and **lying between high and low water mark on river above mentioned.**

(*R. 539-543, emphasis added*). The grant includes reference to a plat on file with the South Carolina Secretary of State. The plat referenced in the grant is dated 19 April 1882

⁸ Merry Land owns other parcels on Ribaut Road and Johnny Morrall Circle in Port Royal.

(the "1882 Plat"). The 1882 Plat is recorded with the grant in the South Carolina Department of Archives and History. There is a later plat, dated 1891 and contemporaneous with the grant, that was recorded with the grant in the Beaufort County Register of Deeds. (the "1891 Plat"). (*R. pp. 257, line 3–p. 258, line 7*). Mr. Hoyler relies on these two plats to establish the Disputed Marsh's location. The 1882 Plat shows a hand-drawn outline of an irregularly-shaped parcel on the Beaufort River, bordering several other parcels. The plat contains several "calls," or stated directions and distances, but several are illegible. The 1891 Plat, recorded in Beaufort County's public records, appears to be a duplicate of the 1882 Plat. Again, many "calls" on the 1891 Plat are illegible.

Before 2007, Merry Land had no way to know of Mr. Hoyler's ownership claim over the Disputed Marsh even though Merry Land had conducted extensive due diligence before purchasing the adjoining upland tracts. In fact, four of the upland property owners who adjoin the Disputed Marsh requested and received permits from the State of South Carolina and other entities to build docks over and through the Disputed Marsh. At least two of these docks existed in 2007. (*R. pp. 416, line 20–p. 417, line 2; R. pp. 643, 647*). In addition, Merry Land had completed very public permitting procedures seeking to build a marina across the Disputed Marsh including published newspaper notices and articles regarding the proposed project. There was no indication of any competing claim of private ownership of the Disputed Marsh during either DHEC's or the USACE's permitting processes. (*R. pp. 416, line 2–p. 417, line 7; R. pp. 684-704*). Similarly, no indication of private ownership of the Disputed Marsh was revealed during a title review performed by an experienced real estate attorney who reviewed the available tax records, tax maps,

deeds, and Beaufort County's GIS records. (*R. pp. 434-453*). In addition, Merry Land used a professional engineering firm and licensed professional surveyors to provide an ALTA survey and boundary surveys. None of these professionals discovered any information and/or documentation to indicate a competing claim of ownership to the Disputed Marsh. In fact, all documents of record reviewed described the Disputed Marsh as "marshes of the Beaufort River" or simply "marsh". (*R. pp. 297-334; R. pp. 639-669*).

It is well-established in this State that "[t]itle to land between the high and low water marks remains in the State and is held in trust for the benefit of the public."⁹ Furthermore, a "grant of tidelands by the State or a predecessor sovereign is construed strictly in favor of the State and the general public against the grantee."¹⁰ Nevertheless, private ownership of marsh and/or tidelands property may be recognized under certain specific circumstances in accordance with South Carolina statutory law¹¹ which provides:

**SECTION 48-39-220. Legal action to determine
interest in tidelands.**

- (A) Any person claiming an interest in tidelands which, for the purpose of this section, means all lands except beaches in the coastal zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters, may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State. Service of process shall be made upon the Secretary of the State Budget and Control Board.
- (B) Any party may demand a trial by jury in any such action by serving upon the other party(s) a demand therefor

⁹ State v. Hardee, 259 S.C. 535, 539, 193 S.E.2d 497,499 (1972).

¹⁰ Grant v. State, 395 S.C. 225, 717 S.E.2d 96 (2011).

¹¹ See S. C. Code Ann. § 48-39-220 (Thomson Reuters West 2014). Mr. Hoyler filed his "quiet title" action pursuant to this statute.

in writing at any time after the commencement of the action and not later than ten (10) days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

- (C) Nothing contained in this chapter shall be construed to change the law of this State as it exists on July 1, 1977, relative to the right, title, or interest in and to such tidelands, except as set forth in this section.
- (D) The Attorney General shall immediately notify the department upon receipt of any private suit made under this section, his response to that suit, and the final disposition of the suit. The department will publish all such notifications in the state register.¹²

In addition to the procedures contained in S.C. Code Ann. § 48-39-220, DHEC promulgated a regulatory process to address private claims of ownership of public tidelands.¹³ Pursuant to S.C. Code Reg. 30-2(I), the following procedures apply:

I. **Applications Involving Adjoining Landowners Claiming Ownership of Critical Area**

- (1) All permit applicants must provide information in writing concerning the ownership of critical area in or over which a project is to be constructed.
- (2) The alleged adjoining landowner of critical area must be notified pursuant to the provisions of [S.C. Code Ann. §] 48-39-140(C) and [S.C. Code Ann. Reg. §] 30-2.
- (3) If the alleged adjoining landowner of critical area files a written objection to the permit application within the period prescribed in [S.C. Code Ann. §] 48-39-140 (15 days for minor and 30 days for major permits) based upon a claim of ownership and indicates an intention to file a court action pursuant to [S.C. Code Ann. §] 48-39-220, the application will be deemed incomplete and further processing of the permit will not take place until a final judicial decision is rendered by a court of competent jurisdiction. However, written proof of filing a court action pursuant to [S.C. Code Ann. §]

¹² History of statute: 1977 Act No. 123, Sec. 22; 1993 Act No. 181, Sec. 1235.

¹³ See S.C. Code Ann. Reg. 30-2(I) (Thomson Reuters West 2014).

48-39-220 must be received by [DHEC] within 30 days of the date of the expiration of the comment period. If no such written proof is timely received, the permit will be processed pursuant to law.

- (4) If the final judicial decision determines that the critical area in question is owned by the adjoining critical area landowner and that the critical area landowner has a right to exclude others as part of the title, the permit will not be issued unless the applicant presents the Department with a copy of a deed, lease, or other instrument from the adjudicated critical area landowner that would allow construction of the proposed project, or written permission from such owner to carry out the proposal as provided for in [S.C. Code Ann. § 48-39-140(B)(4)].
- (5) Permit applicants who are vested with the power of eminent domain shall be exempt from the provisions of paragraphs (3) and (4) of [S.C. Code Ann. Reg. § 30-2(I)].

Merry Land undertook an extensive inquiry and due diligence investigation to confirm a community marina could be constructed across public trust tidelands presumptively owned by the State of South Carolina. (*R. pp. 402, line 17–p. 408, line 4*). Had Mr. Hoyler implemented the procedures set forth in S.C. Code Ann. § 48-39-220 prior to 2007, and had Mr. Hoyler prevailed, then Merry Land would have been on notice of Mr. Hoyler's claim of ownership under S.C. Code Ann. § 48-39-220(D) which requires immediate notification of such a claim by the Attorney General's office to DHEC. Such notification would have triggered the procedures of S.C. Code Ann. Reg. § 30-2(I) during the DHEC permitting processes. Merry Land would have learned of Mr. Hoyler's claim and Merry Land would not have closed on the property purchase or, alternatively, would not have paid a "waterfront access" premium for the parcels purchased.¹⁴

¹⁴ Merry Land paid \$4.5 million for eight acres of waterfront acreage and \$1.5 million for ten acres of upland. (*R. p. 406, lines 13-15*).

B. Mr. Hoyler's Efforts to Establish the Boundaries of the Land Grant

Mr. Hoyler retained Lorrick Fanning, a professional land surveyor, to locate the land grant's boundaries. Mr. Fanning prepared a plat (*R. p. 637*) which he described as "a plat ... prepared for M[r.] Hoyler that represents property he owns, Tax Parcel HAR 1200070000632." (*R. p. 275, lines 3-5*). The Fanning Plat is dated 17 December, 2010 (*R. p. 275, lines 3-5*) and Mr. Fanning used the 1882 Plat to "recreate" the boundaries of the 1891 grant. (*R. pp. 545-547; R. p. 277, line 19-p. 278, line 9*). As has already been noted, there is also a contemporaneous plat prepared in 1891 (*i.e.*; the 1891 Plat). The Fanning Plat depicts an 89-acre parcel.

Importantly, the land grant refers to a tract of land lying between the high water mark and low water mark on the Beaufort River. (*R. pp. 548-636*). Both the 1882 Plat and the 1891 Plat have hand-written bearings and distances, or "calls", establishing the property boundary. A number of the "calls", however are illegible. Both the 1882 and 1891 Plats include a northern boundary line dividing the marsh parcel. That line is deficient in "calls" on either end. While it seems from the 1882 and 1891 Plats that the northern portion of the marsh parcel was cut off and deeded to a separate entity, the Beaufort County GIS information does not indicate the northern boundary line or show any division of the marsh parcel. (*R. p. 674*). If Mr. Hoyler purports to own the entire parcel as it is depicted by Beaufort County, then the total acreage is approximately 113 acres. Alternatively, if Mr. Hoyler purports to own only the lower, larger parcel, the acreage based on the 1882 Plat and the 1891 Plat is 95.27 acres.

Mr. Fanning "re-created" the eastern and western boundaries of the land 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 did use the “bearings and distances” to establish the northern and southern boundaries. (*R. 363, lines 6-24*). Nevertheless, Mr. Fanning had to admit that he “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.¹⁵

Aerial photography of the Disputed Marsh shows multiple tributaries traversing the marsh, with a predominance of tributaries adjacent to Merry Land’s several properties. (*R. pp. 674, 706*). Mr. Fanning acknowledged that the Fanning Plat failed to show water courses and/or tributaries. (*R. pp. 349, line 1-p. 350, line 25*). When asked if Mr. Hoyler “owned” the tributaries Mr. Fanning replied “[a]s a surveyor I retraced the original plat”. (*R. p. 351, lines 6-12*). In including the tributaries as Mr. Hoyler’s property, Mr. Fanning claimed “they are above the mean low water mark on the Beaufort River side”, but admitted he had failed to investigate the interior of the parcel to confirm elevations in the tributaries. (*R. pp. 353, line 22–p. 354, line 1*).

Moreover, Mr. Fanning acknowledged the hand-drawn plats lacked a scale and a directional arrow. (*R. pp. 354, line 9-p. 355, line 6*.) He further acknowledged that a notable shell rake that wasn’t submerged was also included in the acreage calculation.

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

(*R. pp. 370, line 12–p. 371, line 17*). Mr. Fanning's acreage determination of 89 acres, which is six acres less than the acreage described in the land grant and referenced plats, includes the tributaries and water courses and shell rake referenced in the testimony and aerial photos.

IV. ARGUMENT AND CITATION OF AUTHORITY

STANDARD OF REVIEW

This Court of Appeals reviews a Master-in-Equity's findings as though the case "was heard by a circuit court without a jury."¹⁶ The nature of the underlying issue controls whether a suit is legal or equitable.¹⁷ The underlying issue in this case is the determination of title to real property - specifically, tidelands - according to the statutory procedures set forth in *S. C. Code Ann.* § 48-39-220. Though an action to quiet title is generally equitable, *id.*, "[t]he determination of title to real property is a legal issue."¹⁸ When an action concerns title to real property, the action is at law.¹⁹ Indeed, "[a]n action to determine ownership of tidelands pursuant to [S]ection 48-39-220 is an action at law."²⁰

In an action at law without a jury, this Court of Appeals' review extends only to the correction of errors of law.²¹ Because this action is at law, this Court of Appeals must "reaffirm the master's factual findings if there is any evidence in the record which

¹⁶ *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 548 (1989).

¹⁷ *Lowcountry Open Land Trust v. State*, 347 S.C. 96, 101, 552 S.E.2d 778, 781 (Ct.App. 2001).

¹⁸ *Wigfall v. Fobbs*, 295 S.C. 59, 60, 367 S.E.2d 156, 157 (1988) (internal citations omitted).

¹⁹ *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (2006) (*quoting Lowcountry Open Land Trust v. State*, 347 S.C. 96, 101, 552 S.E.2d 778, 781).

²⁰ *Grant v. State*, 395 S.C. 225, 228, 717 S.E.2d 96, 98 (Ct. App. 2011); *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (2006).

²¹ *Grant v. State*, 395 S.C. 225, 228, 717 S.E.2d 96, 98 (internal citation omitted).

reasonably supports them.”²² This Court of Appeals may not disturb the trial court’s factual findings “unless a review of the record discloses that there is no evidence which reasonably supports the [lower court’s] findings.”²³

To the extent that the underlying action is in the nature of a boundary dispute, “[a] boundary dispute is an action at law and the location of a disputed boundary line is a question of fact.”²⁴

A. THE MASTER-IN-EQUITY PROPERLY DENIED MR. HOYLER’S CLAIM TO OWNERSHIP OF THE DISPUTED MARSH.

The Master-in-Equity concluded the land grant reflected an intent to convey tidelands but denied Mr. Hoyler’s action to quiet title due to the fact the property’s boundaries remained uncertain. The Master-in-Equity stated:

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). Mr. Hoyler asserts the Master-in-Equity improperly denied his action to quiet title because “no effort was made by the Trial Court to effectuate the intent of the grantor.” (*Mr. Hoyler’s Initial Brief*, p.19). Mr. Hoyler alleges South Carolina courts have established a procedure²⁵ wherein the Master-in-Equity’s approach should have been

²² Query v. Burgess, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (2006).

²³ Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct.App. 2000).

²⁴ Bodiford v. Spanish Oak Farms, Inc., 317 S. C. 539, 544, 455 S. E. 2d 194, 197 (Ct. App. 1995).

²⁵ See Bennett v. Investors Title Ins. Co., 370 S.C. 578, 635 S.E.2d 649 (Ct.App.2006).

limited to asking “[b]ecause the tract in question involves alienation of State land, ... (i) could the state convey and (ii) did the State convey it?” (*Mr. Hoyler’s Initial Brief*, p.20).

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 are any rules of law or public policy requiring a different conclusion.**²⁶

“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.”²⁷ “In the instant case, a reading of the Deed as a whole reveals the parties used the 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

²⁶ *Davis v. Davis*, 223 S.C. 182, 184-85, 75 S.E.2d 46, 47 (1953) (italicized in original, bold emphasis added).

²⁷ *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 ...’ ”)).

discerned from the Deed as a whole, was to show the boundaries, metes, courses and distances of the property conveyed. ...”²⁸

The finding of an intent to convey tidelands did not completely satisfy Mr. Hoyler’s burden of proof before the Master-in-Equity. Merry Land has consistently maintained that (a) the form deed lacked specification in the location of the tract of land allegedly being conveyed and (b) the 1882 Plat and the 1891 Plat referenced by the form deed contained insufficient information to ascertain and identify the boundaries of the land intended to be conveyed. The rule of law regarding certainty of deeds in South Carolina is that a description is sufficient if it enables a person of ordinary prudence acting in good faith and making inquiries suggested by the description to identify the land.²⁹ In Brownlee, there was an ambiguity in the deed at issue which described a tract as containing “225 acres, more or less” whereas the actual acreage computed after a survey of described boundaries was much more than 225 acres.³⁰ The Supreme Court, in Brownlee, rested its holding on the elementary position that where land is sold by boundaries, acreage is governed by the boundaries and inaccuracies relating to the area are immaterial.³¹ In addition, the Supreme Court also noted in Brownlee that the surveyors had no trouble in

²⁸ Bennett v. Investors Title Ins. Co., 370 S.C. 578 at 595, 635 S.E.2d 649, 658 (Ct.App.2006).

²⁹ Brownlee v. Miller, 208 S.C. 252, 261, 37 S.E.2d 658, 662 (1946).

³⁰ Brownlee v. Miller, *supra* at 255, 659.

³¹ Brownlee v. Miller, *supra* at 260, 661. Cf. Gourdin v. Davis, 31 S.C.L. (2 Rich.) 481 (1846) (recitals of quantity following a particular description are merely descriptive and do not determine the quantity sold).

locating the land and they testified at the hearing that the boundary lines were fairly well established.³²

In this matter, the expert surveyors admittedly disagreed upon whether the land could be located and the boundary lines depicted in the survey could be re-established, presenting an opposite set of facts from Brownlee. First, Merry Land presented Donald Cook, a licensed, professional surveyor, as an expert witness in land surveying. Mr. Cook testified as to certain deficiencies in the both the 1882 Plat and the 1891 Plat which accompanied or were referenced in the land grant. Mr. Cook noted the absence of both a "scale" and of a "point of beginning" or "point of commencement" as "two main deficiencies." (*R. p. 467, lines 14-17*). These deficiencies materially impacted Mr. Cook's ability to replicate the parcel reflected in those two plats. (*R. p. 467*). According to Mr. Cook:

[W]ithout a point of beginning you have no part – no point to start to locate the parcel on the ground. Without a scale you can't, you know, tell if they were – what measurement of units they were using. So, therefore, scaling it, you don't know really how big the parcel is or potentially how big it is.

(*R. p. 468, lines 2-8*).

Merry Land attempted to provide testimony from its engineer, Greg Baisch, regarding his efforts in 2006 to have the surveyors employed with Ward Edwards Engineering to re-create the 1882 Plat and the 1891 Plat. Mr. Baisch testified he worked with his surveyors to attempt to locate the parcel reflected in those two plats relative to Merry Land's property. The Master-in-Equity did not permit Mr. Baisch to testify regarding

³² Brownlee v. Miller, 208 S.C. 252, 261, 37 S.E.2d 658, 662 (1946).

the actions of the surveyors working at his direction.³³ Nevertheless, the Master-in-Equity “kept the trial record open” and allowed Merry Land to present the deposition testimony of a second surveyor – Jim Gardner.³⁴ Mr. Gardner, a former Ward Edwards Engineering employee, was the surveyor who initially analyzed the 1882 Plat and the 1891 Plat at Merry Land’s request.³⁵

After receiving the two plats, Mr. Gardner began his analysis by requesting a computer assisted drafting (“CAD”) technician at Ward Edwards, under his supervision, to enter the bearings and distances shown on the plat into a CAD program. When Mr. Gardner reviewed the technician’s efforts to plot the bearings and distances into CAD, he concluded that the plat could not be closed. He stated “according to Lori, and what I saw also when we did review it, was that there were some shortcomings in the bearings and distances that we could discern, that just – it didn’t close.” (*R. p. 525 (page 17), lines 3-6*). Mr. Gardner 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 created an exhibit which reflected his attempt (along with the

³³ The Master-in-Equity sustained Mr. Hoyler’s counsel’s objection based on hearsay and excluded Mr. Baisch’s testimony that his staff was unable to re-create the older plats because they couldn’t close the boundary of the parcel. At the end of the hearing, Merry Land’s counsel explained she was “caught off guard” when the Master-in-Equity didn’t allow Mr. Baisch, an expert, to testify to matters performed by staff personnel he supervised. In turn, the Master-in-Equity allowed the trial record to remain open for the purpose of including the deposition of a then as yet to be identified surveyor. Merry Land’s counsel later located Jim Gardner, a former employee of Ward Edwards, and his deposition was taken on 26 February 2016. (*R. pp. 715-717*).

³⁴ With the Master-in-Equity’s permission, Mr. Gardner’s deposition was, as noted, taken after the hearing and then presented for consideration.

³⁵ Mr. Gardner was questioned regarding his qualifications and Appellant’s counsel had no objection to Mr. Gardner testifying as an expert. (*R. p. 523 (page 8), lines 8-10*).

technician) to plot the bearings and distances on the plat. (R. p. 525 (page 15), line 23–page 16, line 3).

With regard to the import of closure of plat, Mr. Gardner opined that “you’re bound – in the State of South Carolina, you’re bound by a mathematical closure of surveys.” (R. p. 525 (page 14), lines 13-20). He also noted that “if you have a break in the survey, it’s not going to close mathematically to any effect, which means you just – it’s kind of floating out there.³⁶ And you can kind of – it – it really corrupts the survey in the fact that you can’t continue on with the chain of measurements to see if it closes.” (R. p. 526 (page 18), line 23–page 19, line 3; R. p. 713).

As relates to the eastern corner of the northern boundary line, which was “forced closed” by Mr. Fanning, Mr. Gardner testified that “once you get to this point, you don’t have a direction or distance to go. ... All you know, you’d go generally in an easterly direction. And that’s -- that’s not on there. That’s the reasons for bearings and distances, to tell you where the survey goes.” (R. pp. 526-257 (pages 21-22)). “If I can’t do a mathematical closure on a survey plat, I can’t tell how good the survey is or how good it isn’t.” (R. p. 528 (page 26), lines 12-14). Mr. Gardner noted that an inability to close also negatively impacts the certainty of the southern boundary of the parcel:

[T]he plat not closing, not coming back together, in other words, if you started at a point, you’re supposed to come around and end at the starting point. . . . This survey, if it didn’t do that, then everything could be shifted one way or the other. And you wouldn’t know where these corners were, truly, without you know, other surveys specifying adjoining

36 Merry Land’s witness Ray Cook was asked what it meant if a parcel doesn’t close and he replied that “[i]t means the that the points are just kind of hanging out there in space.” (R. p. 468, lines 14-17).

corners or adjacent boundaries. (*R. p. 530 (page 35), lines 3-12*).

This Court has previously rejected a “forced closure” of a boundary line.³⁷ In Clements, Respondent Young claimed that the property line was represented by a “tie line which was established by a previous action for the purpose of a partition sale.” Importantly the surveyor testified that “he created a tie line on his plat ... which simply extended a line from another parcel of property ... that he never actually surveyed the line. He created it as a matter of convenience in order to complete the partition.” This Court held that “a compiled line, created merely for the convenience of presently avoiding a dispute, is unacceptable as a basis for an order establishing a true boundary line.”³⁸

Regarding the inability to discern all the “calls”, Mr. Gardner opined:

if one thing is not discernable, that's limiting your directional accuracy. So, I mean, even though you might could read this bearing and distance, if you have a bearing and distance that's close to it, that you can't read, depending on whether the surveyor – if he started down here and came all the way around, should have wound up back at this point. Then, still, no you can't.

(*R. p. 530 (page 37), lines 1-8*). Mr. Gardner indicated multiple areas of uncertainty and ambiguity on the 1891 Plat (which he described as a copy of the 1882 Plat) which impaired the ability to recreate the marsh parcel. (*R. pp. 525 (page 17), line 7–p. 526 (page 19), line 3; R. p. 710*). These uncertainties and ambiguities included multiple unreadable bearings and distances despite the CAD technician's efforts to magnify the plat. In addition, a “call” on the 1891 Plat as “1.55 chains” would be much shorter than

³⁷ Clements v. Young, 310 S. C. 73, 425 S. E. 2d 63 (1992).

³⁸ Clements v. Young, *supra* at 64-65.

the line which was reflected on the 1891 Plat. Mr. Gardner testified that the northern boundary included no bearings or distances and, consequently, no direction nor distance to locate the boundary line. The bearings and distances which purported to create points for the southern boundary were also illegible. (*R. pp. 525-527 (pages 17-22); R. p. 710*).

-----Mr. Gardner relied on the bearings and distances on the plat as the surveyor's intent in defining and locating the 95.27 acres referenced in the grant:

Well, the information on the plat would have been bearings and distances that were measured in some form or fashion by a surveyor. And since he didn't say, you know, or show mean high water or mean low water on here, I would say this would be what – you know, this is what the surveyor intended. And from the 1882 survey, this is what they were intended to be this 95 and 27-hundredths of an acre.

(*R. p. 533, (page 46), lines 3-10*). Mr. Gardner described the process of locating the northern boundary line as a “forced closure.” (*R. p. 529, (page 30)*).

Neither Mr. Fanning nor Mr. Gardner could recreate a survey or plat, as defined in South Carolina, in their efforts to locate the boundaries of the 1891 land grant. “A survey, the primary purpose of which may include but is not limited to, determination of the perimeters of a parcel or tract of land by establishing or reestablishing courses, monuments, and boundary lines for the purpose of describing or platting or dividing the parcel.”³⁹ A “plat” is defined as “an accurate graphical representation, neatly lettered and properly dimensioned report of a survey made by a surveyor of a finite piece of real property, including pertinent data and appropriate information.”⁴⁰ These regulations, governing the practice of surveying and engineering in this State, distinguish between

³⁹ S. C. Code Ann. Reg. 49-430(C)(14) (Thomson Reuters West 2014).

⁴⁰ S.C. Code Ann. Reg. 49-450 (Thomson Reuters West 2014).

compiled maps, where “partial or no actual surveying has been performed,” “plats” and “surveys”.⁴¹ Based on Mr. Fanning’s testimony, his attempt to re-create the disputed marsh parcel resulted in, at best, a compiled map, and not a survey or plat.

There is considerable precedent regarding the conveyance of public trust tidelands. “Because the State is presumed to hold title to tidelands in trust for the benefit of the public, a grant of private ownership must contain specific language in the grant or on the plat demonstrating an intent to convey land below the high water mark.”⁴² While the sovereign’s intent to convey public trust tidelands may be demonstrated by either the Grant or the Plat, the precedent in South Carolina consists predominantly of cases where the Grant is silent or ambiguous as to tidelands and the claimant relies on the accompanying Plat to establish alienation of tidelands.⁴³ In Hobonny Club, Inc. v. McEachern,⁴⁴ which is included in that category of tidelands cases where the land grant was vague and the intent to convey marsh was based on the accompanying plat, 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 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

⁴¹ S. C. Code Ann. Reg. 49-430(C)(17) (Thomson Reuters West 2014).

⁴² Grant v. State, 695 S. C. 225, 229, 717 S. E. 2d 96, 98 (2011).

⁴³ 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).

⁴⁴ Hobonny Club, Inc. v. McEachern, 272 S. C. 392, 252 S. E. 2d 133 (1979).

on the ground.

