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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Appellate Case No. 2019-001894

Case No. 2007-CP-07-03212

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'n; 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 Woodsworth;
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.

BRIEF OF *AMICUS CURIAE* BEAUFORT RIVER DEVELOPMENT, LLC
IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Beaufort River Development, LLC is a South Carolina limited liability corporation that purchased about 7.4 acres of undeveloped land, including 800 feet along the Beaufort River, in March 2007 for \$5.45 million. Beaufort River Development has spent another \$2.7 million in permitting and infrastructure for the property, and it was assigned a permit from the Department of Health Environmental Control to build a dock over the marsh to the river.

Like the property owned by Merry Land Properties, Beaufort River Development's property is adjacent to the marsh that Hoyler claims to own. Therefore, any decision about the validity of Hoyler's deed will affect Beaufort River Development, including its ability to access the river from its property.

STATEMENT OF THE ISSUE ON APPEAL

Hoyler claims to own about 95 acres of marsh along the Beaufort River, based on a deed he received in 1979 that traces back to an 1891 grant to his predecessor from Governor Ben Tillman. Over almost three decades after 1979, some owners of upland property adjacent to that marsh built docks across the marsh to the Beaufort River, and others obtained permits to build docks across the marsh. Hoyler never objected to the docks or permits, sued for trespass, or sued the State under S.C. Code § 48-39-220 to assert his claim of title until 2007.

The question presented is:

Whether Hoyler's failure to assert his claim of title estops him preventing landowners like Beaufort River Development from obtaining permits and building docks across that marsh.

INTRODUCTION

The law requires a person to speak up to protect his rights. And for good reason. When a person fails to do so, others—unaware of that person's purported rights—might inadvertently spend time and money in ways that violate those rights. When this happens, the law forces the person who did not make his rights known to bear any loss.

That is what happened here. Hoyler claims to have owned marsh along the Beaufort River since 1979, yet over three decades, landowners along that marsh either built docks across the marsh to the river or obtained permits (through a "very public" process) to build docks across the marsh. Yet Hoyler said nothing. The well-established

doctrine of estoppel by silence therefore bars him from objecting to these docks and permits now.

The Court of Appeals did not take up this estoppel issue, given its conclusion that the 1891 deed from which Hoyler claimed title did not sufficiently identify the land that was conveyed. (App. 859.) Nevertheless, as this Court considers whether to grant a writ of certiorari on any of the questions raised in Hoyler's petition, the Court should be aware of the broader impact that any decision giving effect to a belated claim to own marsh has on adjacent property owners.

ARGUMENT

Hoyler's silence regarding his claim to own property typically owned by the State estops him from asserting his claim against current property owners.

Equitable estoppel has three elements related to the party to be estopped and three related to the party asserting estoppel. As for the three against the party to be estopped, these elements are:

- (1) conduct which amounts to a false representation, or conduct 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 that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts.

Rodarte v. Univ. of S.C., 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017). And as for the three related to the party asserting estoppel, they are: "(1) lack of knowledge, and 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 of position in reliance on the

conduct of the party being estopped.” *Id.*, 799 S.E.2d at 916–17 (internal footnote omitted).

South Carolina has long recognized estoppel by silence when it comes to real property. *See, e.g., Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006); *S. Ry. Co. v. Day*, 140 S.C. 388, 138 S.E. 870, 875 (1926). Under this doctrine, “if a party stands by, and sees another dealing with property in a manner inconsistent with his rights, 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 interest are affected.” *McClintic v. Davis*, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955). It is, at its core, a doctrine of fairness. It prevents one party from sitting idly by while another party spends time and money, only for the first party then to claim what the other party did was improper and must (at the cost of more time and more money) be undone.

A. The common law requires Hoyler to have asserted his claim of title, rather than sitting silently while docks were being built and permits obtained.

This case illustrates the importance of estoppel by silence, particularly in situations involving land that is traditionally owned by the State under the Public Trust Doctrine. Had Hoyler spoken up about his claimed ownership of the marsh when the first dock was being built, others—like Merry Land and Beaufort River Development—would not have purchased riverfront property to develop (if indeed Hoyler was determined to have owned that marsh).

