THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2019-001894

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 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

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RETURN OF RESPONDENT STATE OF SOUTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals was required to affirm the Master's findings when it was supported by evidence?

2. Whether the deed is construed strictly in favor of the State and against the grantee?

3. Whether the plat and deed provide sufficient guidance as to the location of the property?

4. Whether Petitioner has shown any special and important reason why his Petition should be granted?

STATEMENT OF THE CASE

The State concurs in the Facts / Procedural History section of the Court of Appeals Opinion, and notes, in particular, the following:

> 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. [R. V. I, p. 53.] 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. [R. v. I, p. 92]. 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. [R. v. I, p. 57] On February 22, 2008, the master, with the consent of counsel for all parties, executed an order granting Merry Land's motion to intervene. [R. v. I, p. 1] [footnote omitted].
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> * * *
>
> [T]he 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), SCRCP. The master denied this motion in a Form 4 order.

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. [R. v. 1, p. 15] On June 19, 2016, Hoyler filed a second Rule 59(e) motion in response to the written order, and the master denied this motion. [R. v. 1, p. 48] This appeal followed.

Hoyler v. State, 428 S.C. 279, 833 S.E.2d 845, 850-851 (Ct. App. 2019), reh'g denied (Oct. 17, 2019)

ARGUMENT

I

THE COURT OF APPEALS PROPERLY DETERMINED THAT IT WAS COMPELLED TO AFFIRM THE MASTER'S FINDINGS

The Court of Appeals was required to affirm the Master's findings if supported by any evidence as it was here. As set forth below, the Court of Appeals found that the deed was ambiguous as to the location of the property which then became a fact issue on which the Master's findings must be affirmed if supported by any evidence:

> 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, 550 S.E.2d at 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)) . . . .
>
> * * *

> 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. . . .
>
> 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)).

Hoyler, 833 S.E.2d at 855-857.

Petitioner confuses and misapplies these standards in arguing that the deed is unambiguous as to the intent to convey State marshland. That a deed purported to convey State marshland is undisputed. What is in dispute is whether the deed and plat are sufficient to convey identifiable marshland that can be located. As the Court of Appeals 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." 833 S.E.2d at 852. The deed and plat in the instant case are not "specific enough." As quoted above, the Court of Appeals found that "[t]he plat's illegibility effectively made the deed ambiguous as to the precise location of the 95.27 acres in dispute . . . ." Accordingly, location was a fact issue as to which the Master's findings must be affirmed because they were supported by evidence.

II

THE DEED AND PLAT ARE CONSTRUED STRICTLY AGAINST THE GRANTEE AND IN FAVOR OF THE STATE

> 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. [footnote omitted] . . . .
>
> 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. [footnote omitted.]
>
> For this reason, "the party asserting a transfer of title bears the burden of proving its own good title," 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. [footnotes omitted]

Hoyler, 833 S.E.2d at 852. As quoted previously, "[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." *Id.* (footnote omitted)

The above standards are strict and were properly applied to the Petitioner's claims. He failed to meet these standards, and the Court of Appeals properly affirmed the decision of the Master.

III

THE PLAT AND DEED PROVIDE INSUFFICIENT GUIDANCE AS TO THE LOCATION OF THE PROPERTY

Petitioner errs in contending that the deed was sufficient in and of itself to convey marsh. The deed 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 deed references the plat. As quoted by the Court of Appeals, "[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." *Hoyler,* 833 S.E.2d at 854 (Ct. App. 2019), reh'g denied (Oct. 17, 2019) quoting *Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 397, 252 S.E.2d 133, 136 (1979)."

The problem here is that the plat, as well as the deed, does not provide sufficient guidance as to the location of the property. Although Petitioner 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; however, as the Court of Appeals 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." *Hoyler,* 833 S.E.2d at 855.

Petitioner contends that this Court should have placed the boundaries based upon natural boundaries in this case which he contends are the location of the current mean high water and mean low water lines. The problem with his argument is that the plat used "specific bearings and distances, some of which are illegible for the boundary lines . . . ." rather than mean high water. *Hoyler*, 833 S.E.2d at 855. "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." *Id.* at 856. The Court of Appeals noted that "[t]he master . . .concluded, '[s]ince 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.'" 833 S.E.2d

at 856. The Court of Appeals properly "agree[d] with the master's assessment of [Petitioner'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.'" *Hoyler,* 833 S.E.2d at 856.

The bearings and distances on the plat were also insufficient. That some of the bearings "are illegible for the boundary lines" (833 S.E.2d at 855) and the northern boundary is "sliding" (Order at R. v. I, p. 40) prevents the determination of the location of the property today. *See also,* Order at R. v. I, p. 20 (Based on Gardner testimony, "the southern boundary [is] ambiguous, as with the northern boundary."). 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. As noted above, the Court of Appeals stated that it could not "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." *Hoyler*, 833 S.E.2d at 856. Therefore, the Court of Appeals was "compelled to affirm the master's finding" that "the 1891 plat it incorporated were insufficient to convey title to a defined location of marsh bordering the Beaufort River." *Id.*, 833 S.E. 2d at 857.

IV

PETITIONER HAS NOT SHOWN SPECIAL AND IMPORTANT REASONS FOR GRANTING CERTIORARI

Under Rule 242, SCACR, this Court will grant a petition for certiorari "only where there are special and important reasons." Rule 242, SCACR. Although Petitioner contends that the decision of the Court of Appeals is in conflict with decisions of this Court, he misunderstands tidelands case law and its application to the deed and plat in this case. The Court of Appeals Opinion discussed years of tidelands opinions and carefully and properly applied that body of law to this case. The Opinion should be sustained.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny the Petition.

Respectfully submitted,

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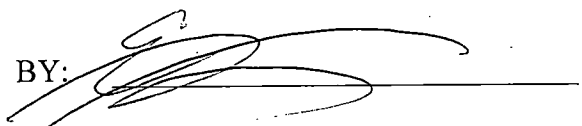
BY: 

December 19, 2019

ATTORNEYS FOR RESPONDENT STATE

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CERTIFICATE OF SERVICE

I certify that I have served the Return of the State to the Petition for Writ of Certiorari upon the other parties by mailing copies to their counsel at the addresses below via the United States Mail this December 19, 2019:

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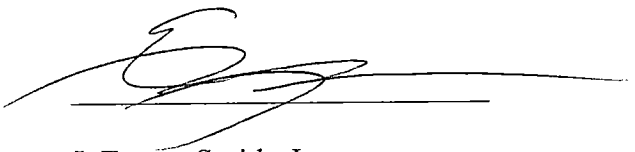

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