A licensed professional engineer certified the boundaries to be accurately relocatable on the ground by contemporary engineering methods.⁴⁵

The Supreme Court concluded “these plats were incorporated into the grants and show with precision where the boundaries of the tracts conveyed lie.”⁴⁶

Consequently, Mr. Hoyler’s analysis falls well short. Even though there may be intent to convey a tract of land “lying between high and low water mark” on the Beaufort River (*R. p. 544*), the location of the property is dependent upon the referenced plat and the 1891 Plat (*R. pp. 545-547*) suffers from a clear lack of precision. The Master-in-Equity relied on the testimony of two professional licensed surveyors, namely Messrs. Cook and Gardner, who testified they were unable to locate the precise boundaries of the Disputed Marsh absent a resort to significant speculation and guess work. While Mr. Fanning had an “easier time” locating the boundaries, his success was based on:

- (a) ignoring the bearings and distances along the expansive eastern and western borders and relying on locating mean high and mean low water;
- (b) forcing closure of the northern boundary without being guided by the actual bearings and distances on the plats;
- (c) using “discretion” in setting both the northern and southern boundaries in order to accomplish sufficient acreage to justify the re-created plat; and
- (d) including a notable shell rake that was above mean high water based on the Master-in-Equity’s

⁴⁵ Hobonny Club, Inc. v. McEachern, 272 S. C. 392, 396, 252 S. E. 2d 133, 135 (1979).

⁴⁶ Hobonny Club, Inc. v. McEachern, *supra* at 397, 136.

observations that portions of the shell rake were never submerged.

Importantly, Mr. Fanning paid no attention to the multiple tributaries located within the Disputed Marsh and those particularly abutting Merry Land's upland parcels and included these tributaries in acreage calculations associated with re-creating the Disputed Marsh parcel. There was no dispute that these tributaries are navigable. (*R. pp. 488-493, R. p. 675-681*). Mr. Fanning apparently "assumed" these tributaries were above mean low water and considered to be part of the conveyance to Mr. Hoyler, but did not establish the tributaries' respective elevations. It is well-settled that "all navigable waters shall forever remain public highways free to the citizens of the State and the United States."⁴⁷ And, "[a]ll streams which have been rendered or can be rendered capable of being navigated . . . and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State as to the citizens of the United States . . ."⁴⁸ "The state had in the beds of these tidal channels not only title as property, the *jus privatum*, but something more, the *jus publicum* . . . which she held in a fiduciary capacity for general and public use; in trust for the benefit of all citizens of the state"⁴⁹

The Master-in-Equity's analysis in determining intent, but still 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 Master-in-Equity's factual determination that, despite

⁴⁷ See S.C. Const. Art. 14 Sec. 4 (Law. Co-op 1976).

⁴⁸ S.C. Code Ann. § 49-1-10 (Thomson Reuters West 2014).

⁴⁹ State v. Pacific Guano Co., 22 S.C. 50, 83-84 (1884).

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 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.⁵⁰

B. THE MASTER-IN-EQUITY PROPERLY ORDERED JOINDER OF ADJACENT UPLAND PROPERTY OWNERS AS THE LITIGATION REASONABLY IMPACTED THEIR PROPERTY INTERESTS

Relying on S.C. Code Ann. § 48-39-220, Mr. Hoyler asserts that the Master-in-Equity should not have allowed the participation of all other parties herein other than the State. Mr. Hoyler asserts S.C. Code Ann. § 48-39-220 sets forth a "methodology for establishing title" and further asserts that the Master-in-Equity misinterpreted the statute by allowing Merry Land to intervene and in joining all the adjoining property owners. According to Mr. Hoyler, "[t]here is not only no evidence that any of the Intervenor had

⁵⁰ L. Kimble Carter, Esquire, South Carolina Boundary Law Compendium, Second Edition, pp. 22-23 (S.C. Bar 20__).

any interest in the tidelands and [sic] there is *no claim* that they did.” (Mr. Hoyler’s *Initial Brief*, p.39) (emphasis in original).

Mr. Hoyler ignores the different methods by which Merry Land and the adjoining property owners became involved in the case. Merry Land sought and was granted intervention specifically to protect Merry Land’s interests in the Disputed Marsh as (1) the owner of adjacent upland property and (2) possessor of DHEC and USACE permits authorizing construction of a marina over the Disputed Marsh. There were also other property owners who had already constructed docks across the Disputed Marsh and, like Merry Land, risked the loss of the right to water access if Mr. Hoyler prevailed on his title claim.⁵¹ Other property owners adjacent to the Disputed Marsh who had not yet constructed docks were also facing the loss of potential water access and of their rights of access into and through the Disputed Marsh.

Merry Land actively sought to participate based on this claim of interest relating to the Disputed Marsh. This is exactly the type of party that the plain language of S.C. Code Ann. § 48-39-220 contemplates – “[a]ny person claiming an interest in tidelands” Merry Land had no reason to bring an action against the State since DHEC had already granted Merry Land the authorization to construct a walkway through the Disputed Marsh which was, in turn, presumptively State-owned. Merry Land was compelled to intervene when Mr. Hoyler filed this case against the State. Since Mr. Hoyler sued the State only after Merry Land contacted him and advised him of its development plans, it seems likely

⁵¹ In short, the owners who had already built docks were facing the possibility of removal and Merry Land was facing loss of the authorization to construct the marina it had considered a key feature of its multi-family residential development and mixed use project.

that a great part, if not all, of Mr. Hoyler's motivation for instituting the suit was to prevent Merry Land from implementing its plans.

Mr. Hoyler fails to cite any legal authority which shows that S.C. Code Ann. § 48-39-220 applies only to the party or parties asserting an ownership interest in a parcel. The language of the statute broadly recognizes the right of "[a]ny person claiming an interest in tidelands" to institute an action "... for the purpose of determining the existence of any right, title or interest" ⁵² This language plainly **does not limit** potential parties to those claiming ownership by color of title only.

In all actuality, it is Mr. Hoyler's failure to invoke the procedures of S.C. Code Ann. § 48-39-220 at any point since 1979 which has given rise to the need for Merry Land's involvement. Had Mr. Hoyler brought this action at or near the time of his conveyance, both DHEC and the South Carolina Attorney General's office would have had a record of his ownership claim.

Mr. Hoyler has repeatedly argued that the lower court improperly joined the adjacent upland property owners in the case and now argues that doing so was error and an abuse of discretion. Joinder is different from intervention and is governed by different rules.⁵³ The Master-in-Equity, upon learning the Disputed Marsh adjoined several upland properties besides Merry Land's, properly recognized that questions of law and/or fact arising from this case would be common to the adjoining landowners. Mr. Hoyler fails to explain how such circumstances should and/or would not be considered sufficient

⁵² S.C. Code Ann. § 48-39-220 (Emphasis added).

⁵³ Rules 18-21, SCRCP, address joinder of parties. Rule 21, SCRCP, specifies that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

justification for joinder of all the adjoining landowners who are, admittedly, significantly at risk of losing their rights to access the Disputed Marsh and the navigable waters adjacent to their properties should Mr. Hoyler prevail on his claim of ownership.

Moreover, prior to verbally ordering the joinder, the Master-in-Equity discussed with the parties present at the initial hearing “the [Master-in-Equity’s] belief as to the necessity of joining [the adjoining landowners]” before announcing the decision to hold the hearing in abeyance pending their notification.

South Carolina law provides, in pertinent part, as follows:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of his claimed interest. If he has not been so joined, the court shall order that he be made a party.⁵⁴

The Reporter’s Notes to Rule 19, SCRCP, explain that the principle behind Rule 19 is that *whenever possible* persons materially interested in the action *should be* joined so that they may be heard and a complete determination may be accomplished.⁵⁵ Joinder should be considered “possible” anytime the requirements of Rule 19, SCRCP, are met. While Rule 19, SCRCP, does not guarantee participation of any of the joined parties in the litigation, it certainly provides an opportunity for anyone with a material interest in the

⁵⁴ Rule 19, SCRCP.

⁵⁵ Reporter’s Notes to Rule 19, SCRCP (emphasis added).

subject matter of the action the opportunity to participate in order to ensure a complete, fair, and reasonable determination.

A successful claim establishing private ownership of the marsh would not only allow Mr. Hoyler to prohibit any current adjoining landowner from entering onto the Disputed Marsh, but would also negatively affect the property values of the adjoining parcels by eliminating the ability to access the navigable waters. As a result of evidence presented during the initial hearing, the Master-in-Equity quickly realized that a favorable ruling for Mr. Hoyler could injure the adjoining landowners who were not yet parties. Moreover, Rule 19, SCRCP, places the burden on Mr. Hoyler to justify any reasons for non-joinder of the adjoining landowners. Mr. Hoyler has provided no reasonable justification for non-joinder other than an assertion S.C. Code Ann. § 48-39-220 simply does not allow it. More importantly, Mr. Hoyler has failed to present any legal authority to support this interpretation. The Master-in-Equity implemented the appropriate procedures and exercised the appropriate discretion in allowing Merry Land to intervene and, more importantly, in ordering joinder of the then-missing adjoining landowners to the action.

C. ALL OF THE RESPONDENTS WHO INTERVENED AND/OR WERE JOINED HEREIN CLEARLY ESTABLISHED THEIR LEGAL STANDING TO PARTICIPATE.

Mr. Hoyler asserts the Master-in-Equity abused his discretion by allowing Intervenor Merry Land and the joinder Respondents "to remain in the Trial because they lacked standing." (*Mr. Hoyler's Initial Brief*, p. 18). Notwithstanding Mr. Hoyler's

assertions, Merry Land and the other participating Respondents clearly had standing to participate in the case.

Axiomatically, legal standing requires the satisfaction of three elements. As the Supreme Court of South Carolina recently discussed in Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n⁵⁶, first, a party must show an injury-in-fact which is a concrete, particularized and actual or imminent invasion of a legally protected interest has been suffered by the party.⁵⁷ Secondly, there must be a causal connection shown to exist between the injury and the challenged conduct.⁵⁸ Finally, it must be likely that a favorable decision will redress the injury.⁵⁹

It cannot be reasonably argued that Merry Land did not sustain an injury-in-fact due to Mr. Hoyler's claim of ownership over the Disputed Marsh, given that Merry Land has been completely prevented from moving forward with the development of the 18 acres of property in which Merry Land made a significant investment, including construction of the permitted marina to be used by the residential and mixed-use development. If Mr. Hoyler had successfully established ownership of the Disputed Marsh, it most likely would result in the permanent loss of all rights held by all adjacent

⁵⁶ Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 753 S.E.2d 846 (2014).

⁵⁷ Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 72, 753 S.E.2d 846, 850 (citing Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 600-601, 550 S.E.2d 287, 291-92 (2001)).

⁵⁸ Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 72, 753 S.E.2d 846, 850 (citing Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 600-601, 550 S.E.2d 287, 291-92 (2001)).

⁵⁹ Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 72, 753 S.E.2d 846, 850 (citing Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 600-601, 550 S.E.2d 287, 291-92 (2001)).

landowners, including Merry Land, to use the Disputed Marsh for deep water access to the Beaufort River. Mr. Hoyler sought a declaration from the Master-in-Equity that he had the right to exclude others from the Disputed Marsh. (R. p. 56, 65-66, 95-97). Consequently, a causal connection exists since all the injuries-in-fact would directly result from Mr. Hoyler's successful resolution of his ownership claim. Finally, the parties who participated in this litigation did so with the goal of obtaining a favorable decision from the Master-in-Equity (i.e.; a denial of title to Mr. Hoyler) which would immediately redress their injury.

Mr. Hoyler has failed to address any of these points. Instead, Mr. Hoyler asserts only that Merry Land and the joined Respondent-parties cannot demonstrate any legally protected interest at risk because S.C. Code Ann. § 48-39-220 "sets their boundaries as the mean high water mark whosoever owns the marshland." Aside from the obvious fact that Merry Land and the other Respondents all have significant interests in preserving public trust tidelands for public use, Mr. Hoyler's argument glosses over the actual reason for which he invoked S.C. Code Ann. § 48-39-220 - to establish ownership of the Disputed Marsh in order to prohibit Merry Land (and all of the other Respondents) from using the Disputed Marsh pursuant to the previously-issued DHEC and USACE permits. Clearly, this constitutes an injury-in-fact to all Respondents.

D. THE MASTER-IN-EQUITY PROPERLY LEFT THE TRIAL RECORD OPEN AFTER THE MERITS HEARING TO ALLOW THE TESTIMONY OF AN IMPORTANT ADDITIONAL WITNESS.

Mr. Hoyler challenges the Master-in-Equity's ruling at the conclusion of the hearing that the trial record could remain open to allow Merry Land to locate the surveyor who had worked under the direction of Greg Baisch to review the 1882 Plat and the 1891 Plat.

The Master-in-Equity stated "what I'm going to do is to hold the record open for 45 days to permit [Merry Land] to depose a yet to be named surveyor with regard to fact matters only, not as an expert⁶⁰. And 15 days after that I would like post-trial briefs from everyone." (R. p. 513, lines 11-16).

The Master-in-Equity did not abuse his discretion by allowing Merry Land an additional 45 days in which to submit very important deposition testimony into the record. Clearly, a trial court has wide latitude to rule on evidentiary matters. It is well-established that the "decision to admit or exclude evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of discretion."⁶¹ "An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support."⁶² Moreover, an "appellate court will generally make all reasonable presumptions to the effect that the discretionary powers of the trial court have been exercised properly, correctly, or without abuse, and will not presume, or assume, that there has been an abuse of discretion."⁶³ Most

⁶⁰ Counsel for both parties forgot the Master-in-Equity's admonishment to limit Mr. Gardner to a fact witness and Merry Land's counsel elicited testimony reflecting Mr. Gardner's qualifications to be considered an expert witness. (R. p. 523 (page 8)). Mr. Hoyler's counsel did not object to Mr. Gardner testifying as an expert, but preserved his overall objection to Mr. Gardner's deposition. (R. p. 523 (page 8)).

⁶¹ Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 201, 207, 609 S.E.2d 838, 842 (Ct.App. 2005) (citing Gamble v. Int'l Paper Realty Corp. of S.C., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996)).

⁶² Osborne v. Adams, 338 S.C. 82, 90, 525 S.E.2d 268, 273 (Ct.App. 1999).

⁶³ Osborne v. Adams, 338 S.C. 82, 90, 525 S.E.2d 268, 273 (quoting 5 C.J.S., Appeal and Error, § 773 (West 1993)).

importantly, “[g]reat weight is given to the judgment of the trial court on discretionary matters.”⁶⁴

The Master-in-Equity, in allowing the submission of additional testimony via deposition, specifically agreed with Merry Land’s argument that adding minimal additional time would not significantly affect the parties, given that the case had already been pending a very long time (*i.e.*; since 2007) and that much of the delay was attributable Mr. Hoyler’s three dismissed interlocutory appeals. (*R. pp. 507, line 24–p. 509, line 6*). Moreover, the Master-in-Equity limited the deposition testimony to facts only as the proposed witness was the surveyor initially asked by Merry Land’s engineer to analyze the 1882 Plat and the 1891 Plat. (*R. p. 513, lines 11-16*).

The Master-in-Equity did not abuse his broad discretion by keeping the record open. Depositions are, of course, appropriate tools to present evidence.⁶⁵ As previously stated, this case had already been pending for a very long time due in large part to Mr. Hoyler’s multiple, *albeit*, unsuccessful appeals. The delay between the filing of this action and the actual hearing on the merits contributed to Merry Land’s difficulty in locating Mr. Gardner.⁶⁶ Other courts have kept the record open for additional testimony after

⁶⁴ *Osborne v. Adams*, 338 S.C. 82, 90, 525 S.E.2d 268, 273.

⁶⁵ *S.C. Code Ann.* § 14-11-120 (Thomson Reuters West 2014) (stating that a deposition “may be read in evidence at the hearing, subject to the right of either party upon good cause shown to require the personal attendance and viva voce examination of the witness at the hearing.”); *Smith v. Smith*, 308 S.C. 492, 497, 419 S.E.2d 232, 235 (Ct. App. 1992) (finding that post-hearing depositions were appropriate evidence for the trial court to consider because they “could have a bearing on the matters before [the trial judge]” – namely, wife’s motion for retroactive alimony).

⁶⁶ Mr. Gardner, the “missing” surveyor from Ward Edwards Engineering had been laid off from that surveying company in 2006, shortly after completing Merry Land’s work due to adverse economic conditions.

hearings. For example, in Seabrook Island Property Owners Ass'n v. Berger,⁶⁷ the trial court allowed the defendant to submit a post-hearing affidavit setting forth his arguments and testimony against the POA's claim for attorneys' fees.⁶⁸

Mr. Hoyler also argues that Mr. Gardner's deposition was cumulative evidence. (*Mr. Hoyler's Initial Brief*, p. 44). Notwithstanding Mr. Hoyler's meritless argument, Mr. Gardner's testimony was not cumulative since he was the licensed professional surveyor who was first asked by Merry Land to examine the deeds and plats. Thus, Mr. Gardner's testimony specifically pertained to the facts of this examination. Moreover, even if it is assumed, *arguendo*, that Mr. Gardner's testimony was somehow cumulative to Mr. Baisch's,⁶⁹ the mere admission of such testimony cannot be considered reversible error. In order "[t]o warrant a reversal based on the admission of evidence, [Mr. Hoyler] must show both error and resulting prejudice."⁷⁰ Furthermore, "[w]hen improperly admitted evidence is merely cumulative, no prejudice exists, and therefore, the admission is not reversible error."⁷¹

⁶⁷ Seabrook Island Property Owners' Association v. Berger, 365 S. C. 234, 616 S. E. 2d 431 (2005).

⁶⁸ Seabrook Island Property Owners' Association v. Berger, 365 S. C. 234, 616 S. E. 2d 431.

⁶⁹ Mr. Baisch was the engineer Merry Land presented during the hearing. The Master-in-Equity prohibited Mr. Baisch's testimony as to the very matters Mr. Gardner addressed in his deposition as Mr. Baisch, although with supervisory authority, did not himself perform the evaluation of the 1882 Plat, the 1891 Plat, *etc.* Mr. Gardner, of course, performed those tasks.

⁷⁰ Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 307, 609 S.E.2d 838, 842 (Ct.App. 2005) (internal citation omitted).

⁷¹ Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 307, 609 S.E.2d 838, 842 (internal citation omitted).

Mr. Hoyler has failed to demonstrate that he suffered any prejudice due to the Master-in-Equity's decision to allow the inclusion of Mr. Gardner's deposition testimony. Mr. Hoyler participated in the deposition and later filed a Post-Trial Brief. Mr. Hoyler neither argued nor demonstrated prejudice in the Post-Trial Brief or in his Initial Appellant's Brief. (*R. pp. 102-119; Mr. Hoyler's Initial Brief*). In short, Mr. Hoyler has merely asserted, absent any proof or authority, that Mr. Gardner's testimony was cumulative.

The Master-in-Equity properly allowed the trial record to remain open for a short period of time so as to allow Merry Land to locate and depose an important witness. Depositions are appropriate tools to present testimony. In any case, Mr. Hoyler has failed to demonstrate he sustained any prejudice as a result.

**E. THE MASTER-IN-EQUITY PROPERLY CONSIDERED
MR. HOYLER'S POST-TRIAL MOTIONS.**

Mr. Hoyler claims that the Master-in-Equity refused to timely hear his post-trial motions. However, Mr. Hoyler cites no authority for this proposition. Mr. Hoyler is also ignoring the fact that he actually filed a post-trial motion before the court issued its Final Order in the case. Rather, the Trial Court did provide Mr. Hoyler opportunity to present post-trial issues through the post-trial brief that the court requested both parties to file. Finally, Mr. Hoyler has failed to establish any prejudice sustained as a result of the Trial Court's alleged failure.

Mr. Hoyler claims he twice requested the Master-in-Equity to afford him an opportunity to orally make post-trial motions. In an e-mail dated 1 March 2016, Mr. Hoyler's counsel stated he would "like the opportunity to make [Mr. Hoyler's] post-trial

motions for the record.”⁷² In response, Judge Dukes stated that he “agree[d] that so much time has passed [since the merits hearing] that at least a follow-up conference call if not a supplemental hearing should be held for summation. I’m happy to do whatever the group would prefer.”⁷³ Later, on 28 March 2016, Mr. Hoyler asked the Master-in-Equity to “[p]lease provide guidance as to Post-Trial Motions, because we have now completed the Trial by depositing Mr. Gardner. I believe that we will need to make them to complete the record.”⁷⁴

Mr. Hoyler fails to cite any authority for his proposition that the Master-in-Equity was required to hear any post-trial motions. (*Mr. Hoyler’s Initial Brief*, pp. 45-46). Furthermore, Mr. Hoyler fails to clearly establish the Master-in-Equity’s refusal to consider any of Mr. Hoyler’s requests. The correspondence exchanged between the parties does not reflect any such refusal. Moreover, the Master-in-Equity gave both parties the opportunity to raise any issues in their respective post-trial briefs which the Master-in-Equity directed to be submitted once Mr. Gardner’s deposition had been taken. Mr. Hoyler has failed to present any evidence which establishes Mr. Hoyler was prevented from making post-trial motions or that the Master-in-Equity refused to afford Mr. Hoyler a hearing.

Even if it is assumed that the Master-in-Equity should have conducted an in-court post-trial motions hearing, Mr. Hoyler has failed to show that he was prejudiced in any way as a result. “Post-trial motions are not necessary to preserve issues that have been

⁷² See R. pp. 721-726.

⁷³ See R. p. 727.

⁷⁴ See R. p. 728 (Emphasis added).

ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.”⁷⁵ Mr. Hoyler has not identified any issues raised to the Master-in-Equity upon which the Master-in-Equity failed rule. (*Mr. Hoyler’s Initial Brief*, pp. 45-46). Mr. Hoyler was not prejudiced and the Master-in-Equity’s actions were proper and correct.

F. REGARDLESS OF THE DISPOSITION OF THE DISPUTED MARSH’S OWNERSHIP, MR. HOYLER IS BARRED FROM PREVENTING MERRY LAND’S CONSTRUCTION OF THE PERMITTED MARINA BASED ON THE PRINCIPLES OF ESTOPPEL AND LACHES.

In this State “[e]stoppel arises when a party, relying upon what another has said or done, changes his position to his detriment.”⁷⁶ Consequently, “if a party stands by, and sees another dealing with property in a manner inconsistent with his right, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interests are affected. His silence is acquiescence and it estops him.”⁷⁷ It is a well-established principal in South Carolina that estoppel by silence arises when one party observes another dealing with his property in a manner inconsistent with his rights and makes no objection while the other party changes his position based on the party’s silence.⁷⁸

⁷⁵ Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (Internal citation omitted).

⁷⁶ Queen’s Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct.App.2006) (citing Gibbs v. Kimbrell, 311 S.C. 261, 268, 428 S.E.2d 725, 729 (Ct.App.1993)).

⁷⁷ Southern Railway Co. v. Day, 140 S.C. 388, 138 S.E. 870 (1926).

⁷⁸ Queen’s Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 358, 628 S.E.2d 902, 911.

The elements of estoppel as to the estopped party are:

- (1) a misrepresentation or nondisclosure;
- (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and
- (3) actual or constructive knowledge of the true facts.

As to the party claiming estoppel:

- (1) lack of knowledge or means of acquiring knowledge of the true facts;
- (2) reasonable reliance; and
- (3) prejudicial change of position.⁷⁹

Mr. Hoyler has "claimed" ownership of the Disputed Marsh since 1979, but he failed to utilize the remedy provided by S.C. Code Ann. §48-39-220 to confirm and memorialize such ownership. In the decades between 1979 and 2007 the property adjacent to the Beaufort River and the Disputed Marsh has been subdivided, developed, and sold. Docks and other structures have been constructed in the Disputed Marsh adjacent to the Beaufort River.⁸⁰ Had Mr. Hoyler instituted his claim against the State at any time prior to 2006, when Merry Land first received its marina permit (R. pp. (*Def. Exh.* 52)-705), the South Carolina Attorney General's Office would have provided DHEC notice of the lawsuit and the final disposition. Had that information existed, DHEC would have been able to stop Merry Land's permit at the application stage had Mr. Hoyler been successful in the litigation. Moreover, the law⁸¹ requires that notice of the final disposition

⁷⁹ See *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 451 S.E.2d 924 (Ct.App.1994); *O'Cain v. O'Cain*, 322 S.C. 551, 473 S.E.2d 460 (Ct.App. 1996).

⁸⁰ Merry Land's member Tennent Houston testified the presence of these already in-place docks and other structures indicated to him that the Disputed Marsh was owned by the State of South Carolina for the benefit of the public and that a waterfront property owner could gain access through the Disputed Marsh to the Beaufort River. (R. p. 417, lines 6-14).

⁸¹ See S.C. Code Ann. § 48-39-220(D) (Thomson Reuters West 2014).

of Mr. Hoyler's claim and his lawsuit (had it been filed earlier) would have been published in the State Register. While Mr. Hoyler may argue these procedures are discretionary and not mandatory, Merry Land asserts that when Mr. Hoyler, as the purported owner of tidelands, intends to assert ownership to block waterfront access of adjacent upland properties to the Beaufort River, then Mr. Hoyler's failure to timely invoke the available procedures constitutes concealment. Absent an action having been filed by Mr. Hoyler, there was no way for Merry Land or anyone else to obtain notice of Mr. Hoyler's claim. This is especially true in this situation where the public records which did exist were, at best, misleading. There was simply nothing in the chain of title of Merry Land's various properties which could have been routinely discovered to provide Merry Land the required notice of Mr. Hoyler's claim to the Disputed Marsh.

Merry Land would never have purchased the Port Royal property if Mr. Hoyler had taken any action between 1979 and 2007 to alert adjoining property owners of his claim to the Disputed Marsh. The evidence shows that it wasn't until Beaufort County updated the parcel data on its GIS system that information regarding Mr. Hoyler's claim was actually readily available. Tennent Houston, a member of Merry Land, testified regarding when Merry Land first learned of Mr. Hoyler's claim. Mr. Houston stated that "[a]fter we closed the purchase and the permit was issued, we contacted our bank to refinance the loan. And they had an appraiser who in his analysis noticed on the local Beaufort County GIS system, the computers, that there seemed to be a tax parcel there." (*R. pp. 427, line 22-p. 428, line 2*). Consistent with the testimony of David Tedder, Esquire, the real estate attorney who represented Merry Land in the closing, Mr. Houston noted the parcel information was not available at the time when Merry Land acquired the Port Royal

property. Mr. Tedder testified that Defendant's Ex. 56 was a "screen shot" of the parcel information available on Beaufort County GIS at the time of the closing. (*R. p. 707*). There was no indication whatsoever that the Disputed Marsh was a separate parcel of land with a separate and distinct tax identification number.

Merry Land relied on the legal presumption that the Disputed Marsh was public trust property. Merry Land suffered a prejudicial change in position by purchasing the eight acres of waterfront property for \$4.5 million and the ten acres of additional high ground property for \$1.5 million after obtaining a community marina permits from DHEC and USACE. After the real estate transactions had closed Merry Land learned that the Disputed Marsh, over which the marina walkway crossed to access the Beaufort River, was the subject of a private claim of ownership.

Additionally, the facts of this case and the arguments herein also support reasonable findings and conclusions Mr. Hoyler is barred by laches from asserting his ownership of the Disputed Marsh so as to block construction of the marina. "Laches is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'"⁸²

It is clear from S.C. Code Ann. § 48-39-220 that the possession of a deed to a marsh parcel does not rebut the presumption of State ownership unless the deed or grant has been adjudicated by a court of competent jurisdiction. Mr. Hoyler took no action for

⁸² Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 359, 628 S.E.2d 902, 921 (Ct.App.2006) (*citing Gordon v. Drews*, 358 S.C. 598, 612, 595 S.E.2d 864, 871 (Ct.App.2004) (*quoting Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct.App.1999))).

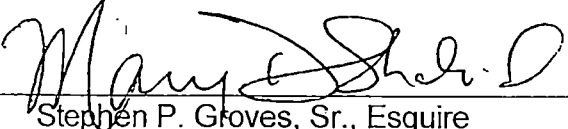
28 years to have his claim known or determined in accordance with S.C. Code Ann. § 48-39-220's procedures. Mr. Hoyler's failure to pursue his ownership claim to the Disputed Marsh while the upland property abutting the large disputed marsh tract is being subdivided and developed is unreasonable. Interestingly, Mr. Hoyler has failed to offer even a meager explanation to justify his action and/or inaction. Such inaction, particularly in light of the size of the Disputed Marsh parcel and its location in a rapidly developing community, constitutes neglect by Mr. Hoyler.

V. CONCLUSION

While a demonstration of sovereign intent to alienate public trust tidelands is necessary to support Mr. Hoyler's claim, Mr. Hoyler must also be able to establish the location of the Disputed Marsh in relationship to the multiple properties adjoining the marsh. Assuming for the sake of argument that the Disputed Marsh is bounded on the east and west by "low water" and "high water," Mr. Hoyler cannot properly establish the Disputed Marsh's northern and southern boundaries without forcing closure and sliding these boundaries to approximate the acreage depicted in the two plats. Moreover, the inclusion of multiple navigable tributaries therein as private property, particularly those tributaries adjacent to Merry Land's waterfront parcels, contradicts existing law. The Master-in-Equity appropriately concluded that the 1882 Plat and the 1891 Plat were insufficient to establish the boundaries of the Disputed Marsh. The Master-in-Equity's factual determination is supported by the overwhelming evidence. Merry Land respectfully requests that the Master-in-Equity's decisions be affirmed in all respects.

Respectfully submitted,

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13 April 2017

NPCHAR1:1908745.1-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

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APR 17 2017

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'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.

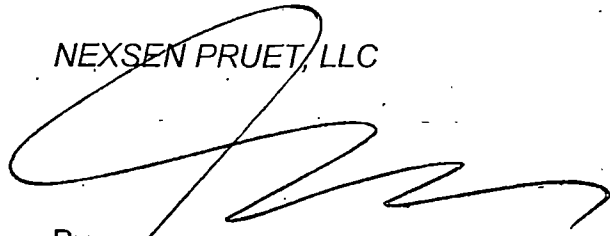
**RULE 211, SCACR, CERTIFICATION by the
RESPONDENT, MERRY LAND PROPERTIES, LLC**

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*Attorneys for the Respondent,
Merry Land Properties, LLC*

I, Stephen P. Groves, Sr., Esquire, hereby certify, this 13th day of April 2017, that the **Final Brief** of the Respondent, Merry Land Properties, LLC, complies with all of the requirements set forth in Rule 211(b) of the South Carolina Appellate Court Rules.

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13 April 2017

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM BEAUFORT COUNTY
Court Of Common Pleas
Marvin H. Dukes, III, Master-In-Equity

APR 14 2017

SC Court of Appeals

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,
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Lackey, Patricia Banfield, Bertrand Cooper, Jr., NHP SH South Carolina I,
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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,
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STATEMENT OF ISSUES

1. Whether the Court must affirm the Master's factual findings because evidence supports them?
2. Whether the State owns the bottoms of any tidal waterways crossing the property at issue?
3. Whether precedent exists for other abutting landowners participating in the litigation?
4. Whether the Master acted within his discretion in leaving the record open for the taking of the Gardner testimony?
5. Whether Appellant has shown any error, abuse of discretion or prejudice in the Master's not entertaining Post-trial Motions?

ARGUMENT

I

THE MASTER'S FINDINGS MUST BE AFFIRMED BECAUSE THEY ARE SUPPORTED BY SOME EVIDENCE

An action to determine ownership of tidelands pursuant to section 48-39-220 is an action at law. See *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct.App.2006). In an action at law, tried without a jury, our scope of review extends to the correction of errors of law. *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct.App.2000). Furthermore, "the trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the [court's] findings."

Grant v. State, 717 S.E.2d 96, 98, 395 S.C. 225, 228 (Ct..App. 2011)(emphasis added); see also, *Lowcountry Open Land Trust v. State*, 552 S.E.2d 778, 781, 347 S.C. 96, 101-02 (Ct. App.,2001).

Therefore, this Court must affirm the Master's findings of fact if any evidence supports them.

Because evidence supports those findings, they must be affirmed.

II

WHETHER EVIDENCE SUPPORTS THE MASTER'S DETERMINATION THAT THE GRANT AND PLAT ARE INSUFFICIENT TO LOCATE THE PROPERTY CLAIMED

"The State of South Carolina holds presumptive title to all land below the high water mark in trust for the benefit of its citizens. *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E. 2d 116, 119 (2003). To rebut the State's presumptive title, a claimant must show (1) its predecessor in title possessed a valid grant, and (2) the grant's language was sufficient to convey land below the high water mark." *Grant v. State, supra*, 717 S.E.2d at 98.

As follows, the Master found the grant and plat at issue in this case insufficient:

1. The Tillman Grant to Crofut was legally permissible and, although was an alienation of the public trust land, was allowed because the intent to grant tidelands between high water and low water was clearly expressed.
2. However, the boundaries of the grant remain uncertain. The length and placement of the high-ground (western) boundary is of paramount importance and this Court finds that the Plaintiff can prove no more than a rough approximation. The granting plat is nothing more than a hand-drawn sketch. This Court accepts the testimony that the survey cannot "close" or be accurately placed and is therefore unacceptable. An accurate description of a grant of property between high and low water in an area so interwoven with navigable watercourses and dozens of small marshy knolls must have more detail and accuracy than is given here. This Court would be required to resort to guesswork to accurately find the boundaries of the claimed property.

IT IS THEREFORE ORDERED THAT because of the vague and incomplete survey and description, Plaintiff's request to declare title to tidelands is, hereby, DENIED.

The State does not contest that the grant shows an intent to convey marshland in that it expressly states that it conveys land "between high and low water mark" and references a plat of marsh, but the problem is that the location of the marsh must be precisely determined, and the evidence on its location is insufficient. Appellant states that the Master "already determined the title to be in the Appellant and not the State" (Brief at p. 28), but he misreads the Order. The grant shows an intent to convey, but it does not contain an accurate description of what it is conveying. The grant contains only a general description of the location of the property and the plat it references provides insufficient guidance. As stated by the Master, "[w]hile it is evident that the State, by way of the Grant intended to convey public trust tidelands . . . [and] [t]his Court recognizes that the land conveyed by the Grant lies in the vicinity of the area but . . . [the Court] cannot determine the specific location of the grant." Record Volume I (R. V. I) p. 32, ¶ 41.

When, as here, the property conveyed by the grant cannot be accurately located, the

Appellant is not entitled to a declaration of title against the State. “A grant from the sovereign to a subject is construed strictly in favor of the government and against the grantee.” *Hobonny Club, Inc. v. McEachern*, 252 S.E.2d 133, 135–36, 272 S.C. 392, 396 (1979); *see also, Lowcountry Open Land Trust v. State*, 552 S.E.2d 778, 782, 347 S.C. 96, 103 (Ct. App. 2001). The Supreme Court has emphasized the importance of accuracy in the deeds and plats in the location of property conveyed. “Where 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*, 252 S.E.2d at 136.

Hobonny Club found a high degree of accuracy in the plats at issue in that case which is not present in the instant case:

It is our opinion that the plats in question speak with a precision not usually attainable by mere words, and they compel the conclusion that the grantor intended to include the tidelands encompassed within the perimeters of the plats. It is difficult to imagine how more precisely to express intent as to the location of boundaries than to incorporate an accurate plat in the description. The plats incorporated in the two grants to Joseph Bryan are exceptional. They are not mere maps on which boundary waterways are drawn in free-hand to represent directions and conformations of boundaries. These plats are carefully scaled and platted so as to delineate the boundaries of the tracts granted with mathematical precision. It is undisputed that the boundaries are accurately relocatable on the ground by contemporary engineering methods. The specificity of the attached plats outweigh, in our judgment, the general terms of the descriptions in the grants in determining the intent of the grantor.

Id. The appellate Courts have rejected plats that did not meet these standards. *See eg., Query v. Burgess*, 639 S.E.2d at 457 (“[t]he plat contains the bare bones of a survey and is neither precise nor detailed;”) *Grant v. State*, 717 S.E.2d at 102 (Ct. App. 2011)(“in contrast to the plats in *Hobonny Club*, Grant's expert land surveyor, Bessent, testified the 1786 plat is poorly drawn and not capable of being relocated on the ground.”).

The Crofut grant and plat do not meet the above standards for reasons discussed in the Court's Order including the multiple deficiencies identified by Mr. Gardner, Merry Land's surveyor, such as illegibility, bearings and distances . R. V. I. p. 32, ¶41 – p. 34, ¶ 50. Appellant contends that the deed and plat are unambiguous and that expert testimony was admissible only to aid in determining location. He argues that the "Trial Court erred in allowing in any extrinsic testimony to dispute the clear language of the deed and plat." Brief at p. 29. "Extrinsic evidence is admissible to resolve ambiguities, not to create them where none exists." *Bellamy v. Bellamy*, 355 S.E.2d 1, 3, 292 S.C. 107, 111 (Ct. App. 1987). In *Bellamy*, "there was no ambiguity in the description of the realty conveyed by the deed." *Id.* In the instant case substantial ambiguity is present. The Crofut grant provided no guidance as to the location of the tract conveyed, and the plat it referenced failed to provide sufficient clarity as to the location of the property on the ground.

As recognized by the Master regarding Mr. Gardner's testimony:

[t]he CAD [computer aided drafting] tech[nician] referred to the 1891 plat for bearings and distances but was unable to read all of the "calls" even after using a magnifying glass and creating large copies of the plat in an attempt to better see the handwriting. The CAD tech also created enlarged copies of the 1882 plat but still was unable to discern the calls. As a result of this initial review, the CAD tech was only able to create a drawing of the parcel lacking any boundary at the top (northern end).

R. V. I. p. 31, ¶ 39; *see also*, R. V. II pp. 527 and 528 at Gardner Depo. p. 24, l. 14 – p. 26, l. 25. These deficiencies in the plat led to some other shortcomings noted above by the Master. All of these deficiencies are ambiguities properly addressed by Mr. Gardner, and all provide evidence supporting the Master's decision. In contrast to *Brownlee v. Miller*, 37 S.E.2d 658, 662, 208 S.C. 252, 261–62 (1946), cited by Appellant, in which "it [was] quite clear that the description was sufficient . . . [and] the surveyors had no trouble in locating the land . . .," the surveyor Gardner

in the instant case did have trouble locating the land.

Appellant contends that “the plat adds nothing to the western boundary determination because the boundary is always the high water mark.” Brief at p. 23. This point overlooks that the evidence does not demonstrate where the marsh grant is located to determine its western extent and alignment. The plat’s use of bearings, although sometimes illegible, and the grant of specific acreage, show that that the grant had a fixed western boundary that may not be where the current high water mark is located. “Significantly, under South Carolina law, wetlands created by the encroachment of navigable tidal water belong to the State.” *McQueen v. South Carolina Coastal Council*, 580 S.E.2d 116, 120, 354 S.C. 142, 150 (2003). Therefore, the Court correctly found that Appellant could prove “no more than a rough approximation” of the location of the western boundary. R. V. I. p. 47.

III

THE STATE OWNS THE BOTTOMS OF ANY TIDAL NAVIGABLE WATERWAYS

If any of the property at issue in this case is crossed by or bound by navigable waters, the waters remain public highways and subject to a public trust. S.C. Const. art XIV, §4; *State v. Head*, 330 S.C. 79, 498 S. E. 2d 389 (Ct. App. 1997). The State owns the beds of any such navigable tidal rivers absent express legislation. *Heyward v. Farmers' Min. Co.*, 19 S.E. 963, 973 (1894).

Appellant does not concede that such watercourses traverse the property at issue, but contends that if they are present, the State conveyed them. He asserts that waterways were conveyed because of boilerplate, form language in the Crofut deed referring to “water courses.” Such language was rejected as indicative of an “intent to include tidelands” in *State v. Fain*, 259

S.E.2d 606, 609, n. 1, 273 S.C. 748, 754 (1979) and by *Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.*, 146 S.E. 434, 440 (1928), as cited in *Fain*. As stated in *Heyward*:

If the plaintiff can trace title back to a grant from the state to land covered by tidal, though not navigable, waters, the state would be estopped by its grant. The principle, however, is different when the land granted is covered by navigable waters, as shown by Mr. Justice McGowan in *State v. Pacific Guano Co.*, [22 S.C. 50, 84 (1884)] to wit: "The absolute rule heretofore referred to, limiting landowners bounded by such streams to the high-water mark, unless altered by law or modified by custom, accords with the view that the beds of such channels below low-water mark are not held by the state simply as vacant lands, subject to grant to settlers in the usual way through the land office. There seems to be no doubt, however, that the state, as such trustee, has the power to dispose of these beds as she may think best for citizens; but, not being, as it seems to us, subject to grant in the usual from, under the provisions of the statute regulating vacant lands, it would seem to follow that, in order to give effect to an alienation which the state might undertake to make, it would be necessary to have a special act of the legislature, expressing in terms and formally such intention.

The above authority makes absolutely clear that the Crofut deed did not, and could not, convey land below mean low water such as creek bottoms because a specific statute would be necessary to do so.

IV

THE STATE HAS NO OBJECTION TO THE PARTICIPATION OF MERRY LAND AND THE OTHER ABUTTING OWNERS AND SIMILARLY SITUATED OWNERS HAVE PARTICIPATED IN TIDELANDS LITIGATION IN THE PAST

The State assumes that Merry Land will address these issues. The State has no objection to the participation of those parties. Similarly situated parties have participated in tidelands litigation in the past. In *Query, supra*, a claimant to marshland brought suit against the State and another landowner abutting the marsh who wanted to build a dock across those tidelands. The Master in Equity in *Query* ruled with the State and the abutting landowner that the State owned the

marsh; however, should this Court, *arguendo*, determine that Merry Land should not have been allowed to intervene, the State requests that this case be remanded to the Master so the State may be given the opportunity to introduce the evidence submitted by Merry Land.

V

**THE MASTER PROPERLY LEFT THE RECORD OPEN
FOR THE SUBMISSION OF MR. GARDNER'S TESTIMONY**

Appellant argues that the trial was improperly continued mid-trial for the taking of the deposition of Mr. Gardner citing Rule 40(i), SCRPC, as to pre-trial continuances. The Gardner testimony was not the result of a pre-trial continuances, but judges may leave the record open in trials for the submission of additional testimony. *See eg, Martin v. Rapid Plumbing*, 631 S.E.2d 547, 552, 369 S.C. 278, 287 (Ct. App. 2006)(noting party failed to move to leave record open); *State v. Vickery*, 732 S.E.2d 218, 220, 399 S.C. 507, 512 (Ct. App. 2012)(Trial court "would leave the record open" on an evidentiary issue); *Greene v. Griffith*, 2004 WL 6248971, at *4 (Ct.App. 2004)(Trial judge left the record open for ten days).

"The conduct of trial, including the admission and rejection of testimony, is largely within the trial judge's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion or the commission of legal error that results in prejudice for the appellant." *South Carolina Dept. of Highways and Public Transp. v. Galbreath*, 431 S.E.2d 625, 628, 315 S.C. 82, 85 (Ct.App. 1993). Appellant has shown no abuse of discretion in the Master's leaving the record open for Mr. Gardner's deposition testimony.

VI

**THE MASTER DID NOT IMPROPERLY OVERLOOK
ALLOWING POST TRIAL MOTIONS**

Appellant shows no error of law, prejudice or abuse of discretion in the Judge's not entertaining post-trial motions. The parties were allowed to file post-trial briefs, and Appellant filed a Motion to Alter or Amend under Rule 59, SCRPC.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the Orders of the Master under appeal.

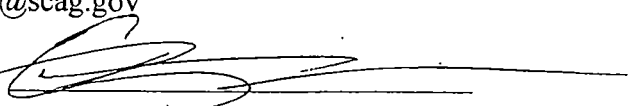
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April 14, 2017

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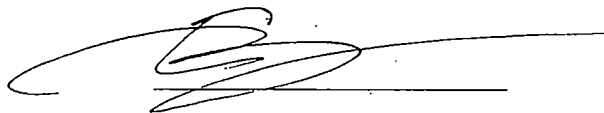
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CERTIFICATE OF COMPLIANCE WITH RULE 211 (b)

I hereby certify that the Final Brief of the Respondent State of South Carolina complies
with Rule 211(b), SCACR.



J. Emory Smith, Jr.
Deputy Solicitor General

April 14, 2017

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In the Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN MISAPPREHENDING AND MISAPPLYING SOUTH CAROLINA LAW, WITH REGARD TO THE CONVEYANCE IN ISSUE?
- II. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION IN ALLOWING INTERVENTION OF ADJACENT UPLAND PROPERTY OWNERS, IN THIS CASE?
- III. DID THE TRIAL COURT ERR IN FINDING THAT THE INTERVENORS HAD STANDING IN THIS CASE?
- IV. DID THE TRIAL COURT ERR AND ABUSE ITS DISCRETION IN GRANTING A CONTINUANCE FOR FURTHER TESTIMONY?
- V. DID THE TRIAL COURT ERR IN REFUSING TO HEAR POST-TRIAL MOTIONS IN A TIMELY MANNER?

STATEMENT OF THE CASE

Appellant is putative titleholder to certain real property lying between the high tide and low tide lines along the Beaufort River in Beaufort County. On November 8, 2007, Appellant filed a legal action against the State of South Carolina to determine whether Appellant's title was superior to that of the State of South Carolina's title, pursuant to the statutorily mandated obligations contained in *Section 48-39-220, S.C. Code, Ann., (1976, as amended)*, (R. pp. 53-56).

On November 26, 2011, Respondent, Merry Land Properties (i) moved to intervene in the action (ii) responded to the action and (iii) interjected counterclaims, claiming only that Merry Land had permits to use the marshland. In response, Appellant filed a Motion to Dismiss the Intervention/Counterclaims on December 26, 2011, citing various subsections of Rule 12, South Carolina Rules of Civil Procedure.

Later, Appellant consented to the Intervention of Merry Land, while reserving all of his rights to his claims and defenses, and the Trial Court ordered the intervention. Appellant later filed a Reply to the Counterclaim of the Intervenor, Merry Land on February 8, 2012, (R. pp. 95-97).

STATEMENT OF THE CASE, (Cont.)

After a thorough discovery process, a first Hearing was held on January 31, 2011, before the Honorable Marvin H. Dukes, III, Master-in-Equity for Beaufort County. At that Hearing, Appellant moved to dismiss the Intervenor Merry Land from this action, for lack of subject matter jurisdiction, which was denied by the Trial Court, (R. p. 201 line 23 - p. 202 line 2). At the Hearing, Appellant moved for Summary Judgment and the ruling on that Motion was postponed while Appellant presented his case, (R. p. 201 line 1- p. 202, line 8).

Also, at the Hearing, and after the completion of the presentation of an expert witness, on behalf of the Appellant, (R. p. 223 lines 1-14), the Trial Court, *sua sponte*, ordered the Appellant to add as parties, all of the highland property owners that abutted Appellant's marshland property, approximately thirty-two additional Defendants, (R. p. 223 lines 6-15) Thereafter, the Trial Court issued its written Order confirming the Trial Court's earlier, oral Order of March 21, 2011, (R. pp. 4-10). The Appellant notes two prior Orders of the South Carolina Court of Appeals, which dismissed the Appellant's prior Appeals as being **interlocutory**. These Orders were, S.C. Court of Appeals Orders filed September 26, 2011, and, August 20, 2013, (R. p. 49), (R. p. 51). The Appeals were not on the merits and have no bearing on this Appeal.

STATEMENT OF THE CASE, (Cont.)

The parties had then returned to the Trial Court and resumed the Hearing before the Trial Court that began on January 31, 2011. At the conclusion of the Hearing and after the presentation of all evidence and witnesses, the Trial Court adjourned the Hearing for an indefinite period of time and allowed Intervenor Merry Land's counsel to find and depose a second surveyor witness, (R. p. 512 lines 13-25), (R. p. 513 lines 11-25). The Trial Court allowed Intervenor Merry Land's counsel to **introduce a second surveyor witness** testimony into the record before the Trial Court, (R. p. 511 line 8 – p. 513 line 16). All actions were timely objected to by Appellant's counsel, (R. p. 507 line 24 – p. 512 line 8).

The Trial Court issued its written Order denying the relief sought by the Appellant on May 27, 2016, (R. pp. 15-47). Appellant's counsel filed timely Motions, pursuant to Rule 52(b) and Rule 59(e), (R. pp. 173-176). The Appellant timely sought reconsideration, which was denied by the Trial Court, by its Order filed October 26, 2016, (R. p. 48). Appellant filed a timely Notice of Appeal. Intervenor Merry Land's counsel then filed a Motion to Dismiss this Appeal on July 21, 2016. This Court denied Intervenor Merry Land's counsel's Motion to Dismiss and this Court returned jurisdiction to the Trial Court to hear Appellant's pending Motions described above by its Order, filed September 28, 2016. Thereafter, the Trial Court denied Appellant's pending Motions. This Court resumed jurisdiction by its correspondence to all parties of record dated November 9, 2016, (R. p. 730). In compliance with this Court's correspondence dated November 9, 2016, Appellant's Initial Brief follows.

STATEMENT OF THE FACTS

Appellant is putative owner of fee simple title to ninety-five acres, more or less, lying between the mean high and low water marks along the Beaufort River in Beaufort County, South Carolina. The property includes areas described as marshlands, (hereinafter as, "The Property").

Respondent State of South Carolina includes its political subdivisions, agents and officials. Respondent State of South Carolina, holds title to certain real properties as assets of the Respondent State of South Carolina. In accordance with Chapter 11 of Title 1 of the S.C. Code of Laws, the Respondent State of South Carolina can acquire, encumber, transfer and lease real property in the name of the Respondent State of South Carolina.

The Property is the identical conveyance of real property to J.M. Crofut, Appellant/Landowner Hoyler's predecessor in title, from the Honorable Benjamin R. Tillman, then Governor of South Carolina, dated July 27, 1891, and was for approximately ninety-five acres of marshland described as being located on the Beaufort River, (hereinafter as, "Deed"), (R. pp. 539-547).

STATEMENT OF THE FACTS (Cont.)

The Deed is accompanied by a plat which depicts a tract of land containing approximately ninety-five acres. Appellant/Landowner's witnesses demonstrated an unbroken chain of title to the Property at the trial, which is identical to the Property encompassed in the Deed allowing for erosion and accretion over the period of time the Appellant/Landowner's predecessors in interest have held the Property, (R. pp. 536-537). Appellant/Landowner demonstrated alienation of the Property from the State of South Carolina, based on the Deed. The Appellant/Landowner argued at Trial and the Trial Court found, that title to these tidelands has not reverted back into the State of South Carolina, (R. p. 47, Numbered Paragraph 1).

On November 8, 2007, Appellant/Landowner filed a legal action against the State of South Carolina to determine whether Appellant/Landowner's title was superior to that of the State of South Carolina's title, pursuant to the statutorily mandated obligations contained in *Section 48-39-220, SC Code, Ann., (1976, as amended)*, (R. pp. 53-56).

At the first Hearing on January 31, 2011, and after the completion of the presentation of one witness, the Trial Court, *sua sponte*, ordered the Appellant/Landowner to add, as parties, all of the highland property owners that abutted Appellant/Landowner's marshland property, approximately thirty-two additional Defendants, (R. p. 223 lines 6-15).

Factually, not a single one of the thirty-plus additional Defendants ordered to be added to this litigation by the Trial Court, participated in the Trial of this case, which led to the Orders under Appeal.

STATEMENT OF THE FACTS (Cont.)

In order to determine the ownership of tideland, as between the State of South Carolina and an individual or corporate claimant, the State of South Carolina has established a specific statutory procedure which is set forth in *Section 48-39-220 S.C. Code Ann., (1976, as amended)*. The Trial Court lacked subject matter jurisdiction to add additional Defendants, because the Appellant/Landowner's action was brought pursuant to *Section 48-39-220, S.C. Code Ann. (1976, as amended)*. This Statute contemplates an action against the State of South Carolina, and no other party.

Once the South Carolina General Assembly has established a statutory scheme, a Trial Court lacks subject matter jurisdiction to fashion a remedy outside the clear parameters of a specific Statute such as *Section 48-39-220. Byrd v. Irmo High School*, 468 SE 2d 861 (1996), stated that "[w]here a statute expressly enumerates the requirements on which it is to operate, additional requirements are not to be implied." Citing, *Trayco, Inc. v. United States*, 994 F.2d 832 (Fed.Cir.1993), *Byrd supra* at 865. Therefore, the Trial Court cannot arbitrarily add Defendants beyond those anticipated under *Section 48-39-220, S.C. Code Ann., (1976, as amended)*.

APPELLANT/LANDOWNER'S WITNESSES AT TRIAL

Witness Georgianna Coates

First, Appellant/Landowner called Georgianna Coates, to the stand. Ms. Coates was offered by Appellant/Landowner, and qualified by the Trial Court as an expert in real estate title examination. Ms. Coates stated that she had examined the title to real estate claimed by the Appellant/Landowner. Ms. Coates testified that Appellant/Landowner's title to the real property in question could be traced back to a conveyance from the Honorable Benjamin R. Tillman, then Governor of South Carolina, to James M. Crofut, (R. p. 204 lines 14-25); (R. p. 205 lines 1-21). Ms. Coates also testified to the references made in the deed to a plat which was referenced in the deed from Governor Tillman to Appellant/Landowner's predecessor in title. Ms. Coates then was able to trace an unbroken chain of title from Mr. Crofut to Appellant/Landowner. Ms. Coates also testified to the ready availability of this information in the public record, including the real estate records as well as the tax records. Ms. Coates affirmed the publicly available nature of this information during the time when Intervenor Merry Land was having its title examined.

Witness Chester Williams, Esquire

Second, Appellant/Landowner called Chester Williams, Esquire, to the stand. Mr. Williams was offered by the Appellant/Landowner, and qualified by the Trial Court as an expert in real estate title, (R. p. 237 lines 22-25); (R. p. 238 lines 1-4), and the conclusiveness of the information offered by Ms. Coates on the title to Appellant/Landowner's property. Mr. Williams offered his expert opinion that based on the title examination of Ms. Coates, Appellant/Landowner was the owner of the property in question and Appellant/Landowner's property was located between the mean high-water and mean low water marks of the Beaufort River in Beaufort County, South Carolina. Mr. Williams affirmed the easy availability of this information in the public records of Beaufort County, including the real estate records as well as the tax records (R p. 238 line 13 -- p. 245 line 17).

APPELLANT/LANDOWNER'S WITNESSES AT TRIAL, (Cont.)

Witness Lorick Fanning, RLS

Finally, Appellant/Landowner called Lorick Fanning. Mr. Fanning was offered by the Appellant/Landowner, and qualified by the Trial Court as an expert in real estate surveying, (R. p. 273 line 22 – p. 274 line 3). Mr. Fanning had been asked by the Appellant/Landowner to recreate the plat which was incorporated into the deed from the state to Appellant/Landowner's predecessor in interest, (R. p. 274 line 8 - p. 275 line 9). Mr. Fanning was able to recreate the plat in its entirety based on the plat incorporated into the original deed from the State and create an overlay of the two, (R. p. 289 lines 21-25); (R. p. 290 line 1 – p. 292 line 10). Mr. Fanning described the process by which he recreated the plat, including field survey work, historical research relying on publicly filed documents and other publicly available documents and surveying techniques¹, specifically the land lot and section system, (R. p. 356 lines 7-13). Mr. Fanning stated that the plat attached to Mr. Crofut's deed and his re-creation of the plat represented intent to convey property between the high and low water marks of the Beaufort River, (R. p. 290 line 16 – p. 292 line 3).

Mr. Fanning had little difficulty in "closing" the plat, i.e. making the plat represent a drawing that started at one point and closed on that same point of reference, (R. p. 339 lines 16-24). Mr. Fanning's plat did not contain the exact acreage of the original plat, which he explained by noting that the eastern and western boundaries of the plat were "natural monuments" which were the high and low water marks of the marshes of the Beaufort River, (R. p. 366 line 3 – p. 367 line 8); (R. p. 378 line 24 – p. 382 line 4). Because these were natural monuments subject to the vagaries of the tidal flow and erosion or accretion of soil over the whole of the property the property had obviously been diminished by some natural forces, (R. p. 380 line 22 – p. 382 line 4); (R. p. 533 deposition page 48 line 15- deposition page 49 line 4).

Witness Fanning's Rebuttal Testimony

Mr. Fanning, Appellant/Landowner's expert witness, on being recalled to the stand, contradicted Mr. Cook's testimony and described that by using the plats and the Beaufort County grid system, a surveying tool that was contemporary with the plats, that he was able to locate the southern boundary of the property, (R. p. 514 line 16 – p. 516 line 6).

¹ (R. p. 274 line 8 - p. 275 line 5); (R. p. 276 line 1 - p. 277 line 16); (R. p. 280 line 24 – p. 281 line 24); (R. p. 282 line 24 – p. 286 line 25).

ARGUMENT
Summary of Argument

Appellant's argument is a simple one. The Trial Court in this case agreed with Appellant and found that the State of South Carolina deeded the 95.27 acre parcel to Plaintiff's predecessor in interest, intending to convey property between the high and low water mark on the Beaufort River, (R. p. 47). However, the Trial Court then improperly determined that the description of the property was inadequate to convey the property to Appellant's predecessor in interest. The law is clear that the ultimate fee in every tract of land must rest somewhere. Title to real estate cannot be held in abeyance; it must be vested somewhere. Abrams v. Templeton, 465 S.E.2d 117,121 (Ct. App., 1995), (Internal Citations Omitted). The Trial Court, having correctly determined the Grantor's intent to convey the Property, failed in its duty to discern and carry out the Grantor's intent. The determination of a Grantor's intent and carrying out that intent is a matter of law and this Court is not bound by the Trial Court's findings. The determination of ambiguity is a question of law for this Court to determine, not being bound by the Trial Court's findings. The Trial Court, over the Appellant's objection, erroneously allowed testimony to try to create an ambiguity in a deed where none existed. Assuming that there was an ambiguity, the Trial Court erred in allowing Intervenor's extrinsic testimony over the objection of the Appellant since they were not offered to resolve the ambiguity. Assuming that the Trial Court did not err in allowing the Intervenor's testimony the Trial Court erred in that there was no evidence to reasonably support the Trial Court's findings. The arguments surrounding the Intervenor's are also simple.

ARGUMENT
Summary of Argument, (Cont.)

The Trial Court erred when it allowed any of the parties to intervene. The State of South Carolina has, by Statute, created a methodology whereby entities or individuals who claim title to marshland, as defined in the Statute, to bring litigation against the State of South Carolina to determine who has superior title. Because no other party (any of the Intervenor), claimed an interest in the real estate, they should not have been allowed to intervene. Likewise, under principles set out in the South Carolina Rules of Civil Procedure, the Intervenor should not have been allowed to Intervene, nor should the Trial Court, at Appellant's expense, have allowed a very large number of other intervenors into the litigation. Furthermore, under the standards required to establish standing in this State, Intervenor Merry Land does not meet those standards and thus should not have been allowed to participate in the Trial.

Appellant timely objected to the introduction of witness testimony, by deposition, where the witness/deponent should have been called to testify at Trial but was not. The failure to call the later added witness was a failure by Intervenor Merry Land's counsel and that failure should not have been excused by the Trial Court, to the prejudice of the Appellant.

Appellant was not given the opportunity to make oral post-trial motions after the long delayed post trial testimony of Intervenor, Merry Land's witness, in violation of the South Carolina Rules of Civil Procedure and against the interests of the Appellant.

ARGUMENT

I. THE TRIAL COURT ERRED AND MISAPPREHENDED AND MISAPPLIED SOUTH CAROLINA LAW, WITH REGARD TO THE CONVEYANCE IN ISSUE.

The Deed in Controversy.

In the instant case the deed in question is an 1891 grant from the State of South Carolina to Appellant's predecessor in interest, (R. p. 239); (R. p. 544). The tract is further described as "Being a parcel of tract of land on the Beaufort River in the County and State aforesaid and lying between high and low water mark on river above mentioned. Having such shape, form and marks as are represented by a Plat of said land on file in the office of the Secretary of State in Book 1 or Public Land Plats, Page 16...", (R. p. 539); (R. p. 544). There is a contemporaneous Plat dated, July 1891, showing the 95.27 acre tract and a second, earlier Plat dated 1882, which shows a larger 114.12 acre tract from which the 95.27 acre tract is derived, (R. pp. 545-546).

Interpretation of the Deed to Crofut (Appellant/Landowner Hoyler's Predecessor).

The Trial Court agreed with Appellant and found in its May 27, 2016 Order, Paragraph 1 under "Conclusions", that in the deed from the State of South Carolina to Crofut, Plaintiff's predecessor in title that the grant "was legally permissible and, although was an alienation of the public trust land, was allowed because the *intent* to grant tidelands between the high water and low water was clearly expressed." (Emphasis not in original), (R. p. 47).

By these words, the Trial Court ruled that Appellant had met his burden of proof under Section 48-39-220 of the S.C. Code of Laws as amended and as interpreted by the Courts in this State.^{2 3}

However, the Trial Court further found that, "...because of the vague and incomplete survey and description, [in the deed and plat], [Appellant's] request to declare title to tidelands is, hereby, DENIED." (R. p. 47). This is in error because no effort was made by the Trial Court to effectuate the intent of the grantor, which is the primary goal of all Courts in this State. The Trial Court's decision results in a forfeiture of the Appellant's rights to the Property which he and his predecessors in title have held for over one hundred years.

This Court Reviews *De Novo*.

"The determination of the grantor's intent when reviewing a clear and unambiguous deed is a question of law for the court. This court reviews questions of law *de novo*. In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court." Proctor v. Steedley, 398 S.C. 561, 730 S.E.2d 357, 363 (S.C. Ct. of App., 2012), (Internal Citations Omitted).

² "To establish fee simple ownership of the marshland tract, therefore, [Lowcountry Open Land Trust] must show (1) its predecessors in title possessed a valid grant, and (2) the grant's language was sufficient to convey the land below the high water mark to Peronneau." Lowcountry Open Land Trust v State, 347 S.C. 96, 103. 552 SE 2d 778 (Ct. of App. 2001).

³ The intent of the State to divest itself of the 95.27 acre tract lying between the low and high water marks is now the Law of The Case. Ulmer v. Ulmer, 369 S.C. 486, 490-491, 632 S.E.2d 858 (S.C. 2006).

“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. 578, 590, 635 S.E.2d 649 (S.C. App., 2006), (Internal Citations Omitted).

“Moreover, in ascertaining such intention the deed must be construed as a whole, and effect given to every part thereof, if such can be done consistently with law.” Bennett supra, at p. 590, (Internal Citations Omitted). “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....” Browett supra, at p. 594.

The first question that this Court should ask is: are there settled rules of law that are contravened by the Trial Court in ascertaining and effectuating the intent of the Grantor, the State, to Crofut, Appellant’s predecessor in title? Because the tract in question involves alienation of State land, the proper question is (i) could the State convey and (ii) did the State convey it?

Beyond, “...the ... principle of tidelands law, it is well settled that the State comes into court with a presumption of title, and, if an individual is to prevail, he must recover upon the strength of his own title, of which he must make proof. It is further a settled rule of construction that a grant by the government to a subject is construed most strongly against the grantee and in favor of the grantor.” State v. Fain 273 S.C. 748, 752, 259 S.E.2d 606 (1979), (Internal Citations Omitted).

However, if the State or one of its royal antecedents has conveyed tidal property, the State does not hold presumptive title. The rule that the State comes into court with a presumption of title, which is the correct rule when lands have never been granted by the sovereign, does not apply when lands have once been granted, as they were in this case. State ex rel McLeod v. Sloan Const. Co., 284 S.C. 491, 500, 328 SE 2d 84 (S.C. Ct. of App. 1985), (Internal Citations Omitted). Once the State divests itself of property, it "... must prove by positive evidence that it regained title in some manner at a subsequent time." State ex rel McLeod *supra* at p. 494.

The Trial Court affirmatively answered the question of whether or not there are any settled rules of law that are contravened by effectuating the intent of the Grantor in the negative when it agreed with Appellant and found in its Order that the grant, "...was legally permissible and, although was an alienation of the public trust land, was allowed because the intent to grant tidelands between high water and low water was clearly expressed." (R. p. 47).

Having satisfactorily answered the preliminary questions of (i) could and (ii) did the State intend to convey the tract of marshland to Crofut, the only question left for decision by the Trial Court and now this Court was; what quantity of real property did the State of South Carolina convey to Crofut?

The Trial Court erroneously answered this question by finding that the State of South Carolina had engaged in a transaction that resulted in a nullity. The Trial Court found that the "...length and placement of the high-ground (western) boundary is of paramount importance and this Court finds that the Plaintiff can prove no more than a rough approximation. The granting plat is nothing more than a hand-drawn sketch. This Court accepts the testimony that the survey cannot 'close' or be accurately placed and is therefore unacceptable. An accurate description of a grant of property between high and low water in an area so interwoven with navigable watercourses and dozens of small marshy knolls must have more detail and accuracy than is given here." (R. p. 47).

In examining these conclusions *seriatim*, this Court should come to the conclusion that the Trial Court erred, as a matter of law, in reaching its Conclusions and reverse the Trial Court's findings.

It is axiomatic that the State of South Carolina is presumed to own land with, few exceptions, below the high water mark and adjacent to marshland.

Because none of the Intervenor in this case made any claim to any land below the high water mark *the high water mark is boundary for them*, whether or not, the State of South Carolina or Appellant owns the marshland adjacent to them. The converse of that legal conclusion is also true. Whoever owns the marshland, neither the State of South Carolina nor Appellant can claim land above the high water mark as against the Intervenor.

South Carolina also recognizes the dynamic nature of tidelands and that there is a likelihood that those boundaries between the high and low water marks can change over time, "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. 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 (Ct. App. 1984), (Internal Citations Omitted).

This legal conclusion is implicit in Section 48-39-220, S.C. Code of Laws, (1976, as amended), because the putative owner of marshland, as defined in that Statute, can only claim between the mean high and mean low water marks. This legal conclusion is explicitly set out in Horry County supra, in which the Court states that the natural ebb and flow of a littoral or riparian property can diminish or enhance the property but the property owner would always have property adjacent to water.

Thus, from a legal standpoint, the plat adds nothing to the western boundary determination because the boundary is always the high water mark.

Also from the Trial Court's Order, "The granting plat is nothing more than a hand-drawn sketch. This Court accepts the testimony that the survey cannot 'close' or be accurately placed and is therefore unacceptable." (R. p. 47). These are factual conclusions and of no import to a legal inquiry.

However, the Trial Court's finding that, "The granting plat is nothing more than a hand-drawn sketch" (R. p. 47), is factually inaccurate. None of the Trial experts described it in that fashion. It is described in the deed as a plat, and by Appellant's expert as a plat and by the Intervenor's witness(s) as a plat, albeit one whose courses and distances are sometimes hard to read. (R. p. 467 line 12 – p. 468 line 19); (R. p. 525 deposition page 14 line 1 – deposition page 16 line 25); (R. p. 525 deposition page 17 lines 1-11). Having determined the intent of the State of South Carolina's grant, the Trial Court cannot undo what it has determined was the Grantor's intent, but the Trial Court should have affirmed the description in the deed as the State of South Carolina intended.

Also from the Trial Court's Order, "An accurate description of a grant of property between high and low water in an area so interwoven with navigable watercourses and dozens of small marshy knolls must have more detail and accuracy than is given here.", (R. p. 47). The legal implications of this finding are again unimportant. The importance of the potential for navigable streams throughout the property is discussed in detail below, but they have nothing to do from a legal standpoint with the location of the property or the intent to convey it. Assuming *arguendo* that there are navigable streams there may be some implication for ownership as between Appellant and the State of South Carolina.

Because the Trial Court found that the State had conveyed the property to Mr. Crofut, Appellant/Hoyler's predecessor in interest, there is no implication for the deed description. The navigable streams do not consume the tract but merely run through it. As discussed in Horry County, *supra*, littoral and riparian properties change under the pressure of the rivers or tides. In the instant case, navigable streams may arise and/or disappear over time and so, assuming *arguendo* that the State owns the navigable streams, they do not diminish the ownership of the vast majority of the property which is not navigable at low tide and which the Trial Court determined had been properly deeded by the State.

The Trial Court, erred as a matter of law when it did not follow what it admittedly found as the clear intent of the Grantor and the Trial Court improperly failed to affirm the Property in the Grantee's successor in title, Appellant, Hoyler:

The Trial Court should have followed the guidance of this Court and the Supreme Court when looking at old plats which related to tidal Property. This Court and the Supreme Court of South Carolina have held (i) that property was properly conveyed to individuals based on vague descriptions and old plats which are not as accurate as modern day plats,⁴ (ii) have found incomplete plats to be acceptable⁵, and (iii) even when deciding against a claimant, have had no trouble in relying on vague descriptions and old plats when rendering a decision.⁶

⁴ State v. Holston Land Company, 272 S.C. 65, 67,248 SE 2d 922 (1978); Conch Creek Corp. v. Guess, 263 S.C. 211, 212-213, 209 SE 2d 560 (1974).

⁵ "The annexed plat is drawn to a scale of one inch to twenty chains. The perimeter lines of the plat consist primarily of segments of straight lines identified by distances and magnetic courses, with the corners and line points identified as trees of specified variety and designated marks. Only on the northwest corner of the platted property near the bridge over Hobonny Creek is the boundary not shown as a straight line with specified courses and distances." Hobonny Club v. McEachern 272 S.C. 392,395, 252 S.E.2d 133 (1979), (Emphasis Added).

⁶ State v. Hardee, 259 S.C. 535, 537-538, 193 SE 2d 497 (1972).

Finally, the Respondent, the State of South Carolina, raised no issue regarding the intention of the State of South Carolina with regard to the description of the Property which it conveyed to Appellant's predecessor in interest with one exception, whether navigable waters which might run through the Property were conveyed to the Appellant. The State of South Carolina, on cross examination and in argument, raised the issue of whether or not the description in Appellant's deed which included, "... all woods, water courses, profits, commodities, appurtenances and hereditaments..." included navigable stream beds which were encompassed by Appellant's property, (R. p. 539); (R. p. 544).

Appellant does not concede that there are any navigable water courses within the property conveyed to his predecessor in title and even if there were, it is clear that the State intended to convey them.

However, the intention of the parties to the deed, to convey the marshland, is not adversely affected by this contention. The deed may simply be interpreted to read that the State of South Carolina conveyed those water courses that were not navigable and which it had clear authority to convey and those which were navigable it never intended to convey as against settled law and public policy. It is of course, impossible to know what navigable water courses existed at the time of the conveyance and which have arisen as a result of the natural ebb and flow of property inundated by the Beaufort River twice daily. However, if this Court finds that the State's intention to convey those navigable water courses is not compatible with South Carolina law, then the navigable water courses would be exempted from that portion of the property that lies above them, which is the majority of the property conveyed by the State of South Carolina.

No Material Vagueness of Deed and Plat.

The Trial Court's primary error stems from finding an ambiguity in the deed through its annexed plat where none exists. That too is a decision that this Court can correct without deference to the Trial Court's decision.

The determination of whether language in a deed is ambiguous is a question of law." Proctor v. Steedley, 398 S.C. 561, 730 S.E.2d 357, 367 (Ct. App., 2012), (Internal Citations Omitted).

"It is fundamental law in this state that if a deed description is unambiguous, extrinsic evidence cannot add to, subtract from, vary or explain its terms, in the absence of fraud, accident or mistake in its procurement." Bellamy v. Bellamy, 292 S.C. 107, 111, 355 S.E.2d 1 (S.C. Ct. of App., 1987), (Internal Citations Omitted). Because no fraud, accident or mistake is argued by either party this Court must find the deed and its attached plat to be ambiguous to allow any extrinsic evidence into the proceeding to resolve the ambiguity.

The deed and attached plat are unambiguous and the language in the four corners of the deed and attached plat are ample evidence for this Court, not being bound under these circumstances to defer to the Trial Court, to determine the clear intent of the Grantor without resort to extrinsic evidence, (R. p. 539); (R. p. 544); (R. p. 545). The property can be readily identifiable from the plat and this Court is free to make that determination and confirm the property in the Appellant. "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), (Internal Citations Omitted), (Emphasis added).

Appellant asserts that the deed and plat incorporated into it are not neither “vague” nor “incomplete” and this Court should determine that either separately is, or taken together are, adequate to the task of “locating the land”, (*Kirven supra*, at pg. 389), that the State of South Carolina intended to convey to Mr. Crofut, (R. p. 47). Should this Court determine as a matter of law that the deed and attached plat are vague, then the question before the court becomes one of fact rather than one of law.

Under those circumstances this Court would typically defer to the Trial Court’s findings of fact because this type of litigation is a legal one rather than an equitable one. “A determination of title is legal in nature. Because this is a law case tried by the master alone with direct appeal to the Supreme Court, our review is limited to correcting errors of law. Accordingly, we will affirm the master’s factual findings if there is any evidence in the record which reasonably supports them.” *Lowcountry Open Land Trust, supra*, at 101-102 (Emphasis Added).

However, there is a substantial difference in this case and the *Lowcountry Open Land Trust* case. In the *Lowcountry Open Land Trust* case the Court was trying to determine whether title to the land was in the State or in the *Lowcountry Open Land Trust* and to resolve another issue regarding “wharfing out” which is not relevant to this case. Once the Trial Court had determined the title was in the *Lowcountry Open Land Trust* and there was no right to “wharf out” the appeal ensued. In the instant case the Trial Court has agreed with Appellant and already determined the title to be in the Appellant and not the State, (R. p. 47), thus resolving the legal question which is now the Law of This Case. *Ulmer v. Ulmer, supra*.

The only question before this Court under these circumstances is the extent of the grant; not its quality or in whom title lies. There are two types of ambiguities which are recognized in documents in South Carolina.

“Ambiguities,(...) are patent and latent; the distinction being that in the former case the uncertainty is one which arises upon the words of the will, deed, or other instrument as looked at in themselves and before any attempt is made to apply them to the object which they describe, while in the latter case the uncertainty arises, not upon the words of the will, deed or other instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe. " Bellamy v. Bellamy, 292 S.C. 107,110, 355 S.E.2d 1 (Ct. of App., 1987), (Internal Citations Omitted). There are no apparent patent ambiguities in the deed or plat and so the Trial Court had to have found a latent ambiguity when it applied the deed and plat to the land which the State was conveying to Crofut.

The ambiguities recognized in South Carolina are not used to nullify a conveyance, but only to determine the intent of the grantor, so that the paramount concern of the Court may be addressed. “When the language in a deed is ambiguous, extrinsic evidence is admissible to aid the court in determining the grantor's intentions. See, Bellamy v. Bellamy, 292 S.C. 107, 111, 355 S.E.2d 1, 3 (Ct. of App. 1987)” Smith v. Rucker, 357 S.C. 532, 537, 593 S.E.2d 497 (Ct. of App., 2004).

The Trial Court erred in allowing in any extrinsic testimony to dispute the clear language of the deed and plat. "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 S.C. 80, 87-88, 113 S.E.2d 349 (1960). (Internal Citations Omitted), (Emphasis Added).

Appellant submitted allowable expert testimony to show that the deed and plat intended to convey land between the low and high water marks which and has regularly been used and found admissible in other trials of this nature, notably in Lowcountry Open Land Trust v State ⁷. The Appellant's expert surveyor recreated the plat incorporated in the original deed, (R. p. 637), which showed that all of the property conveyed was marshland and overlay his resurvey with the incorporated plat and it showed that they coincided to a substantial degree (R. p. 289 line 20 – p. 292 line 7); (R. p. 638). While the main purpose of the testimony was to establish the property conveyed as being marshland, it also indirectly served to locate the property conveyed with remarkable specificity (R. pp. 289-292).

⁷"Given the limitations of surveying in 1836, the results of placing the 1836 overlay on top of the modern photo map[s] are remarkable. It is possible to identify numerous geographic features, including many inlets that still remain visible." Lowcountry Open Land Trust, *supra* at p. 105.

Later in the Trial, the Trial Court erroneously allowed in two witness surveyors for the Intervenor Merry Land to testify, over the objection of Appellant. **Neither of the surveyors offered by the Intervenor, Merry Land, did any field work**, although they normally would, (R. p. 462 line 11 – p. 463 line 3). Also, they were never asked to try to recreate the plat, so at a minimum even if their testimony is admissible, it is of limited value. The testimony of Mr. Cook and the Intervenor, Merry Land's Attorney characterization of that testimony showed that Mr. Cook's testimony was offered to elicit the difficulty in closing the plat, not that he couldn't close it. (R. p. 467 line 12 – p. 468 line 25); (R. p. 502 line 23 – p. 503 line 5).

Appellant asserts that Intervenor Merry Land's testimony is immaterial and irrelevant, because their testimony was intended to create ambiguity, rather than resolve one. Kirven v Bartell, *supra*, at 389.

Even if the Intervenor's witness testimony was admissible, then their testimony is valueless to aid the trier of fact in resolving the Grantor's intent with regard extent of the conveyance. “ In Brownlee v. Miller, 208 S.C. 252, 37 S.E.2d 658, 662, it was contended that a deed should be set aside because of insufficient description and this Court said: ‘The rule of law recognized in our courts is well expressed in the following excerpt from the opinion of the Supreme Court in the case of McNair v. Johnson, 95 S.C. 176, 179, 78 S.E. 892: Another maxim of law applicable to this case is: “That is sufficiently certain which can be made certain.” Crocker v. Evans, 216 S.C. 305, 57 S.E.2d 754,755 (S.C., 1950).

In the instant case, as was the case in the Crocker case, the original plats could be made certain with the exertion of some surveying effort, which the Appellant's surveyor made and which the Intervenor's surveyors did not make.

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." Crocker v. Evans, 216 S.C. 305, 57 S.E.2d 754,755 (S.C., 1950).

It is interesting to note that both of Intervenor Merry Land's surveyor witnesses, were limited by Intervenor Merry Land in that they were not asked to go further than a preliminary reading of the original plats, (R. p. 471 line 6 – p. 472 line 3); (R. p. 472 lines 10-16); (R. p. 528 deposition page 27 lines 1-9); (R. p. 529 deposition page 30 lines 1-17); (R. p. 532 deposition page 42 line 16 – deposition page 43 line 22); (R. p. 533 deposition page 49 lines 1-23).

A conclusion could be drawn that Intervenor Merry Land was concerned with what it might find were it to ask the surveyors to actually do field work. One of them, Intervenor Merry Land's witness, Jim Gardner indicated field work was the next step to locating the property and overcoming any deficiencies in the plat attached to the deed, (R. p. 532 deposition page 43 lines 7-22); (R. p. 533 deposition 49 lines 20-22). Intervenor Merry Land's witness Gardner, further acknowledged the difficulty in working with old plats such that there were no tolerance for error in closing a plat at the time the old plats were made, (R. p. 529 deposition page 30 lines 2-8), and the training (R. p. 529 deposition page 30 lines 9-17), and equipment available to the surveyors was rather primitive (R. p. 528 deposition page 26 lines 1-8).

Additionally, Intervenor, Merry Land's witness Cook, believed that he could possibly locate the Property from one of the attached plats in evidence. (R. p. 471 lines 1-25). When asked what information Intervenor, Merry Land's witness Cook would need to recreate a plat like the 1882, plat Mr. Cook responded that he, "Would look at the records of the county. You would look at plats and records that you were given by the attorneys.", (R. p. 463 line 11 – p. 464 line 1). When asked if he would use the grid system in Beaufort County, he answered that he might or might not, (R. p. 464 lines 2-4).

This is not the work of persons acting with ordinary prudence, and neither of Intervenor, Merry Land's witnesses did any field work, or acting in good faith, being stopped short of the next step to determine the location of the tract in question (R. p. 471 line 6 – p. 472 line 3); (R. p. 472 lines 10-16); (R. p. 528 deposition page 27 lines 1-9); (R. p. 528 deposition page 29 lines 21-25); (R. p. 532 deposition page 42 line 16 – deposition page 43 line 22); (R. p. 533 deposition page 49 lines 1-23).

The Trial Court points out that the plat created by Appellant's expert relies on the mean high and low water marks rather than the "calls" on the 1891 plat and finds that as a reason to reject it. (R. p. 44) The Trial Court's Order, mistakenly rejects the general rule regarding the weight to be given to evidence regarding the location of boundaries (first relying on natural boundaries, next artificial monuments, then to adjacent boundaries and last to courses and distances) and finds that some cases may... require than an inferior means of location be preferred over a higher means of location, Williams v. Moore, 400 SC 90,104, 733 SE2d 224 (Ct. of App. 2012), (Internal Citations Omitted).

There is no reason that the general rule should be rejected under the instant circumstances and the Trial Court mistakenly rejects natural boundaries, the high and low water marks for static boundaries.

First, the statute, Section 48-39-220, S.C. Code Ann., (1976, as amended), under which this case was brought, defines the boundaries of tidelands as being between mean high water and mean low water of navigable water.

Second, the State of South Carolina recognizes the dynamic nature of a marshland to gain and lose area due to accretion and erosion. Therefore, the Trial Court's reliance on a static boundary is contrary to South Carolina law. "Significantly, under South Carolina law, wetlands created by the encroachment of navigable tidal water belong to the State. Proof that land was highland at the time of grant and tidelands were subsequently created by the rising of tidal water cannot defeat the State's presumptive title to tidelands." McQueen v. South Carolina Coastal Council, 354 S.C. 142, 150. 580 S.E.2d 116 (S.C., 2003), (Internal Citations Omitted), See also, Horry County v. Woodward, *supra*.

Finally, explaining the dynamic nature of the natural monuments, the Appellant's expert witness at Trial, stated that the bearings and distances on the plat in the 1800s represented the location of the mean high and mean low water marks as they existed at that time and his bearings and distances represented the mean high and mean low water marks as they exist today, (R. p. 379 lines 11-22). **This shows that the plats are the same except for the expected movement of the tidelands adjacent to the Beaufort River.**

This Court should correct the Trial Court's erroneous admission and reliance on the Intervenor Merry Land's witness in Court and late filed surveyor's testimony. The Trial Court should have found it to be inadmissible because it did not support the Grantor's intent. Additionally, none of the evidence submitted by the Intervenor reasonably supports the conclusions of the Trial Court.

Given the limitations placed on the experts by the Intervenor and the fact that Appellant's expert's boundary survey falls on nearly the exact position of the old plats, and was following the same natural monuments for the eastern and western boundaries, the only reasonable conclusion, that the Trial Court could have reached, is that tract was readily identifiable as being the property that the Grantor intended to convey.

Finally, again assuming that the Trial Court found ambiguity in the deed and plat(s) from the State of South Carolina to Crofut, the Trial Court, based on the resurvey should have rejected the old plat(s) and used the resurvey submitted by Appellant's expert witness at Trial. (R. p. 638).

The Supreme Court of South Carolina has previously found, "...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. DuRant, 236 S.C. 80, 87, 113 S.E.2d 349 (1960), (Internal citations omitted).

In summary, this Court should find that the intent of the Grantor was accurately determined by the Trial Court and that, as a matter of law, the deed and plat(s) are sufficient to convey the property intended. This Court should determine as a matter of law that the deed and plat(s) contain no ambiguity and the intent of the Grantor should be carried out. If this Court should determine that there is an ambiguity in the plat then it should not allow any extrinsic evidence which is inconsistent with terms of the deed and plat(s). If this Court allows extrinsic evidence which is inconsistent with the terms of the deed and plat(s) then it should find that there is not any evidence which reasonably supports the results of the Trial Court's findings of fact.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING INTERVENTION OF ADJACENT UPLAND PROPERTY OWNERS, IN THIS CASE.

"Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the action. See, Black's Law Dictionary 826 (7th ed. 1999). Intervention may be of right or permissive; intervention of right is governed by Rule 24(a), SCRCP, which is modeled after the federal rule. Intervention should be liberally granted, particularly where judicial economy will be promoted by the declaration of rights of all parties who may be affected.

However, this does not mean intervention should always be granted. Instead, "we must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a) (2)." Each case will be examined in the context of its unique facts and circumstances."

Rule 24(a) provides:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Obviously, there is no unconditional right to intervene and the Intervenor must necessarily intervene under Rule 24(a)(2) which provides that;

... (A) party seeking intervention under Rule 24(a)(2) must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. In re Horry County State Bank, 361 S.C. 503, 508, 604 S.E.2d 723 (Ct. of App., 2004), (Internal Citations Omitted).

Trial Court's Abuse of Discretion.

It is undisputed that Intervenor Merry Land Properties, LLC filed a Motion to Intervene and that Appellant consented to the intervention reserving his right to object at a later date. When, prior to Trial, after discovery was complete and on a total failure of Intervenor, Merry Land to show any titular claim to the marshland in question, Appellant moved the Trial Court to not allow Intervenor Merry Land's participation in the Trial of the case, it was denied.

Later on, during the Trial and shortly after the presentation of Appellant's first witness, the trial court, *sua sponte*, stopped the Trial and ordered that, at Appellant's expense, have all of the adjacent upland property owners be made party defendants to this litigation (R. p. 222 line 18 – p. 223 line 15).

All of which was an abuse of discretion. Appellant twice appealed the Trial Court's ruling on Intervention but the appeals were dismissed as being premature, (R. p. 49); (R. p. 51).

"An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Sundown v. Intedge Industries, 383 S.C. 601 681 S.E.2d 885, 888 (S.C. 2009), (Internal Citations Omitted).

Appellant does not dispute that Merry Land made a timely request to intervene. However, he does submit that neither Merry Land nor any of the other Intervenors have any ability to "...assert an interest relating to the property or transaction which is the subject of the action; ..." The litigation is based on South Carolina's methodology for establishing title to marshland as between the State of South Carolina, which holds presumptive title, and a citizen or entity claiming title to the same property through a sovereign grant of title which is set forth in S.C. Code, Section 48-39-220, (1976, as amended).

It reads in pertinent part,

“Section 48-39-220. Legal Action to Determine Interest in Tidelands.

- (A) Any person **claiming an interest in tidelands** which, for the purpose of this section, means all lands except beaches in the Coastal zone **between the mean high-water mark and the mean low-water mark of navigable waters** without regard to the degree of salinity of such waters, may institute an action against the State of South Carolina **for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State.** Service of process shall be made upon the State Fiscal Accountability Authority.” (Emphasis added).

The Trial Court, in order to include any of the Intervenor/Defendants in Trial had to interpret the statute to read that they had “...an interest in tidelands which ... (lie)...between the mean high-water mark and the mean low-water mark of navigable waters... (and were engaged in) an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State.” There is not only no evidence that any of the Intervenor had any interest in the tidelands and there is *no claim* that they did.

"It is perhaps unnecessary to say that courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. *They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret.*

The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws. *There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by the constitutional provisions distributing the powers of government among three departments, the legislative, the executive, and the judicial." (Emphasis added), Laird v. Nationwide Ins. Co., 243 SC 388, 395, 134 SE 2d 206 (1964) citing with approval Creech v. South Carolina Pub. Serv. Auth., 200 S.C. 127, 20 S.E.2d 645 (S.C., 1942).*

The Trial Court abused its discretion in allowing the permissive Intervention of all of the Intervenor by misconstruing the plain meaning of the statutory language set out in S.C. Code, Section 48-39-220, (1976, as amended), which only allows parties claiming a "right, title or interest" below the high-water mark, which in this case are the Appellant and the State of South Carolina.

Those are the only necessary parties to the action because the Statute specifically includes only individuals or entities that have a dispute over any right title or interest in the 95.27 acres of tideland, and by its plain language, excludes those that do not.

Alternatively, assuming *arguendo*, that by abutting the 95.27 acres, somehow the adjacent property owners are able to meet the second prong of the permissive joinder test, the Intervenor/Defendants must fail on the third prong of the test. The Intervenor cannot “demonstrate that ... (they are) in a position such that without intervention, disposition of the action may impair or impede ... (their) ability to protect that interest”. Whether the Respondent, State of South Carolina or the Appellant own the 95.27 acres, neither own beyond the mean high-water mark which is the boundary between the Intervenor/Defendants and either the State of South Carolina or the Appellant. Applying the plain meaning of the Statute, the Law, the Intervenor has no interest in the outcome, because their border with either the Appellant or the State of South Carolina does not change, neither, “impairing or impeding”, their ability to protect their interest which is establishing a border, already established by Statute and *stare decisis*, with an, as of the time of the Trial, undetermined, adjacent marshland property owner.

Finally, the fourth prong of the test is not adequately met by the Intervenor, since the State of South Carolina is the defendant of record under the statute and seeks to protect its interest; therefore the public’s interest is in the ownership of the marshland. It is difficult to think of a more capable representative to protect the interests of the Intervenor’s rights and have those interests be more aligned than the entity charged with overseeing the public trust in marshland. Lowcountry Open Land Trust, *supra*, at p. 111 footnote 6.

Appellant submits that the Trial Court abused its discretion in allowing the Intervenor into the case and therefore their testimony and evidence should be disregarded.⁸

III. THE TRIAL COURT ERRED IN FINDING THAT THE INTERVENORS HAD STANDING IN THIS CASE.

The Intervenor Lack Standing.

The Trial Court abused its discretion by allowing Intervenor/Defendants to remain in the Trial because they lacked standing.⁹ "Standing refers to a "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right. Standing is ... that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims. It concerns an individual's sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court.

Standing is comprised of three elements:

Injury in Fact.

First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'"

⁸ Ironically, the Trial Court, after requiring the Appellant to pay the cost of notifying and adding all of the Intervenor, but Merry Land did not make a determination of the boundary between them and the State. This proves the Appellant's point that the Intervenor were not necessary for a determination of the location of the high water boundary between them and the owner of the marshland.

Causal Connection.

"Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court."

Likely that the purported injury will be redressed by a favorable decision.

Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Burden on party seeking to establish standing.

The party seeking to establish standing carries the burden of demonstrating each of the three elements." Powell ex rel. Kelley v. Bank of Am., 665 S.E.2d 237, 379 S.C. 437 (Ct. of App., 2008), (Internal Citations Omitted), (Emphasis Added).

Factually, none of the Intervenor/Defendants have standing. Under the first prong, there is no threat to any legally protected interest. Their interests are protected by S.C. Code, Section 48-39-220(A), (1976, as amended) the Statute which sets their boundaries as the mean high water mark whomsoever owns the marshland. Under the second prong, because there is not threat or an invasion of legally protected interest there is no causal connection.

⁹ "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Sundown v. Intedge Industries, 383 S.C. 601 681 S.E.2d 885, 888 (S.C. 2009), (Internal Citations Omitted).

Finally, there is no injury to redress, because the outcome of the Trial between Appellant and the State of South Carolina doesn't affect the boundary, only the ownership of their neighboring property. Having failed to meet any of their burdens under the three prong test for standing, Intervenor should be dismissed from this case and their evidence stricken.

IV. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN GRANTING A CONTINUANCE FOR FURTHER TESTIMONY.

At the close of Intervenor, Merry Land's case and after testimony could not be elicited from one of Merry Land's witnesses. Intervenor, Merry Land's attorney asked that the record be left open so that new testimony could be elicited from another witness, (R. p. 507 line 24 – p. 508 line 24). Over Appellant's objection, the Trial Court allowed deposition testimony to be taken and made a part of the record. (R. p. 510 lines 1-10); (R. p. 511 line 12 – p. 512 line 25). At the deposition of Jim Gardner, Appellant's attorney renewed the objection, (R. p. 523 deposition page 8 lines 6-8).

Rule 40(i)(2), SCRCP

(i) Continuance.

(2) For Absence of Witness. No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action or defense of the party moving; that the motion is not intended for delay; but is made solely because the party cannot go safely to trial without such testimony; that there has been due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that the motion is not intended for delay. ... A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matters what fact or facts he believes the witness if present would testify to, and the grounds for such belief.”

The Trial Court improperly allowed Intervenor, Merry Land to delay the case, mid-trial, not prior to trial as the Rule anticipates, to locate a cumulative surveyor witness, not because the witness couldn't be present at Trial, but because Intervenor Merry Land's counsel realized that they had not provided enough testimony before the Trial Court, to be persuasive.

Rule 40(i)(2), SCRCP is very clear in its language that no *pretrial* motion for continuance of trial shall be granted on account of the absence of a witness without the oath contemplated in the Rule.

Additionally, Rule 40 contemplates *pretrial* motions for a continuance “...made solely because the party cannot go safely to trial without such testimony...” Obviously, from the record the Motion for Continuance was made too late, i.e., mid-trial, and none of the requirements of Rule 40(i)(2), SCRCP were met. It was only after Intervenor, Merry Land was concerned that it had not produced enough evidence or could get adequate evidence into the record that it made the Motion for a Continuance to add the testimony of the surveyor witness. By granting it the Trial Judge abused his discretion and the testimony of this witness should be excluded. Sundown v. Intedge Industries, 383 S.C. 601 681 S.E.2d 885, 888 (S.C. 2009), (Internal Citations Omitted).

V. THE TRIAL COURT ERRED IN REFUSING TO HEAR POST-TRIAL MOTIONS IN A TIMELY MANNER.

The Trial Court’s Order **misapprehended or overlooked** Plaintiff’s right to make Post-Trial Motions. After allowing the Intervenor Merry Land to add a witness at the close of Trial and directing the filing of Post-Trial Briefs the Court did not reconvene the parties as this Court ordered at the end of the Trial in November.¹⁰

Additionally, the Trial Court agreed in electronic mail to Plaintiff’s assistant dated March 1, 2016, that “...I agree that so much time has passed that at least a follow-up conference call if not a supplemental hearing should be held for summation.” (R. p. 727).

¹⁰ “JUDGE DUKES: All right. So what I’m going to do is hold the record open for 45 days to permit the Defendant to depose a yet to be named surveyor with regard to fact matters only, not as an expert. And 15 days after that I would like post-trial briefs from everyone. And then I would like when you submit those post-trial briefs please coordinate with Heather and let’s set a conference call. Heather my assistant. And let’s set a conference call roughly two weeks, 15 days, three weeks from the date of submission of the post-trial briefs so we can talk about the post-trial briefs and where we go from then. And we will try to see what we can do.” (R. p. 513 lines 11-24).

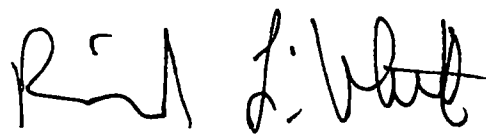
Factually, Plaintiff's counsel specifically asked the Court to allow Post-Trial Motions, by electronic mail to the Court, dated **March 1, 2016** at 1:57 p.m., and **March 28, 2016**, at 3:35 p.m., both of which are incorporated herein, by reference, (R. p. 721); (R. p. 728).

CONCLUSION

The Trial Court's decision, that takes title from Appellant/Landowner Hoyler and returns it to the State of South Carolina, runs directly contrary to "...the salutary principle that the law abhors forfeitures and will seize on slight evidence to prevent one..."¹¹. The Trial Court did everything in its power to create a forfeiture from the Crofut deed back to the State and this Court should rule as a matter of law that the Trial Court committed error and this Court should reverse and remand to the Trial Court with appropriate instructions.

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¹¹ Wimberly v. Sovereign Camp W.O.W., 190 SC 158, 2 SE2d 532, 537 (1939).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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

RECEIVED

APR 26 2017
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 Anne Glick,
Shirley G. Lackey, Patricia Banfield, Bertrand Cooper, Jr.,
NHP SH South Carolina I, LLC n/k/a CCP Bayview 7176 LLC,
Oyster Cove Homeowners Assn., Shirley Ann Moyer,
Barry D. Malphrus, Garry D. Malphrus, Donnie Malphrus,
Rita Brown, Houston Family Partnership, Joan Taylor Trustee,
Michael Bull, Nancy Bull, Marny H. VonHarten, Dianne M. Donaldson,
Brian R. Evans, Stephen Durbin, Valerie Durbin, Phillip Marti,
Jane Marti, Michael Woodworth, Georgiana M. Cooke, Daniel B. Walsh,
Janet E. Walsh.....Respondents.

**RULE 211, SCACR CERTIFICATION,
FINAL BRIEF OF APPELLANT**

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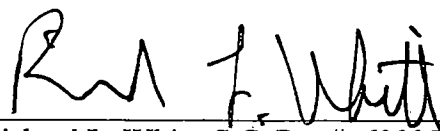
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I, Richard L. Whitt hereby certify that the Final Brief of Appellant, H. Marshall
Hoyler, complies with the requirements set forth in Rule 211 of the South Carolina
Appellate Court Rules.

AUSTIN & ROGERS, P.A.

By:


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April 26, 2017
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The 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.

Appellate Case No. 2016-001277

Appeal From Beaufort County
Marvin H. Dukes, III, Master-in-Equity

Opinion No. 5676
Heard March 4, 2019 – Filed August 7, 2019

AFFIRMED

Jefferson D. Griffith, III, and Richard Lee Whitt, both of Austin & Rogers, P.A., of Columbia, for Appellant.

Mary Duncan Shahid and Angelica M. Colwell, both of Nexsen Pruet, LLC, and Stephen Peterson Groves, Sr., of Butler Snow, LLP, all of Charleston, for Respondent Merry Land Properties, LLC.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, and Deputy Solicitor General J. Emory Smith, Jr., all of Columbia, for Respondent The State of South Carolina.

GEATHERS, J.: Appellant H. Marshall Hoyler challenges an order of the Master-in-Equity denying his request pursuant to S.C. Code Ann. § 48-39-220 (2008) to declare that Hoyler holds title to 95.27 acres of tidelands along the Beaufort River and abutting the Town of Port Royal.¹ Hoyler argues that this property is readily identifiable from the plat incorporated into the deed to his predecessor in title and, therefore, the master improperly considered extrinsic evidence. Hoyler also argues the master erred by (1) allowing adjacent property owners to intervene in the action; (2) concluding the adjacent property owners had

¹ Section 48-39-220(A) provides,

Any person claiming an interest in tidelands[,] which, for the purpose of this section, means all lands except beaches in the Coastal zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters, may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State.

(emphases added). The statute was amended in 2014, after Hoyler filed this action in November 2007, to reflect a change in the entity to receive service of process.

standing; (3) keeping the record open to allow Respondent Merry Land Properties, LLC (Merry Land) to submit additional testimony; and (4) declining to hear post-trial motions in a timely manner. We affirm.²

FACTS/PROCEDURAL HISTORY

In 2006, Merry Land purchased two tracts of land in the Town of Port Royal for the purpose of constructing a mixed-use development, including condominiums, with deep water access to the Beaufort River. One of the tracts consists of eight acres with access to the Beaufort River via tidelands within which Hoyler claims ownership of 95.27 acres (the disputed marsh).³ Merry Land paid

² We decline to address Merry Land's additional sustaining ground. See *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds.").

³ The statute authorizing this action, section 48-39-220, is a part of the Coastal Zone Management Act, Title 48, Chapter 39 of the South Carolina Code (2008 & Supp. 2018). We interpret the provisions of the Act to mean that "marshes" are a subset of "tidelands," which are generally defined in the Act at S.C. Code Ann. § 48-39-10(G) (Supp. 2018) but are also given a distinct definition for purposes of section 48-39-220. The general definition of tidelands in § 48-39-10(G) is, in pertinent part:

all areas which are at or below mean high tide and *coastal wetlands*, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved. *Coastal wetlands include marshes*, mudflats, and shallows *and means those areas periodically inundated by saline waters* whether or not the saline waters reach the area naturally or through artificial water courses and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction. Provided, however, nothing in this definition shall apply to wetland areas that are not an integral part of an estuarine system.

(emphases added). The distinct definition of tidelands for purposes of section 48-39-220 is: "all lands except beaches in the Coastal zone between the mean

\$4.5 million for this tract. The other tract, for which Merry Land paid \$1.5 million, consists of 10 acres and borders Johnny Morrall Circle and Ribaut Road. Prior to closing on the purchase of these tracts, Merry Land obtained state and federal permits authorizing construction of a community marina.

After Merry Land closed on the purchase of these tracts, it refinanced the loan secured by the property. During the refinancing process, the appraiser employed by Merry Land's lender discovered a notation in the Beaufort County GIS System indicating a tax parcel in the marsh where Merry Land planned to launch the marina.⁴ As a result, Merry Land sent a letter to Hoyler, a Rhode Island resident, offering to purchase this property. Rather than accepting the offer, Hoyler filed this action on November 8, 2007, against Respondent State of South Carolina to obtain a declaration that he owned the disputed marsh.

In his complaint, Hoyler asserted the existence of an 1891 deed to his predecessor in title, J.M. Crofut, from former Governor Benjamin R. Tillman for 95.27 acres of marshland located on the Beaufort River. The complaint also asserted that the deed was accompanied by a plat depicting a tract "bounded on the South by lands of Moss, on the West by miscellaneous individuals, on the North by Seal Island Chemical Works[,] and on the East by the Beaufort River." An heir of Crofut, Elizabeth Waterhouse, devised a share of her putative interest in the property to Hoyler in 1968, and in 1979, the remaining heirs conveyed their respective putative interests to Hoyler for \$10.

In its answer to the complaint, the State asserted that it held *prima facie* title to the disputed marsh in trust for the public and Hoyler lacked the power to exclude the public from the marsh. Merry Land filed a motion to intervene in this action as well as an "Answer and Counterclaim" asserting that Hoyler was barred from preventing construction of the planned marina by the doctrines of estoppel and laches. On February 22, 2008, the master, with the consent of counsel for all parties, executed an order granting Merry Land's motion to intervene.⁵

The master conducted a hearing on January 31, 2011, in which he denied Hoyler's subsequent and contrarian motion to dismiss Merry Land from this action

high-water mark and the mean low-water mark of navigable waters *without regard to the degree of salinity of such waters.*" (emphasis added).

⁴ Beaufort County assigned a market value of \$1,000 to this parcel.

⁵ Curiously, the order referring this action to the master was not executed until September 13, 2010.

and ruled, *sua sponte*, that several additional owners of property adjacent to the disputed marsh would be joined as defendants.⁶ In his written order, the master concluded the adjacent property owners were being joined pursuant to Rule 20(a), SCRCF,⁷ because they could lose their right of access to the Beaufort River upon a declaration that Hoyler held title to the disputed marsh. Hoyler filed a motion for reconsideration and a Notice of Appeal. The motion for reconsideration remained unresolved until after this court dismissed the appeal as interlocutory and our supreme court denied certiorari. On remand, the master denied Hoyler's motion for reconsideration and granted a motion to intervene filed by Nancy Deering Carey. Hoyler appealed these rulings, and this court also dismissed the appeal as interlocutory.

Subsequently, Hoyler served all of the adjoining property owners with notice of this action, and the master conducted a hearing on November 19, 2015. The master allowed the record to stay open for 45 days after the hearing to allow Merry Land to obtain the deposition testimony of a surveyor who had worked with Merry Land's civil engineering expert. After the master reviewed this deposition testimony, he sent an e-mail to counsel for the parties requesting a proposed order from counsel for Respondents. In response, Hoyler filed a motion challenging the findings in the master's e-mail pursuant to Rule 59(e), SCRCF. The master denied this motion in a Form 4 order.

⁶ The disputed marsh is contiguous to the Spanish Point subdivision in Port Royal.

⁷ Rule 20(a) states, in pertinent part,

All persons *may* be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(emphasis added).

On May 27, 2016, the master issued a written order concluding that the conveyance to Crofut was a valid exercise of the State's authority under the law as it existed at the time of the conveyance but the property could not be accurately located and, therefore, Hoyler was not entitled to a declaration that he held title to the disputed marsh. On June 19, 2016, Hoyler filed a second Rule 59(e) motion in response to the written order, and the master denied this motion. This appeal followed.

ISSUES ON APPEAL

1. Did the master err by concluding Hoyler was not entitled to a declaration that he held title to 95.27 acres of marshland as against the State?
2. Did the master err by allowing adjacent property owners to intervene in this action?
3. Did the master err by concluding the adjacent property owners had standing?
4. Did the master abuse his discretion by keeping the record open to allow Merry Land to submit additional testimony?
5. Did the master err by declining to hear post-trial motions in a timely manner?

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006) (quoting *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). "To make this determination [the appellate court] look[s] to the main purpose of the action as determined by the complaint." *Id.* (quoting *Estate of Revis v. Revis*, 326 S.C. 470, 476, 484 S.E.2d 112, 115 (Ct. App. 1997)). When the complaint's main purpose "concerns the determination of title to real property, it is an action at law." *Id.*

"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.'" *Id.* (quoting *Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 101–02, 552 S.E.2d 778, 781 (Ct. App. 2001)). Further, "[the appellate c]ourt reviews all questions of law de novo." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App.

2009); *see also* *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) ("Questions of law may be decided with no particular deference to the trial court." (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008))).

LAW/ANALYSIS

I. Determination of Title

Hoyler argues that the 95.27 acres is readily identifiable from the plat incorporated into the deed to Crofut and, therefore, the master improperly considered extrinsic evidence. On the other hand, Merry Land contends the intent underlying the deed's incorporation of the plat was to show the boundaries, metes, courses, and distances of the property conveyed but the plat's information was insufficient to identify those features.⁸ Likewise, the State maintains the plat provided insufficient guidance. We agree with Merry Land and the State.

We begin our analysis with the foundation on which the determination of property rights in tidelands rests, South Carolina's public trust doctrine. The public trust doctrine provides that lands below the high water mark are presumptively owned by the State and held in trust for the benefit of the public, and it has been a vital part of the jurisprudence of South Carolina and many other states for centuries, even pre-dating the beginning of our republic.⁹ The doctrine rightfully

⁸ *See Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009) ("In construing a deed, 'the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy.'" (quoting *Wayburn v. Smith*, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977))); *id.* at 201, 672 S.E.2d at 583 ("In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." (quoting *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391–92 (1987))).

⁹ *See McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149–50, 580 S.E.2d 116, 119–20 (2003); *Grant*, 395 S.C. at 230–31, 717 S.E.2d at 99–100; *Query*, 371 S.C. at 410–11, 639 S.E.2d at 456; *see also* *State v. Pac. Guano Co.*, 22 S.C. 50, 55–56 (1884); *Commonwealth v. City of Roxbury*, 75 Mass. 451, 478–79 (1857); Melissa K. Scanlan, *Shifting Sands: A Meta-Theory for Public Access and Private Property Along the Coast*, 65 S.C. L. Rev. 295, 307–13 (2013); William A. Clineburg and John E. Krahmer, *The Law Pertaining to Estuarine Lands in South Carolina*, 23 S.C. L. Rev. 7, 10–24 (1971).

forbids the State from permitting activity substantially impairing the public interest in marine life, water quality, or public access.¹⁰

The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, water (including waterborne activities such as navigation and fishing), and land (including but not limited to seabed and riverbed soils). Under this Doctrine, everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks.

Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 127–28, 456 S.E.2d 397, 402 (1995) (quoting Greg L. Spyridon and Sam A. LeBlanc, III, *The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action*, 6 Tul. Envtl. L.J. 287, 291 (1993)). In more recent years, our supreme court captured the essence of the doctrine as it applies to tidelands: "Our State's tidelands are a precious public resource held in trust for the people of South Carolina."¹¹

It is through this lens that we examine the claim of a private individual to an ownership interest in tidelands, an interest that would allow him to exclude the public. Because the law, as a zealous guardian of the public interest, bestows presumptive ownership of tidelands on the State for the benefit of the public, any deed from the State purporting to convey tidelands to a private individual must be strictly construed against the grantee and in favor of the public.¹² In *State v. Pacific Guano Company*, our supreme court explained,

¹⁰ *McQueen*, 354 S.C. at 149–50, 580 S.E.2d at 119–20.

¹¹ *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 22, 766 S.E.2d 707, 710 (2014).

¹² *Query*, 371 S.C. at 411, 639 S.E.2d at 456–57; accord *Estate of Tenney v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 100, 106, 712 S.E.2d 395, 398 (2011) ("In areas subject to the public trust doctrine, presumption of State ownership 'may be overcome only by showing a specific grant from the sovereign[,] which is strictly construed against the grantee.'" (quoting *McQueen*, 354 S.C. at 149 n.6,

In all grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor, reversing the rule as between individuals, on the ground that the grant is supposed to be made at the solicitation of the grantee, and the form and terms of the particular instrument of grant proposed by him and submitted to the government for its allowance. But this rule applies *a fortiori* to a case where such grant by a government to individual proprietors is claimed to be not merely a conveyance of title to land[] but also a portion of that public domain [that] the government held in a fiduciary relation[] for general and public use.

22 S.C. 50, 86 (1884).

For this reason, "the party asserting a transfer of title bears the burden of proving its own good title,"¹³ and one claiming an interest in tidelands pursuant to section 48-39-220(A) must convince the court that the State intended to include the tidelands within the boundaries expressed in the deed.¹⁴ Necessarily, 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.¹⁵

580 S.E.2d at 119 n.6)); *Grant v. State*, 395 S.C. 225, 229, 717 S.E.2d 96, 98 (Ct. App. 2011).

¹³ *Lowcountry*, 347 S.C. at 103, 552 S.E.2d at 782; see also *State v. Fain*, 273 S.C. 748, 752, 259 S.E.2d 606, 608 (1979) ("[I]t is well settled that the State comes into court with a presumption of title, and, if an individual is to prevail, *he must recover upon the strength of his own title, of which he must make proof.*" (emphasis added)).

¹⁴ See *Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 398, 252 S.E.2d 133, 136-37 (1979); *Query*, 371 S.C. at 411, 639 S.E.2d at 456 ("To establish ownership of tidelands or marshlands, a claimant must show (1) the claimant's predecessors in title possessed a valid grant, and (2) the grant's language was sufficient to convey title to land below the high water mark.").

¹⁵ See *Hobonny Club*, 272 S.C. at 398, 252 S.E.2d at 136-37; *Grant*, 395 S.C. at 235-36, 717 S.E.2d at 102 (contrasting the plat to the disputed property with the precise plats in *Hobonny Club* and highlighting expert testimony stating that the

In *Query v. Burgess*, this court affirmed the master's finding that the plat accompanying a 1786 deed to the disputed property near the Folly River was "not sufficiently detailed to rebut the State's presumption of title to land below the high water mark." 371 S.C. at 412, 639 S.E.2d at 457. The court noted that the plat "contain[ed] the bare bones of a survey and [was] neither precise nor detailed." *Id.* The court also concluded that the master "reasonably determined the 1786 grant and accompanying plat did not demonstrate the State's intent to grant title to the marshlands" based on "the absence of terms consonant with granting property below the high water mark, such as 'marsh,' 'marshland,' 'high-water mark,' or 'low-water mark.'" *Id.*

In contrast, in *Hobonny Club, Inc. v. McEachern*, our supreme court upheld the circuit court's conclusion that the plaintiff had valid title to certain tidelands "embraced within the boundaries of the plats attached to the royal grants" 272 S.C. at 398, 252 S.E.2d at 137. The court observed, "the failure of the grantor to use 'low water line' in describing the property conveyed was not significant in that the attached plats precisely showed the boundaries of the land granted without the necessity of resorting to words." *Id.* at 398, 252 S.E.2d at 136. The court added,

[T]he plats in question speak with a precision not usually attainable by mere words, and they compel the conclusion that the grantor intended to include the tidelands encompassed within the perimeters of the plats. *It is difficult to imagine how more precisely to express intent as to the location of boundaries than to incorporate an accurate plat in the description.* The plats incorporated in the two grants to [the plaintiff's predecessor in title] are exceptional. They are not mere maps on which boundary waterways are drawn in free-hand to represent directions and conformations of boundaries. These plats are carefully scaled and platted so as to delineate the boundaries of the tracts granted with mathematical precision. It is undisputed that the boundaries are *accurately relocatable on the ground by contemporary engineering methods.* *The specificity of the attached plats outweigh, in our judgment, the general*

plat was "poorly drawn and not capable of being relocated on the ground"); *Query*, 371 S.C. at 411–12, 639 S.E.2d at 456–57.

terms of the descriptions in the grants in determining the intent of the grantor. We conclude that it was the clear intent of the grants in question to convey title to all tidelands lying *within the perimeter lines of the plats* accompanying the grants to [the plaintiff's] predecessor in title[].

Id. at 398, 252 S.E.2d at 136–37 (emphases added); *see also Brownlee v. Miller*, 208 S.C. 252, 261, 37 S.E.2d 658, 662 (1946) (affirming the trial court's order dismissing a petition to set aside a judicial sale and adopting the language of the order, which relied, in part, on the sufficiency of the property description "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"); *id.* at 260, 37 S.E.2d at 661 ("[B]oundaries govern acreage and inaccuracies relating to the area of a tract are generally immaterial.").

In *Grant v. State*, this court once again addressed the plat examined in *Query* and specifically noted that "in contrast to the plats in *Hobonny Club*, Grant's expert land surveyor . . . testified the 1786 plat is poorly drawn and *not capable of being relocated on the ground.*" 395 S.C. at 236, 717 S.E.2d at 102 (emphasis added). The court concluded that the claimant failed to rebut the State's presumptive title, implicitly acknowledging the claimant's obligation to show the language of the conveyance is specific enough to determine a reasonably precise location of its boundaries. *Id.* at 236, 717 S.E.2d at 102.

While a property description need not be perfect, it must allow one examining it to identify the property conveyed; otherwise, the conveyance is void. *See Blake v. Doherty*, 18 U.S. 359, 362 (1820) ("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)).

"A deed is not void for uncertainty, because there may be errors or an inconsistency, in some of the particulars. . . . Generally the rule may be stated to be, that the deed will be sustained, *if it is possible from the whole description, to ascertain and identify the land intended to be conveyed.*" In a note to that section it is said: "As that is certain which can be made certain, the description, if it will enable a person of ordinary

prudence acting in good faith and making inquiries, which the description would suggest to him to identify the land, is sufficient."

Brownlee, 208 S.C. at 261, 37 S.E.2d at 662 (emphases added) (alteration in original) (quoting *McNair v. Johnson*, 95 S.C. 176, 179, 178 S.E. 892 (1913)); see also *Lord v. Holland*, 655 S.E.2d 602, 603–04 (Ga. 2008) ("One essential of a deed is that the description of the premises sought to be thereby conveyed must be sufficiently full and definite to afford means of identification." (quoting *Crawford v. Verner*, 50 S.E. 958, 959 (Ga. 1905)); *Katz v. Daughtrey*, 151 S.E. 879, 880 (N.C. 1930) ("If the land intended to be conveyed cannot be identified from the description contained in the deed, it follows as a necessary corollary that as the deed is, for this reason, inoperative, it is equally inoperative as color of title.")).

In identifying the land intended to be conveyed, it is permissible to rely on extrinsic evidence if it is necessary to clarify a property description. See *Blake*, 18 U.S. at 362 ("[I]t is not necessary that the grant itself should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed." (emphasis added)); *Lord*, 655 S.E.2d at 604 ("While it is not necessary that the instrument should embody a minute or perfectly accurate description of the land, yet it must furnish the key to the identification of the land intended to be conveyed by the grantor." (quoting *Crawford*, 50 S.E. at 959)). However, if it is impossible to locate a key identifier referenced in the deed, the grant is void. *Blake*, 18 U.S. at 362–63. In *Blake*, the plaintiff, who claimed title to certain land through a grant from the State of Tennessee, filed an ejectment action against the defendants, who claimed the land under a patent from the State of North Carolina. *Id.* at 360. The property description in the North Carolina patent designated a hickory tree as the beginning of a survey. *Id.* Using the hickory to illustrate the degree of certainty required in a property description, the Court explained,

Almost all grants of land call for natural objects which must be proved by testimony consistent with the grant, but not found in it. Cane Creek, and its wes[t] fork, are to be proved by witnesses. So the hiccory which is to constitute the beginning of a survey of a tract of land to lie on the west fork of Cane Creek. *If, in the nature of things, it be impossible to find this hiccory, all will admit the grant must be void.* But if it is not impossible, if we can imagine testimony which will show any particular hiccory to be that which is called for in the grant, then it

is not absolutely void for uncertainty, whatever difficulty may attend the location of it.

Id. at 362–63 (emphasis added).

Here, the Governor's deed to Hoyler's predecessor in title, J.M. Crofut, employed the terms high water mark and low water mark, but it also incorporated the 1891 plat in conveying "A Plantation or Tract of Vacant Land, situate in Beaufort [illegible] of Beaufort County and State aforesaid containing ninety-five [and] 27/100 (95 27/100) acres, more or less, [b]eing a parcel or tract of land on the Beaufort River in County and State aforesaid and lying between high and low water mark[s] on [the] river above mentioned[,] *having such shape, form[,] and marks as are represented by a Plat of said land on file in the office of the Secretary of State in Book 2 of Public Land Plats, Page 16.*" (emphasis added).¹⁶ See *Hobonny Club*, 272 S.C. at 397, 252 S.E.2d at 136 ("Where 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."). The incorporated plat designates specific bearings and distances, some of which are illegible, for the boundary lines.

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 v. Schulthess*, 384 S.C. 250, 272, 681 S.E.2d 897, 908 (Ct. App. 2009) ("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 *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001) (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)); *Williams v. Gov't Employees Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014) ("If the court decides [a contract's] language is ambiguous, . . . evidence may be admitted to show the intent of the parties, and the determination of the parties' intent becomes a question of fact for the fact-finder.").

¹⁶ The State reserved mineral and phosphate rights to itself.

This extrinsic evidence consisted of expert testimony presented at the final merits hearing. First, Hoyler presented the testimony of his expert in land surveying, Lorick Fanning, who provided his opinion regarding identification of the area referenced in the deed to Crofut. Fanning recreated the boundaries of the parcel, relying on field work as well as an 1882 plat that purportedly encompassed the parcel conveyed to Crofut. He established the eastern and western boundaries of the parcel by using the current location of the mean high water and mean low water marks.

Merry Land's land surveying expert, Donald Cook, testified that he examined the 1882 plat and the 1891 plat and noticed the absence of a "scale" and a "point of beginning" or "point of commencement." *Cf. Lord*, 655 S.E.2d at 604 ("The description set forth in plaintiff's deed did not include a beginning point or other specifications enabling one to definitively locate the property to be conveyed. It follows that plaintiff's deed was invalid" (citations omitted)); *Katz*, 151 S.E. at 880 (holding that a deed purporting to convey twenty-five acres of a fifty-acre tract "without fixing the beginning point or any of the boundaries of the twenty-five acres" was void for vagueness and uncertainty of description because it failed to describe with certainty the property sought to be conveyed, and it contained no reference to "anything extrinsic, which by recourse thereto [wa]s capable of making the description certain"). Cook explained, "without a point of beginning[,] you have . . . no point to start to locate the parcel on the ground. Without a scale[,] you can't . . . tell . . . what measurement of units they were using. So, therefore, scaling it, you don't know really how big the parcel is or potentially how big it is." *See Brownlee*, 208 S.C. at 260, 37 S.E.2d at 661 ("[B]oundaries govern acreage and inaccuracies relating to the area of a tract are generally immaterial."); *cf. Hobonny Club*, 272 S.C. at 394, 252 S.E.2d at 134 (noting the plat annexed to the deed was drawn to a scale of one inch to twenty chains); *State v. Holston Land Co.*, 272 S.C. 65, 67, 248 S.E.2d 922, 924 (1978) (same).

Merry Land also presented the deposition testimony of a second surveyor, Jim Gardner. Gardner analyzed the 1882 and 1891 plats with the assistance of a computer assisted drafting (CAD) technician in entering the plats' bearings and distances into the CAD program. He concluded the bearings and distances that they *could* discern had shortcomings creating a degree of uncertainty exceeding the allowed tolerance for error, and there were certain bearings and distances that were illegible. In particular, Gardner explained one of the standards for professional surveyors that requires "mathematical closure of surveys," i.e., making the boundary lines "come back together," and described the tolerance for error in the following manner: "anything less than a 1-to-10,000 closure should be dismissed."

Gardner also explained, "if you have a break in the survey, it's not going to close mathematically to any effect, which means . . . it's kind of floating out there." He continued,

the plat not closing, not coming back together, in other words, if you started at a point, you're supposed to come around and end at the starting point. This survey, if it didn't do that, then everything could be shifted one way or the other. And you wouldn't know where these corners were, truly, without . . . other surveys specifying adjoining corners or adjacent boundaries.

Cook's testimony concerning the failure to close was consistent with Gardner's testimony: "It means that the points are just kind of hanging out there in space." As to the intent of the surveyor who created the 1882 and 1891 plats, Gardner stated that the absence of the terms "mean high water" or "mean low water" indicated that the surveyor's intent was to designate the acreage by bearings and distances on the plat.

In reaching his determination that the property could not be accurately located, the master concluded that Hoyler's "efforts to recreate the 1882 plat and the conveyance to Crofut [were] unreliable." Whereas Hoyler relied on natural monuments "utilizing mean high and mean low water to reflect high and low water as stated in the [deed]," the plats did not "rely on natural monuments and instead articulate[d] specific directions in express bearings and distances." The master found that the deed's "express reference to the 1891 plat" and the plat's specificity overrode the use of mean high water and mean low water to fix the location of Hoyler's property.

The master also concluded, "Since the plat references a surveyed boundary, replication of the plat should, in the first instance, be based on the surveyed boundary instead of a natural boundary." The master noted that Fanning erred in replicating the 1891 plat "by relying on 'Mean High Water' and 'Mean Low Water' when the [deed] only refer[red] to 'high' and 'low' water" and did not identify high and low water as the parcel's boundaries. We agree with the master's assessment of Fanning'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." See *Fletcher v.*

Med. Univ. of S.C., 390 S.C. 458, 463, 702 S.E.2d 372, 374 (Ct. App. 2010) ("The probative value of expert testimony stands or falls upon an evidentiary showing of the facts upon which the opinion is, or must logically be, predicated." (quoting *Ward v. Epting*, 290 S.C. 547, 563, 351 S.E.2d 867, 876 (Ct. App. 1986))); *see also Blake*, 18 U.S. at 364, 367 (reversing a judgment for the defendants on the ground that the trial court improperly instructed the jurors they could use a private survey "made by direction of a party interested under the grant" for the purpose of "ascertaining the land contained in the grant under which the defendants claimed").

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." (alteration in original) (quoting *State v. Hardee*, 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972))); *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)).

II. Intervention and Joinder

Hoyler also argues the master erred by allowing Merry Land and the other adjacent property owners to "intervene in the action" because they did not claim an interest in tidelands, their boundary lines would not change as a result of the action, and therefore, they had no interest in the outcome. Hoyler maintains that section 48-39-220 allows the participation of only those parties "claiming a 'right, title[,] or interest' below the high-water mark." We disagree with this reasoning.

Rule 24, SCRPC, states, in pertinent part,

(a) Intervention of Right. Upon timely application anyone *shall* be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction [that] is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone *may* be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion[,] the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(emphases added).

Here, the master executed a consent order allowing Merry Land to intervene in this action. The consent order does not reference Rule 24, and the motion to intervene, which was served with Merry Land's answer and counterclaim, is not in the record. The order states, in pertinent part, "this [c]ourt was advised that

[Hoyler] . . . [does] not object to intervention but reserve[s] any claims and defenses that [he] may have as to [Merry Land]." Subsequently, Hoyler sought to dismiss Merry Land from the action on the ground that it did not have standing. The master denied this motion.

As to the other adjacent property owners, the master, *sua sponte*, invoked Rule 20(a) to join them as defendants because they could lose their right of access to the Beaufort River upon a declaration that Hoyler held title to the disputed marsh. As we previously stated, Rule 20(a), entitled "Permissive Joinder," provides, in pertinent part,

All persons *may* be joined in one action as defendants *if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.* A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(emphases added).

Here, Hoyler's complaint references the dock construction permit obtained by one of the adjacent property owners. The complaint seeks not only a declaration that Hoyler owns the disputed marsh but also a declaration that he "possesses all rights of a fee simple property owner[,] *including the right to exclude dock construction.*" (emphasis added). This language asserts a right to relief arising out of the then-existing and possible future dock construction by adjacent property owners. Further, the legal question of ownership of the disputed marsh was a question that was common to all of the defendants. Hoyler's complaint called into question not only the State's competing claim of ownership but also the rights of adjacent property owners to use the marsh to access the Beaufort River and their eligibility to build docks originating from their respective lots and extending into the disputed marsh.¹⁷ If the master had granted Hoyler's

¹⁷ Included in the master's list of thirty-two adjacent property owners is one owner who was ineligible to build a dock due to insufficient frontage. Eight neighboring

request for a declaration that he had the right to exclude dock construction, the rights of the joined parties to access the river or to build in the disputed marsh would have been extinguished. Therefore, the master properly joined the adjacent property owners as defendants in this action.

Turning back to Merry Land's participation in this action, the master was authorized to allow intervention under Rule 24(b),¹⁸ which states,

anyone *may* be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when *an applicant's claim or defense and the main action have a question of law or fact in common*. . . . In exercising its discretion[,] the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(emphases added). This standard is similar to the standard for permissive joinder under Rule 20(a), and Merry Land is similarly situated to the other adjacent property owners. Merry Land has already obtained a permit to build a community marina in the disputed marsh. Because the permit depends on the State's ownership of the disputed marsh, a declaration favoring Hoyler's ownership would extinguish Merry Land's right to build the marina or otherwise access the Beaufort River. As a result, Merry Land asserted that the doctrines of estoppel and laches barred Hoyler from excluding marina construction in the marsh. Therefore, the legal question of ownership of the disputed marsh was common to both Hoyler's action and Merry Land's assertions.

Further, Merry Land's intervention has not caused any undue delay or unfairly prejudiced the master's determination of the merits of Hoyler's claim to ownership. Hoyler himself unnecessarily delayed the case by seeking review of two unappealable interlocutory orders. Moreover, the master's decision to hold the

owners were listed as eligible for a community dock, and the remaining adjacent owners had sufficient frontage for singular docks.

¹⁸ Hoyler argues none of the adjacent property owners could intervene under Rule 24(a), which governs mandatory intervention. However, there is nothing in the record indicating the master or Merry Land invoked Rule 24(a) in support of intervention. Because the master was authorized to allow permissive intervention under Rule 24(b), we need not consider Hoyler's arguments concerning Rule 24(a).

record open for 45 days to allow Merry Land to obtain deposition testimony caused only minimal delay. Additionally, the inadequacy of the information in the deed and plat provided to Hoyler's predecessor in title would have defeated Hoyler's ownership claim even if Merry Land had not intervened in the action.

Based on the foregoing, the master properly denied Hoyler's motion to dismiss Merry Land from the action.

III. Standing

Hoyler further argues the master erred by allowing the joined parties to continue to participate in the trial because they lacked standing. We disagree.

"Standing refers to [] '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008) (second alteration in original) (quoting Black's Law Dictionary 1413 (7th ed. 1999)). "Standing is . . . that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." *Id.* (quoting 1A C.J.S. *Actions* § 101 (2005)). "It concerns an individual's 'sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court.'" *Id.* (alteration in original) (quoting 1A C.J.S. *Actions* § 101 (2005)).

Standing consists of the following elements:

First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (alterations in original) (quoting *Lujan v. Defs. of*

Wildlife, 504 U.S. 555, 560–61 (1992); accord *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014).

Here, Merry Land's asserted injury-in-fact is its inability to move forward with its development plans despite its considerable investment of time and money to (1) ensure the property it ultimately purchased could support a mixed-use development and marina; (2) obtain government approvals for construction of the development; and (3) obtain federal and state permits for marina construction. In fact, Merry Land delayed closing its purchase of the property until it obtained the permits authorizing marina construction due to its cognizance of the value the real estate market places on deep water access. This injury is clearly "concrete and particularized" and "actual," rather than "conjectural" or "hypothetical." *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (setting forth the first element of standing).

With title to the disputed marsh brought into doubt by Hoyler's filing of this action, Merry Land's development project has remained in limbo, preventing Merry Land from realizing any return on its investment. *See id.* (describing the second element of standing as a "causal connection between the injury and the conduct complained of"). A decision favoring Hoyler would effectively void the marina permit and result in Merry Land's loss of access over the disputed marsh to the river. The State would no longer have the authority to manage these tidelands for public use or to permit adjacent property owners to build docks in these tidelands. Further, there is no realistic expectation that Hoyler would give Merry Land permission to build in the disputed tidelands given his request for a declaration that he can exclude dock construction. *See* S.C. Code Ann. Regs. 30-2(I)(4) (2011) (providing that if a decision in an action under section 48-39-220 determines that the plaintiff owns the disputed tidelands and has a right to exclude others, a critical area permit will not be issued unless "the applicant presents the Department with a copy of a deed, lease, or other instrument from the adjudicated critical area landowner that would allow construction of the proposed project[] or written permission from such owner to carry out the proposal").

On the other hand, a decision favoring the State redresses Merry Land's injury-in-fact by validating not only the State's title to the disputed marsh but also the federal and state permits allowing Merry Land to move forward with its development plans. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (setting forth the third element of standing: "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'").

Similarly, the other adjacent upland property owners were injured by Hoyler's action. Those who had not yet built docks were unable to begin that process without the risk of losing their financial investment upon having to remove them later. Further, those who had already built docks would have had to remove them upon a ruling favorable to Hoyler. Moreover, all of the adjacent owners would have lost access to the Beaufort River upon a ruling favorable to Hoyler. These injuries were clearly "concrete and particularized" and "actual or imminent," rather than "conjectural" or "hypothetical," and they resulted from Hoyler's filing of this action. *See id.* (setting forth the first element of standing and describing the second element of standing as a "causal connection between the injury and the conduct complained of"); *cf. Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 565, 505 S.E.2d 598, 605 (Ct. App. 1998), *overruled on other grounds by Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002) (holding the appellant's claim of an individual injury in the adverse effect of a certificate of consistency on her use and enjoyment of a wetland adjacent to her residence was sufficient to provide standing); *S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988) (holding several environmental groups' allegations of an individualized injury in the adverse effect of a Coastal Council decision on their members' use and enjoyment of wetlands' fish and wildlife were sufficient to show standing).

In other words, the State would no longer have the authority to manage the disputed marsh for public use or to permit adjacent property owners to build in the marsh, and Hoyler has explicitly indicated an intent to exclude dock construction upon a ruling in his favor. On the other hand, a decision favoring the State redresses the adjacent owners' injuries by validating the existing dock permits and the State's authority to grant future dock permits. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (setting forth the third element of standing: "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'").

Based on the foregoing, Merry Land and the other adjacent property owners had a "sufficient interest in the outcome of the litigation to warrant consideration of [their] position by a court." *Powell*, 379 S.C. at 444, 665 S.E.2d at 241 (quoting 1A C.J.S. *Actions* § 101 (2005)). Therefore, the master properly allowed these defendants to participate in this action.

IV. Additional Testimony

Hoyler maintains the master erred by granting Merry Land's request to keep the record open to allow it to submit the testimony of its surveyor. Hoyler argues the master effectively granted a continuance that was not authorized by Rule 40(i)(2), SCRCP. We disagree.

Rule 40(i), SCRCP, governs continuances and states,

(1) **For Cause.** As actions are called, counsel may request that *the action* be continued. If good and sufficient cause for continuance is shown, the continuance may be granted by the court. Ordinarily such continuances shall be only until the next term of court. Each scheduled calendar week of circuit court shall constitute a separate term of court.

(2) **For Absence of Witness.** No motion *for continuance of trial* shall be granted on account of the absence of a witness without the oath of the party, his counsel or agent, to the following effect, to wit: That the testimony of the witness is material to the support of the action or defense of the party moving; that the motion is not intended for delay; but is made solely because the party cannot go safely to trial without such testimony; that there has been due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that the motion is not intended for delay. . . . A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matters what fact or facts he believes the witness if present would testify to, and the grounds for such belief.

(emphases added).

However, once a trial begins, "[t]he conduct of trial, including the admission and rejection of testimony, is largely within the trial judge's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion or the commission of legal error that results in prejudice for the appellant." *S.C. Dep't of Highways & Pub. Transp. v. Galbreath*, 315 S.C. 82, 85, 431 S.E.2d 625, 628 (Ct. App. 1993). "An abuse of discretion occurs when the judge issuing the

order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Further, "[t]o warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice." *Conway v. Charleston Lincoln Mercury Inc.*, 363 S.C. 301, 307, 609 S.E.2d 838, 842 (Ct. App. 2005).

At the November 2015 hearing, Merry Land presented the testimony of Gregory Baisch, a civil engineer employed with Ward Edwards Engineering. Baisch testified that he asked the Ward Edwards survey staff to attempt to close the boundaries of the 1882 and 1891 plats. However, the master sustained Hoyler's objections to Baisch attempting to recount the surveyors' investigation and determinations. At the conclusion of Baisch's testimony, Merry Land moved to keep the record open after the hearing to allow it to locate the surveyor who worked with Baisch, Jim Gardner, and obtain his deposition testimony. The master granted the motion, allowing the record to stay open for 45 days and requiring subsequent post-trial briefs.

The master's ruling did not constitute a continuance as contemplated by the language of Rule 40. With the exception of Gardner's deposition testimony, the master conducted a full bench trial upon remand from Hoyler's unsuccessful, years-long, interlocutory appeals. Hoyler has not shown that he was unfairly prejudiced by the record staying open for a mere 45 days after trial. Hoyler participated in the deposition and had the opportunity to submit a post-trial brief after the deposition. Further, he does not allege in his appellate brief that the slight post-trial delay unfairly prejudiced him.

Based on the foregoing, the master acted within his discretion in allowing the record to remain open to allow Merry Land to submit Gardner's testimony. See *Galbreath*, 315 S.C. at 85, 431 S.E.2d at 628 ("The conduct of trial, including the admission and rejection of testimony, is largely within the trial judge's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion or the commission of legal error that results in prejudice for the appellant."); *Conway*, 363 S.C. at 307, 609 S.E.2d at 842 ("To warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice.").

V. Post-trial Motions

Hoyler's final argument is that the master erred by "refusing to hear post-trial motions in a timely manner." This issue is unpreserved because Hoyler's supporting discussion is conclusory and cites no authority. *See S.C. Dep't of Soc. Servs. v. Mother ex rel. Minor Child*, 375 S.C. 276, 283, 651 S.E.2d 622, 626 (Ct. App. 2007) (noting an issue was abandoned because the appellant made a conclusory argument without citation of any authority to support her claim).

In any event, the record does not support Hoyler's assertion that the master refused to hear any "post-trial motions." The master gave all parties the opportunity to submit post-trial briefs, and they took advantage of this opportunity. *See supra* section IV. Further, to the extent Hoyler is arguing that the master did not properly consider his Rule 59(e) motions, neither Hoyler's e-mail request to "make [his] post trial motions for the record" nor his request for "guidance as to Post-Trial Motions" communicated a request for a hearing on a motion for reconsideration, especially given the fact that the requests pre-dated the master's announcement of his decision. Therefore, we reject Hoyler's argument that the master refused to timely consider his post-trial motions.

CONCLUSION

Based on the foregoing, we affirm the master's order.

AFFIRMED.

WILLIAMS and HILL, JJ., concur.

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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

RECEIVED
AUG 22 2019
SC Court of Appeals

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.

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

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

RECEIVED
AUG 22 2019
SC Court of Appeals

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,

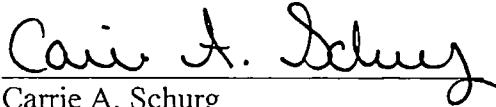
Of which The State of South Carolina and
Merry Land Properties, LLC are the..... Respondents.

AFFIDAVIT OF SERVICE

I, Carrie A. Schurg, an employee of Whitt Law Firm, LLC, certify that I have served
copies of the Appellant's 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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Carrie A. Schurg

August 22, 2019



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

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August 23, 2019

Mr. Richard Lee Whitt, Esquire
PO Box 11716
Columbia SC 29211

Re: H. Marshall Hoyler v. State of South Carolina
Appellate Case No. 2016-001277

Dear Counsel:

This will acknowledge receipt of your petition for rehearing.

By copy of this letter, opposing counsel is requested to file a return to this motion no later than ten (10) days from the date of this letter.

Very truly yours,

A handwritten signature in cursive script, appearing to read "J.A. Kitchings".

CLERK

cc: J. Emory Smith, Jr., Esquire
Mary Duncan Shahid, Esquire
Jeff D. Griffith, III, Esquire
Stephen Peterson Groves, Sr., Esquire
Angelica M. Colwell, Esquire
Robert D. Cook, Esquire
Alan McCrory Wilson, Esquire

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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H. Marshall Hoyler. Appellant,

v. .

The State of South Carolina, Merry Land Properties, LLC,
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Edward McCray Wise Revoc. Living Trust, Carol Ann Devries Wise Revoc. Living
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Helen M. Olesak, Lesley Anne Glick a/k/a Lesley Ann Glick, Shirley G.
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Ann Moyer, Barry D. Malphrus, Garry D. Malphrus, Donnie Malphrus,
Rita Brown, Houston Family Partnership, Joan Taylor Trustee, Michael Bull,
Nancy Bull, Marny H. VonHarten, Dianne M. Donaldson, Brian R. Evans,
Stephen Durbin, Valerie Durbin, Phillip Marti, Jane Marti, Michael Woodworth,
Georgiana M. Cooke, Daniel B. Walsh, Janet E. Walsh Respondents

**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." *Hoyler 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.

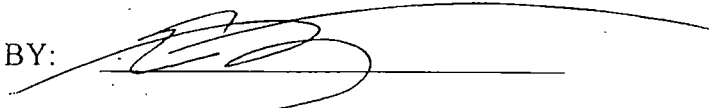
Respectfully submitted,

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BY: 

September 10, 2019

ATTORNEYS FOR RESPONDENT STATE

THE STATE OF SOUTH CAROLINA
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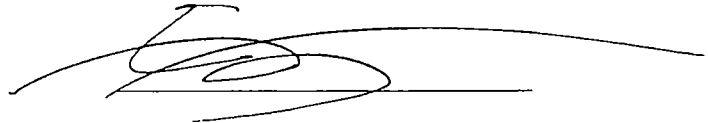
CERTIFICATE OF SERVICE

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:

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September 10, 2019
Page 2

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J. Emory Smith, Jr.
Deputy Solicitor General



ALAN WILSON
ATTORNEY GENERAL

September 10, 2019

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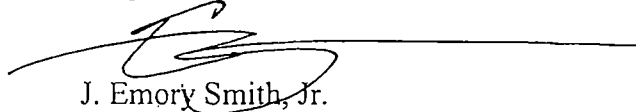
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
HAND DELIVERED

Re: Hoyler 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
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Stephen P. Groves, Sr., Esquire
Angelica M. Colwell, Esquire

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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v.

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Georgiana M. Cooke, Daniel B. Walsh, Janet E. Walsh Respondents

**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." *Hoyler 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.

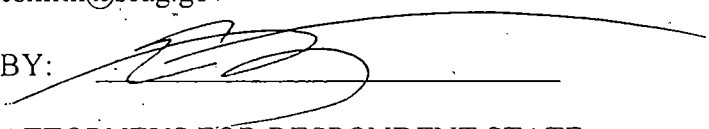
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BY: 

ATTORNEYS FOR RESPONDENT STATE

September 10, 2019

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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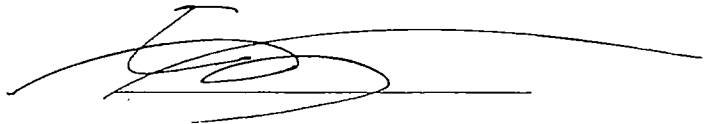
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Deputy Solicitor General



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ALAN WILSON
ATTORNEY GENERAL

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Deputy Solicitor General
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cc: Jefferson D. Griffith, III, Esquire
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Angelica M. Colwell, Esquire

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In the Court of Appeals

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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 *aruguendo*, 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 on 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.

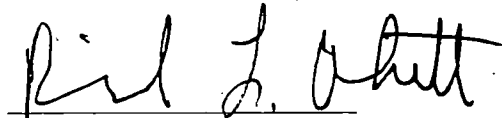
ARGUMENT IN REPLY TO RESPONDENT STATE OF SOUTH CAROLINA

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.

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September 16, 2019

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. 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.

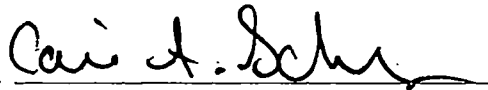
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September 16, 2019

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

Appellate Case No. 2016-001277

ORDER

After careful consideration of the petition for rehearing, the Court has discovered no material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied. However, we modify Opinion No. 5676 to

redistribute the citations to authority and to restate the Standard of Review section as follows:

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006) (quoting *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). "To make this determination [the appellate court] look[s] to the main purpose of the action as determined by the complaint." *Id.* (quoting *Estate of Revis v. Revis*, 326 S.C. 470, 476, 484 S.E.2d 112, 115 (Ct. App. 1997)). When the complaint's main purpose "concerns the determination of title to real property, it is an action at law." *Id.*

"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." *Id.* (quoting *Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 101–02, 552 S.E.2d 778, 781 (Ct. App. 2001)). Further, "[the appellate c]ourt reviews all questions of law de novo." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009); see also *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) ("Questions of law may be decided with no particular deference to the trial court." (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008))).

H B W

J.

John O. Deste

J.

D. Hanlon

J.

FILED

Oct. 17, 2019

Columbia, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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

H. Marshall Hoyler.....Appellant,

v.

The State of South Carolina, Merry Land Properties, LLC,
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Edward McCray Wise Revoc. Living Trust,
Carol Ann Devries Wise Revoc. Living Trust,
Amelie Cromer, Philip Cromer, Robert Chiavello, Tocharoen Living Trust,
Helen M. Olesak, Lesley Anne Glick a/k/a Lesley Anne Glick,
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Brian R. Evans, Stephen Durbin, Valerie Durbin, Phillip Marti,
Jane Marti, Michael Woodworth, Georgiana M. Cooke, Daniel B. Walsh,
Janet E. Walsh.....Respondents.

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ARGUMENT IN REPLY

INTRODUCTION

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

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

Improper Argument by the State.

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

The State Argues for the First Time.

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

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

Judicial Estoppel Also Applies.

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

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

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

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

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

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

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

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

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

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

The State is not clothed in a presumption of title, because title passed in 1891 and the State has not proved that it regained title. State ex rel McLeod v. Sloan Const. Co., 284 S.C., 491,494, 328 SE 2d 84 (S.C. Ct. of App. 1985). Additionally, as stated hereinabove, the State called no witnesses and produced no evidence that the State regained title.

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

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

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

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

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

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

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

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

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

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

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

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

Rule 40(i), SCRCP.

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

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

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

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

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

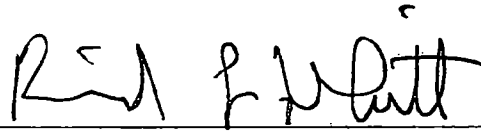
CONCLUSION

Based on the foregoing, this Court should Reverse the decision of the Trial Court and Remand this case to the Trial Court, for entry of an Order consistent with this Court's Findings and ruling herein.

[Signature Page Follows]

AUSTIN & ROGERS, P.A.

By:

A handwritten signature in black ink, appearing to read "R L Whitt", written over a horizontal line.

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April 17, 2017
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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

RECEIVED

APR 26 2017

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 Anne Glick,
Shirley G. Lackey, Patricia Banfield, Bertrand Cooper, Jr.,
NHP SH South Carolina I, LLC n/k/a CCP Bayview 7176 LLC,
Oyster Cove Homeowners Assn., Shirley Ann Moyer,
Barry D. Malphrus, Garry D. Malphrus, Donnie Malphrus,
Rita Brown, Houston Family Partnership, Joan Taylor Trustee,
Michael Bull, Nancy Bull, Marny H. VonHarten, Dianne M. Donaldson,
Brian R. Eyans, Stephen Durbin, Valerie Durbin, Phillip Marti,
Jane Marti, Michael Woodworth, Georgiana M. Cooke, Daniel B. Walsh,
Janet E. Walsh.....Respondents.

**RULE 211, SCACR CERTIFICATION,
REPLY BRIEF OF APPELLANT TO BRIEF OF RESPONDENT,
STATE OF SOUTH CAROLINA**

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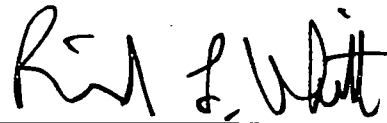
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I, Richard L. Whitt hereby certify that the Reply Brief of Appellant, H. Marshall Hoyer, to Brief of Respondent, State of South Carolina complies with the requirements set forth in Rule 211 of the South Carolina Appellate Court Rules.

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**REPLY BRIEF OF APPELLANT
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ARGUMENT IN REPLY

INTRODUCTION

The Respondent, Merry Land, in its Initial Reply Brief provides argument on the Appellant's "certainty of deeds", but skips some preliminary steps which are necessary for an appropriate analysis of the law with regard to findings by the Trial Judge. (Respondent, Merry Land's Initial Brief P. 14).

This case presents mixed questions of law and equity and the "... [Appellate Court] will apply the appropriate standard of review for a particular issue in a case that contains both legal and equitable issues. Eldridge v. Greenwood, 331 S.C. 398, 417, 503 SE 2d 191 (S.C. Ct. of App. 1998), (Internal Citations Omitted).

The paramount consideration for a reviewing court in interpreting a deed is to determine the intent of the Grantor. "In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. **The intention of the grantor must be found within the four corners of the deed.**" Springob v. Farrar, 334 S.C. 585 590, 514 S.E.2d 135, (S.C. Ct. of App. 1999), (Internal Citations Omitted), (Emphasis Added).

I. THE MASTER-IN-EQUITY IMPROPERLY DENIED APPELLANT, MR. HOYLER'S CLAIM TO OWNERSHIP OF THE DISPUTED MARSH.

"The determination of the grantor's intent when reviewing a clear and unambiguous deed is a question of law for the court. This court reviews questions of law *de novo*. In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court." Proctor v. Steedley, 398 S.C. 561, 730 S.E.2d 357, 363 (S.C. Ct. of App., 2012), (Internal Citations Omitted), (Emphasis Added).

This Court should consider Trial Exhibits, "2", "2-A" and "3", (these Exhibits consist of two copies of the 1891 deed, with attached plat), and determine that the intent of the Grantor, the State of South Carolina is clear; the State of South Carolina intended to sell Mr. Crofut, Appellant's predecessor in interest, 95.27 acres of marshland, subject to the State of South Carolina's retained phosphate mining rights, (R. p. 539-543); (R. p. 544); (R. p. 545-546). The intent of the Respondent, the State of South Carolina was clear, and the Trial Judge correctly reached the conclusion that the Respondent, the State of South Carolina intended to grant the marshland contained within the description of the deed and plat. (R. p. 47).

However, the Trial Court erred when it determined that the plat, and therefore the deed of which it was a part, was ambiguous. This Court should reject the Trial Court's erroneous determination as a matter of law. . "Likewise, the determination of **whether language in a deed is ambiguous is a question of law.**" Proctor v. Steedley, 398 S.C. 561 579, 730 S.E.2d 357 (S.C. Ct. of App., 2012), (Internal Citations Omitted), (Emphasis added).

“The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation.” Proctor v. Steedley, 398 S.C. 561 579, 730 S.E.2d 357 (S.C. Ct. of App., 2012), (Internal Citations Omitted).

A patent ambiguity is one that arises upon the words of a will, deed, or contract.” Beaufort Cnty. Sch. Dist. v. United Nat. Ins. Co., 392 S.C. 506, 526, 709 S.E.2d 85 (Ct. App. 2011), (Internal Citation Omitted). There is no patent ambiguity in the deed under review herein, because the deed describes the property adequately and the plat attached to the Crofut deed provides the necessary detail, (R. p. 539-543); (R. p. 544); (R. p. 545-546).

There was no testimony at Trial showing that there are obvious errors in the 1891 Crofut deed. Instead, the alleged errors were more nuanced, such as no graphic scale and no starting point, wrong “calls” and short distances, (R. p. 468 line 2 – p. 469 line 25); (R. p. 526 deposition p. 20 lines. 1-25); (R. p. 526 deposition p. 21 lines 1-25). Those comments represent Respondent, Merry Land’s begging the question of whether or not a latent ambiguity exists.

Is there a latent ambiguity? For the reasons cited below, this Court should determine, as a matter of law, without deference to the Trial Court that, there is not. Proctor v. Steedley, *supra*, p 367.

“A latent ambiguity exists when there is no defect arising on the face of the instrument, but arising when attempting to apply the words of the instrument to the object or subject described. *Id.* (offering an example of a latent ambiguity as a named beneficiary in a will that is unambiguous on the face of the will, but creates a latent ambiguity where there are two people with that name). Beaufort Cnty. Sch. Dist. v. United Nat. Ins. Co., 392 S.C. 506, 526, 709 S.E. 2d 85 (S.C. Ct. of App. 2011). No latent ambiguity exists under the facts of this case.

In this instance, the Respondent, the State of South Carolina with deliberate specificity, carved out a parcel of its marshland, using 19th century surveying techniques, reserved the right to mine phosphate from the property granted and deeded it to Mr. Crofut, Appellant, Hoyler's predecessor in title. (R. p. 539-543); (R. p. 544).

There was no Trial testimony provided showing that the Plat attached to the Crofut deed, does not generally fit the area in question, but, there is testimony from Respondent, Merry Land's witness Gardner that the 1882 plat "represented" the conveyance to Mr. Crofut, (R. p. 527 deposition p. 23 lines 3-15); (R. p. 529 deposition p. 30 lines 18-25); (R. p. 529 deposition p. 31 lines 1-25); (R. p. 529 deposition p. 32 lines 1-14). When asked, Respondent Merry Land's witness, Gardner at post-trial "deposition, "What is the tolerance of error that was established when these (19th century plats) were made?" (R. p. 529 deposition p. 30 lines 4-8). Respondent, Merry Land's witness, Gardner stated that he was not sure that there was one. (R. p. 529 deposition p. 30 lines 4-8).

Respondent, Merry Land's witness, Gardner went on to explain: "Used to, you know, the county surveyor was the fellow that could, I guess, do a little bit of trigonometry or something like that and all. You know he ran for the position or whatnot."... "But to be - there wasn't even-licensing wasn't even in effect at the time these (plats) were done, I don't believe." (R. p. 529 deposition p. 30 lines 8-17).

The only person who gave expert testimony about reconstructing the 1882 plat using modern techniques was the Appellant, Mr. Hoyler's expert surveyor witness, Fanning who testified that he had no difficulty in determining the location or the size of the property conveyed in the Crofut deed. (R. p. 276 lines 12-25); (R. p. 277 lines 1-11); (R. p. 279 lines 11-14); (R. p. 290 lines 14-25); (R. p. 291 lines 1-25); (R. p. 292 lines 1-3).

Appellant's expert surveyor witness, Mr. Fanning also presented an Exhibit which showed an overlay between his survey and the original survey and they demonstrably overlapped to a remarkable degree. (R. p. 638).

The facts of this case are highly unusual and telling, in that one of the parties to the original 110 year plus old deed, the State of South Carolina, is also a party to this case. The Respondent, the State of South Carolina did not offer a single witness, nor any evidence before the Trial Court to contest the clarity of the Crofut deed. It seems appropriate to conclude that the Respondent, the State of South Carolina was satisfied with the description in the deed to Crofut, Appellant's predecessor in interest and that Respondent, the State of South Carolina's intent was unambiguously manifested within the four corners of the deed to Crofut, Appellant's predecessor in interest.

If this Court determines that there is a latent ambiguity and the deed must be interpreted, then it is not constrained by the findings of the Trial Court. As noted above, this is a case of mixed law and equity and interpreting a deed is an equitable issue. Eldridge, supra, pp. 416-417 "If the action is viewed as interpreting a deed, it is an equitable matter and the appellate court may review the evidence to determine the facts in accordance with the court's view of the preponderance of the evidence." Slear v. Hannah, 329 S.C. 407, 410-411, 496 S.E.2d 633 (1998), (Internal Citations Omitted).

"In the case of Gibbes v. Elliott, 26 S.C. Eq. 327, 5 Rich. Eq. 327, **it was held that a court of equity has no authority, in general, to try questions of title to lands, where the parties claim by distinct titles; but where the whole dispute is upon the construction of a will, or other written instrument, under which both parties claim, the court has jurisdiction to determine the rights of the parties.**" Wayburn v. Smith, 263 S.C. 518, 521, 211 S.E.2d 560 (1975), (Emphasis Added).

The dispute between the State and Appellant, Mr. Hoyler arises from a common instrument, the 1891 deed.

In reviewing the evidence, this Court is bound to look for reasons to preserve the deed, not for reasons to find it ambiguous. The South Carolina Supreme Court has expressed and affirmed the maxim that, “That is sufficiently certain which can be made certain.” Dargan v. Tankersley, 380 SC 480, 488-489, 671 SE 2d 73 (S.C. 2008).

“The rule of law regarding certainty of deeds in South Carolina is that a description is sufficient if it (i) enables a person of ordinary prudence (ii) acting in good faith and (iii) making inquiries suggested by the description to identify the land.” (P. 14 of Respondent, Merry Land’s Initial Brief), (Romanettes added). Taken separately, the Appellant, Mr. Hoyler, has met each of the criteria.

In the instant case, the Beaufort County tax assessor, Appellant’s expert witness and a title examiner for a lender of Respondent Merry Land, were able to identify Appellant, Mr. Hoyler’s property from the public records of Beaufort County. These individuals, particularly the independent parties, the Tax Assessor of Beaufort County and the Respondent’s lender, had no stake in the outcome of this litigation.

Conversely, the Respondent, Merry Land’s witnesses looked only at the 19th century plats. When the Respondent, Merry Land’s witnesses encountered difficulty with the 1891 deed’s description, due to the plats’ age and their claimed inability to read the plats, Respondent, Merry Land’s witnesses took no steps to try to locate the plats or recreate the plats. Respondent, Merry Land’s witnesses, possessed the education and experience to be registered land surveyors.

However, Respondent, Merry Land's witnesses both failed to satisfy the prong of the test that required Respondent, Merry Land's witnesses to make "...inquiries suggested by the description to identify the land." Brownlee v. Miller, 208 S.C. 252, 261, 37 S.E.2d 658, 662 (1946). Both of the Respondent, Merry Land's surveyors indicated that they needed to, but failed to do any field work, (R. p. 462 lines 15-25); (R. p. 463 lines 1-11); (R. p. 464 lines 5-13); (R. p. 471 lines 1-25); (R. p. 472 lines 1-16). Particularly Respondent, Merry Land's witness Gardner, acknowledged that he needed to complete more field work to accurately locate the property shown on the plat, attached to the Crofut deed, (R. p. 528 deposition p. 27 lines 1-11); (R. p. 530 deposition p. 37 lines 10-17); (R. p. 531 deposition p. 38 lines 1-9); (R. p. 532 deposition p. 43 lines. 2-22). Neither of Respondent, Merry Land's witnesses testified at Trial that locating the 95.27 acres was impossible, given an opportunity to do field work.

If this Court determines that there was a latent ambiguity in the plats, then this Court should rely in on the Testimony of Appellant's expert surveyor witness, Fanning in forming it's own view of the facts, not being bound by the facts found by the Trial Court. Eldridge v. Greenwood, *supra*.

Appellant's expert surveyor witness, Mr. Fanning was able to close the plat without difficulty. (R. p. 276 lines 15-25); (R. p. 277 lines 1-16); (R. p. 279 lines 11-14); (R. p. 339 lines 16-25); (R. p. 340 lines 1-16). Appellant's expert surveyor witness, Mr. Fanning, in adherence to the law of this State testified that (i) a mean high and a mean low water mark are dynamic in nature and naturally move over time Horry County v. Woodward, 282 S.C. 366, 318 SE 2d 584 (Ct. of App. 1984) and (ii) in compliance with the statutory mandate under which the litigation was brought, Section 48-39-220, S.C. Code Ann., (1976, as amended), established a current eastern and western boundary.

Appellant's expert surveyor witness, Mr. Fanning indicated that the 1882 plat reflected the eastern and western boundaries as they existed at the time the 1882 plat was drawn just as the boundaries on his plat reflected the natural conditions as they existed at the time of his survey. (R. p. 379 lines 4-25); (R. p. 380 lines 1-25); (R. p. 381 lines 11-25); (R. p. 382 lines 1-6).

As to the Northern and Southern boundaries of his Plat, Appellant's expert surveyor witness, Mr. Fanning, used the available data by looking at the "... 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." (R. p. 285 lines 17-21). The land section network referred to by Appellant's expert surveyor witness, Mr. Fanning is the nearly unique system in Beaufort County in which a grid network covers the land in the county making it mathematically possible to locate land by doing mathematical calculations. Appellant's expert surveyor witness, Mr. Fanning, referenced the grid points on the highland property from the 1882 plat (R. p. 373 lines 8-25); (R. p. 374 lines 1-25) and then used them, as well as the bearings and distances on the old plats to recreate it and overlay it on Appellant's expert surveyor witness' Plat, (R. p. 290 lines 14-25); (R. p. 291 lines 1-25); (R. p. 292 lines 1-3).

The Trial Court's decision under Appeal, fails to effectuate the intent of the Grantor as it is required to do under South Carolina law. This Court should correct that error as a matter of law, due to the manifested intent of the State of South Carolina in the deed to convey the 95.27 acre property to Crofut, Appellant's predecessor in interest and the clarity with which it did so. Springob, *supra*, pp. 590-591. Additionally, this Court should find as a matter of law that there is no ambiguity in the plat and hence the deed from the State to Crofut confirming the deed in Appellant Hoyler. Springob, *supra*, pp. 590-591.

Finally, should this Court feel compelled to interpret the deed if it finds that it is ambiguous, Smith v. Du Rant, *supra*, pp. 88-92, then the issue before it becomes an equitable one Eldridge v. Greenwood, *supra*, p. 416 and it should make its on determination of the facts based on a preponderance of the evidence , it should find that in its review of the evidence that the preponderant facts favor Mr. Hoyler and it should reverse the Trial Court and confirm his deed, Smith v. Commissioners of Public Works, 312 S.C. 460, 441 S.E.2d 33, 334-335 (Ct. App. 1994) citing with approval, Townes Assoc., Ltd. v. City Council of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

“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, 88, 113 S.E.2d 349 (1960) (internal citations omitted), (emphasis added).

II. THE MASTER-IN-EQUITY IMPROPERLY ORDERED JOINDER OF ADJACENT UPLAND PROPERTY OWNERS.

Respondent, Merry Land continues to rely on a purported interest that Respondent, Merry Land has in the adjacent upland and the marshland in question because it had permits from the Office of Coastal Resource Management and the US Army Corps of Engineers.

An examination of the Statute set forth below, pursuant to which Appellant sued the State of South Carolina to establish his title against the state, is necessary to show that the Respondent, Merry Land is an improper party.

“Section 48-39-220 (A) Any person claiming an interest in tidelands which, for the purpose of this section, means all lands except beaches in the Coastal zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters, *may institute an action against the State of South Carolina* for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State. Service of process shall be made upon the State Fiscal Accountability Authority.” (Emphasis Added).

“In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation” Palmetto Princess v. Edisto Beach, 369 S.C. 50,54, 631 SE 2d 76 (2006), (Internal citations omitted). It is clear that the Respondent, Merry Land, assuming *arguendo* has some right title or interest in the marshland, must sue the State. It is not appropriate to intervene in litigation based on the Statute described hereinabove, which was specifically designed to determine rights to real property between purported owners of marshland against the State. The Statute cited above, is not designed to protect the interests of adjacent highland owners who have no interest in title to the adjacent marshland.

"It is perhaps unnecessary to say that courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. " Laird v. Nationwide Ins. Co., 243 SC 388, 395, 134 SE 2d 206 (1964), citing with approval Creech v. South Carolina Pub. Serv. Auth., 200 S.C. 127, 20 S.E.2d 645 (S.C., 1942).

Respondent complains that Appellant, Mr. Hoyler was not vigilant enough in pursuing his claim and filed it after the permits were issued to the Respondent and in fact that is the real reason Respondent needed to intervene. (Respondent, Merry Land's Initial Brief p. 25, Paragraph 2).

There is no obligation on behalf of Mr. Hoyler found either in the Statute, Section 48-39-220 (A) S.C. Code Ann., (1976, as amended), or any of its subordinate regulations (see below), to bring an action at all. Respondent, Merry Land was obligated to provide Appellant, Mr. Hoyler's name to the Office of Coastal Resource Management, a division of the Department of Health and Environmental Control (hereinafter "OCRM") as an adjoining landowner or an affidavit stating that such information was not readily available.

"23A S.C.Code Ann. Regs OCRM Rules 30-2 Applying for a Permit

(5) **A list of all adjoining landowners and their addresses** or a sworn affidavit that with due diligence such information is not ascertainable. When considered appropriate by the Department, additional information may be required concerning affected landowners.

Permit Application C. Notification: The Department shall within thirty days of receiving either a Joint Public Notice or SCDHEC-OCRM permit application, notify in writing interested agencies, **all adjoining landowners**, local government units in which the land is located and other interested persons. This notice shall indicate the nature and extent of the applicant's proposal.

I. Applications **Involving Adjoining Landowners Claiming Ownership of Critical Area**

(1) All permit applicants must provide information in writing concerning the ownership of critical area in or over which a project is to be constructed.

(2) **The alleged adjoining landowner of critical area must be notified pursuant to the provisions of Section 48-39-140(C) and R.30-2.**

(3) If the alleged adjoining landowner of critical area files a written objection to the permit application within the period prescribed in Section 48-39-140 (15 days for minor and 30 days for major permits) based upon a claim of ownership and indicates an intention to file a court action pursuant to Section 48-39-220, **the application will be deemed incomplete and further processing of the permit will not take place until a final judicial decision is rendered by a court of competent jurisdiction.**

However, written proof of filing a court action pursuant to Section 48-39-220 must be received by the Department within 30 days of the date of the expiration of the comment period. If no such written proof is timely received, the permit will be processed pursuant to law." (Emphasis Added).

Because the Respondent failed to notify Appellant, Mr. Hoyler of Respondent, Merry Land's application, Respondent, Merry Land's application is rendered incomplete and it has no property interest to complain of or protect.

The other Defendants were improperly joined by the Trial Court. The statutory authority under which the Appellant brought his case does not provide for the joinder of any party who does not have an interest in the marshland. It is exclusively to determine ownership of that property.

Under Rule 19 of the South Carolina Rules of Civil Procedure, none of the upland owners meet its test for permissive joinder. Under prong one, there is no need for their presence, because complete relief for the other parties to the lawsuit can be achieved without them. In fact their absence from the case is anticipated by the plain language of the statute in that no provision is made for their participation. The second prong of the test is not met because as noted above the additional joined parties have no rights in the marshland and could not obtain a permit to cross the land until a decision had been rendered as to the marshland's ownership.

III. THE RESPONDENTS WHO INTERVENED AND /OR WERE JOINED BY THE TRIAL COURT, LACKED LEGAL STANDING TO PARTICIPATE.

Respondent, Merry Land in its Initial Brief identifies the three-pronged test for standing and then Respondent, Merry Land states that the Respondent meets them all. The party seeking to establish standing carries the burden of demonstrating each of the three elements." Powell ex rel. Kelley v. Bank of Am., 665 S.E.2d 237, 379 S.C. 437 (S.C. Ct. of App., 2008), (Internal Citations Omitted), (Emphasis Added).

First, Respondent, Merry Land claims that it has actual damage caused by Appellant, Mr. Hoyler for failing to timely file his claim, (Respondent, Merry Land's Initial Brief, p. 28 Paragraph 2).

As noted above, Appellant, Mr. Hoyler had to be notified by the Respondent Merry Land, pursuant to statutory and regulatory schemes that it intended to seek a permit which would cross his land. Until that time, Appellant, Hoyler was under no obligation to bring a suit to determine title as between Appellant, Hoyler and the State of South Carolina, to the marshland. Also notably, neither the statute nor the regulation requiring notice gives any indication of any right that the permit applicant has to join in the suit between the individual landowner and the state. Second, there must actually be an injury to establish a causal connection to the injury and the legally protected interest. Because the permits were issued based on wrong information provided by the Intervenor to the permitting bodies, the permits are void as being incomplete. 23A S.C.Code Ann. Regs OCRM Rules 30-2 (I)(3). Here there is no legally protected interest in the marshland which the joined parties were trying to protect and there is no real property interest in a potential permissive use permit issued by the State of South Carolina.

Third having no real interest in the property, assuming a permit gives a protected interest (see, Army Navy Bingo, Garrison# 2196 v. Plowden, 281 S.C. 226, 229, 314 SE 2d 339 (S.C. 1984 in which the Supreme Court found no property right in a bingo license calling the license a "permit") if there is no injury, there is no outcome favorable or not which could address it.

IV. THE TRIAL COURT IMPROPERLY LEFT THE TRIAL RECORD OPEN AFTER THE MERITS HEARING.

Appellant has addressed the failure of the Trial Court to comply with Rule 40(i)(2), South Carolina Rules of Civil Procedure in holding the record open for a surprise witness that was not even listed on the pretrial list of witnesses in his initial brief and the Court's attention is called thereto.

Neither Respondent has found, or provided a citation to a South Carolina case, that allows the Trial Court to hold the record open for a witness that was needed when a party could not get evidence into the record at Trial. Respondent, Merry Land provides a citation to, Seabrook Island Property Owners' Association v. Berger, 365 S. C. 234, 616 S. E. 2d 431 (2005). That was a case in which a witness, post appeal, was not allowed to testify at a hearing to determine attorney's fees but required to submit his testimony by Affidavit. The case cited by Respondent, Merry Land is a far cry from a surprise witness being allowed to testify after Trial because evidence could not be elicited in the manner satisfactory to the Respondent, as was done in the case *sub judice*.

V. THE TRIAL COURT IMPROPERLY REFUSED TO HEAR APPELLANT, MR. HOYLER'S POST-TRIAL MOTIONS.

Appellant Hoyler was prejudiced by the Trial Court not honoring the Trial Court's earlier promise concerning Post-Trial Motions. Appellant's counsel on March 1, 2016, informed the Trial Court that Appellant, Hoyler would, "...like the opportunity to make [Appellant, Mr. Hoyler's] post-trial motions for the record." (R. p. 721).

The Trial Court replied that, “[Trial Judge] he agree[d] that so much time has passed [since the merits hearing] that at least a follow-up conference call if not a supplemental hearing should be held for summation. I’m [Trial Judge] happy to do whatever the group would prefer.” (R. p. 727). No opportunity was provided for Post-Trial Motions and counsel for Appellant, Mr. Hoyler persisted by counsel’s email of March 28, 2016, **“Please provide guidance as to Post-Trial Motions, because** we have now completed the Trial by deposing Mr. Gardner. I believe that we will need to make them to complete the record.” (Emphasis in original), (R. p. 728). Based on the foregoing, Appellant, Hoyler was prejudiced by the Trial Court’s actions.

VI. RESPONDENT, MERRY LAND FAILED TO SUPPORT ITS TRIAL COURT ARGUMENTS, AS TO ESTOPPEL AND LACHES.

This Court’s attention is called to the discussion of the Regulations regarding obtaining a permit to cross State owned marshland. The onus of notifying adjacent landowners is on the entity seeking the permit. 23A S.C.Code Ann. Regs. OCRM Rules 30-2, Applying for a Permit *supra*. It is only after being notified of the pending permit application that an individual is required to file a lawsuit to preserve the owner’s title against the State and until that suit is resolved the permit is incomplete. 23A S.C. Code Ann. Regs. OCRM Rules 30-2 Applying for a Permit Subsection I. Applications Involving Adjoining Landowners Claiming Ownership of Critical Area Subsections (1-3) [Therefore, it is disingenuous and erroneous for the Respondent, Merry Land to refer to the permits, obtained through negligently misinforming the OCRM that there were no adjacent property owners, when quite clearly, there were.

Witness Houston, principal with the Respondent Merry Land, testified that although Respondent, Merry Land was required to notify Appellant, Mr. Hoyler, their title examination failed to find Appellant, Mr. Hoyler's property. (R. p. 424 lines 8-19); (R. p. 425 lines 3-10). Respondent, Merry Land's witness Houston also acknowledged that after Respondent, Merry Land closed on the upland property an examination of the property records by an individual revealed Appellant, Mr. Hoyler's GIS tax information, and that information was publicly available to anyone prior to Merry Land's purchase of the property. (R. p. 429 lines 14-25); (R. p. 430 lines 1-8).

Respondent, Merry Land's witness Houston further acknowledged, that knowing that the Beaufort County GIS (geographic information system) was being changed out at the time of that Merry Land was having its title examined, that had someone gone to the paper documents in Beaufort County and found Appellant, Mr. Hoyler's property referenced. (R. p. 433 lines 1-13). The failure of Respondent, Merry Land to follow the OCRM Regulations with regard to the permitting process did not require Appellant, Mr. Hoyler to act and so he cannot be estopped from doing something that he had not yet been require to do.

Second, South Carolina is a "race notice" state, as set forth in Section 30-7-10, S.C. Code Ann., (1976, as amended). "The basic purpose of the rule normally followed is to assure stability of title. Any other rule would make title searching hazardous. A title searcher must live by the record." Burnett v. Holliday Brothers, Inc., 279 S.C. 222, 227, 305 SE 2d 238 (SC 1983).

Because Appellant, Mr. Hoyler indisputably had record title, the responsibility for finding his title, if it was going to adversely affect Respondent, Merry Land fell squarely on Merry Land's title examiner's. The assumptions that they made and their failure to find Appellant, Mr. Hoyler's properly recorded title is their error and their attempt to somehow blame Appellant, Mr. Hoyler, who no one claims did anything wrong is not only legally wrong but unconscionable. Factually, Respondent, Merry Land's witness Houston testified at Trial that Appellant, Mr. Hoyler had done nothing wrong. (R. p. 422 lines 11-17).

Third, Respondent, Merry Land's assertion that somehow Appellant, Mr. Hoyler wants to use his land adverse to the interest of Respondent, Merry Land is not supported by the evidence. Appellant, Mr. Hoyler did not testify and his motives are a matter of speculation. However, Appellant, Mr. Hoyler would be within his rights to exercise dominion over Appellant's property just as does any other property owner in this State. The Record does not indicate that Respondent, Merry Land offered any of its adjacent landowner's unfettered access across its property. Does Respondent, Merry Land intend to charge them for access to its property or allow them access at all? Respondent, Merry Land's unsupported attempt to demean Appellant, Mr. Hoyler's right to exercise his rights over his property, is inappropriate. .

"While the doctrine of waiver or equitable estoppel may be invoked as affirmative defenses to counterclaims, they may not be asserted in a complaint as offensive weapons." Janasik v. Fairway Oaks Villas Horizontal Property Regime 307 SC 339, 345, 415 SE 2d 384 (S.C. Ct. of App. 1992), (Internal citations omitted).

The doctrine of estoppel applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury."

The elements of equitable estoppel as to the party estopped (Hoyler) are: (1) conduct amounting to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention or expectation that such conduct will be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. This claim must fail because the Appellant made no representations to anyone.

Appellant, Mr. Hoyler acted as any other individual that owns real property in South Carolina. Appellant, Mr. Hoyler relied on his real estate professionals to properly acquire and record title to his property in the public records in the county files in the county in which the real estate is located, which they did. Appellant, Mr. Hoyler also paid his taxes on the property conveyed by the State which is another public statement of ownership, easily obtainable to anyone caring to look closely enough. Appellant, Mr. Hoyler did not know Respondent, Merry Land or its officers and could make no representation to them. Absent affirmative conduct intending to mislead, the other two elements are superfluous. Fradley v. Smith 247 S.C. 353, 359-360, 147 S.E.2d 412 (1966).

The elements as to the party (Respondent, Merry Land) claiming the estoppel, are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) a prejudicial change in position. Here, the Respondent, Merry Land again fails to make its case on the first element, because the information which would have informed it that Appellant, Hoyler owned the property was publicly available to it. Respondent, Merry Land's failure to find the publicly available information does not equate to not having the means of acquiring the knowledge which would have prevented Respondent, Merry Land's predicament. Frady v. Smith 247 S.C. 353, 359-360, 147 S.E.2d 412 (1966).

Furthermore, because Respondent, Merry Land and Appellant, Mr. Hoyler didn't know about each other, it was impossible for Respondent, Merry Land to rely on Appellant, Mr. Hoyler's conduct. This Court should find that the Respondent, Merry Land has not proven this affirmative defense at Trial.

LACHES

The Respondent, Merry Land next asserts laches as an Appellant asserts that as an equitable defense laches may not be used offensively and must therefore fail. Therefore, Respondent, Merry Land may not use laches offensively.

The Respondent, Merry Land has also failed to meet its burden of proof in establishing a claim of laches. Laches is the negligent failure to act for an unreasonable period of time.

“Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay suffers his adversary to incur expenses or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce these rights. Delay alone in the assertion of a right does not constitute laches.” Provident Life and Acc. Ins. Co. v. Driver, 451 SE 2d 924,929 (S.C. Ct. App. 1994), (Internal citations omitted), (Emphasis added).

The Respondent, Merry Land, as the party asserting laches, must also satisfactorily show negligence, the opportunity to have acted sooner, and material prejudice before the bar in equity is complete. As with waiver, laches arises upon the failure to assert a known right under circumstances indicating that the lached party has abandoned or surrendered the right. The lached party [Appellant Hoyler], must have had actual knowledge or inquiry notice of the facts forming the basis of Intervenor’s [Respondent, Merry Land’s] claim, and its failure to assert its right is irrelevant until there is a reason or situation that demands assertion. The burden of proof is upon the person claiming laches.” (Emphasis added).

First, Respondent, Merry Land’s position turns laches on its head. It is an equitable doctrine in a law case.

Next, Respondent, Merry Land essentially says that Appellant, by failing to assert its claim against a third party (the State) has caused Respondent, Merry Land to change its position. Laches is a theory that exists between two parties who may have had some interaction where there may be some rights between them. Respondent, Merry Land’s position is that a failure to assert a right against a third party somehow affects the rights of the world as to individual or entity.

Second, delay alone does not constitute laches. The Respondent has not shown neglect in failing to act. There is no neglect in failing to pursue the action against the Respondent, the State of South Carolina. Respondent, Merry Land's witness Houston acknowledged, when shown the actual language of the Statute, that Appellant, Mr. Hoyler had done nothing wrong. Finally, as shown in the emphasized language above, the Appellant must have had actual knowledge or inquiry notice of the facts forming the basis of Respondent's claim. Respondent, Merry Land has proved none. Respondent's attempt to do so by showing that it gave public notice of its intent to build a marina in the general area of the Appellant's property does not show any actual notice to Appellant.

Additionally, the Respondent, Merry Land, under the terms of the dock permit application must give individual notice to adjacent property owners. Respondent, Merry Land, admittedly failed to do that. However, even if Appellant, Mr. Hoyler had received an individual notice he would have not been required to file a claim against the Respondent, the State of South Carolina.

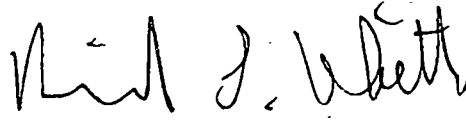
CONCLUSION

Based on the foregoing, this Court should Reverse the decision of the Trial Court and Remand this case to the Trial Court, for entry of an Order consistent with this Court's Findings and ruling herein.

[Signature Page Follows]

AUSTIN & ROGERS, P.A.

By:

A handwritten signature in black ink, appearing to read "Richard L. Whitt". The signature is written in a cursive, flowing style.

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April 17, 2017

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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

RECEIVED

APR 26 2017

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 Anne Glick,
Shirley G. Lackey, Patricia Banfield, Bertrand Cooper, Jr.,
NHP SH South Carolina I, LLC n/k/a CCP Bayview 7176 LLC,
Oyster Cove Homeowners Assn., Shirley Ann Moyer,
Barry D. Malphrus, Garry D. Malphrus, Donnie Malphrus,
Rita Brown, Houston Family Partnership, Joan Taylor Trustee,
Michael Bull, Nancy Bull, Marny H. VonHarten, Dianne M. Donaldson,
Brian R. Evans, Stephen Durbin, Valerie Durbin, Phillip Marti,
Jane Marti, Michael Woodworth, Georgiana M. Cooke, Daniel B. Walsh,
Janet E. Walsh.....Respondents.

**RULE 211, SCACR CERTIFICATION,
REPLY BRIEF OF APPELLANT TO BRIEF OF RESPONDENT,
MERRY LAND PROPERTIES, LLC**

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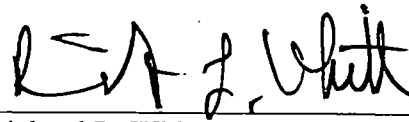
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I, Richard L. Whitt hereby certify that the Reply Brief of Appellant, H. Marshall Hoyler, to Brief of Respondent, Merry Land Properties, LLC, complies with the requirements set forth in Rule 211 of the South Carolina Appellate Court Rules.

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**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

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SEP 11 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'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**

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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 Marsh¹ from the State.

Hoyler relies on State v. Hardee² 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. McEachern**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. Mazingo 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 grant³⁷ 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 the 1891 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 description of the boundaries of the land ...' ")).

Respectfully submitted,

NEXSEN PRUET, LLC

By: 

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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

RECEIVED

SEP 11 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'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

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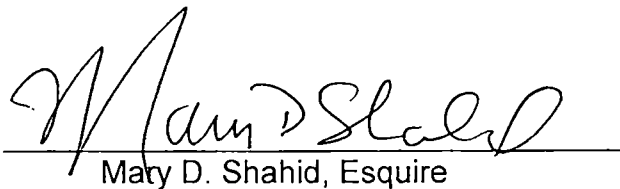
I, Mary D. Shahid, Esquire, hereby certify that on 10 September 2019, I served one copy of the **Respondent's Return to Appellant's Petition for Rehearing**, submitted by the Respondent, Merry Land Properties, LLC, on counsel for the Petitioner and the Respondents via the United States Mail, postage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

Jefferson D. Griffith, III, Esq. and Richard L. Whitt, Esq.
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State of South Carolina*


Mary D. Shahid, Esquire

Charleston, South Carolina

10 September 2019

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

RECEIVED
SEP 11 2019
SC Court of Appeals

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.

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

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.

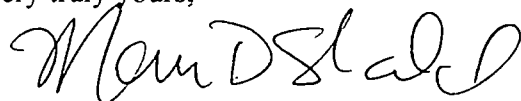
Monday, September 9, was the first opportunity available to me to finalize this Return and prepare it for delivery to the Court. I appreciate the Court's acceptance of this late filing.

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The Honorable Jenny Abbott Kitchings
September 10, 2019
Page 2

Very truly yours,

A handwritten signature in black ink, appearing to read "Mary D. Shahid". The signature is fluid and cursive, with the first name "Mary" being the most prominent.

Mary D. Shahid

Enclosure

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