By the time Merry Land and Beaufort River Development purchased property along the Beaufort River, at least three docks had been built over the marsh. (App. 32, 421.) These docks extending over the marsh could not have been missed by anyone who looked.

Even if S.C. Code § 48-39-220 does not mandate that Hoyler have sued the State to assert his claim to own the marsh, decisions from our appellate courts required him to assert that claim against adjacent landowners, at least once docks started being built across the marsh. For example, in *Coker v. Cummings*, 381 S.C. 45, 55, 671 S.E.2d 383, 388 (Ct. App. 2008), the Court of Appeals refused to credit the “plats and an affidavit” offered to prove the boundary line when the defendants had been living on the disputed property for many years. Similarly, this Court held in *Piedmont & Northern Railway Co. v. Henderson*, 216 S.C. 98, 103, 56 S.E.2d 740, 742 (1949), the railway company was estopped from claiming title to land on which the defendant had planted a hedge and built a house and fence. Both of these cases (as well as others) flow from this Court’s well-established rule that “[i]f man a man stands by, and sees another build a house on his land, without giving notice, he will lose his land.” *S. Ry. Co.*, 140 S.C. 388, 138 S.E. at 874 (quoting *Caldwell v. Williams*, 8 S.C. Eq. 175, 177 (S.C. App. L. & Eq. 1831)).

Docks may not be houses, but they are—like houses—permanent and obvious structures. Hoyler therefore was required to make known his claim that he owned the marsh over which the docks went. Hoyler’s failure to do so is fatal to any effort he could undertake to have those docks removed.

It is also fatal to his ability to prohibit owners who obtained permits believing the marsh was owned by the State from building docks across the marsh. Unlike most land in this State, which is privately owned, the vast majority of marshes are owned by the State under the Public Trust Doctrine. *See, e.g., Estate of Tenney v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 100, 107, 712 S.E.2d 395, 398–99 (2011). Nothing about the marsh here suggested it was privately owned, (App. 421–22), and none of the “extensive due diligence” from a commercial developer turned up any sign of Hoyler’s ownership, (App. 32). Without such a sign, purchasers bought land along the river to develop and obtained permits to build docks, which were an important feature of their projects. That those docks are not already built does not diminish the substantial reliance interests these purchasers have, which, in Beaufort River Development’s case, is millions of dollars.

Whether Hoyler intended to mislead Merry Land, Beaufort River Development, or anyone else is irrelevant. *See Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct. App. 1994). What matters is that he was silent. Due to his silence, some people built docks from land they already owned, and other people bought land to develop and obtained permits to build docks. Hoyler is therefore estopped by his silence from prohibiting those docks from being built.¹

¹ If Hoyler were found to have title, he might not be estopped from asserting title against a *future* purchaser of property adjacent to the marsh. *See Queen’s Grant II Horizontal Prop. Regime*, 368 S.C. at 359, 628 S.E.2d at 912 (distinguishing between prospective and retrospective relief in matters of estoppel). But the Court need not wade into those proverbial waters here, as this case only raises questions related to existing property owners.

B. Public policy supports requiring someone in Hoyler's position to assert his claim of title to marsh.

Applying estoppel in this situation is good public policy. Marshes are generally not privately owned, and the person in the best position to know that a particular piece of marsh is privately owned is its owner. The law already places a burden on an owner to speak when someone acts in a way contrary to his property rights. In the case of marshes, this rule makes particularly good sense: It is the rule most likely to protect property rights while preventing others from wasting resources building on property that someone else owns.

1. A purported owner of marsh is in the best position to make his claim known.

Multiple considerations favor requiring the person claiming to own the marsh to make that claim known. *First*, the person claiming to own the marsh has both knowledge of his claim and the incentive to make it known. This person is therefore in the best position to bear this legal burden.

Second, a third party may have a hard time discovering that marsh is privately owned. Consider the efforts of Merry Land in its due diligence, which are similar to those of other commercial developers. It engaged a local engineer, local attorney, and local real estate broker. It had people walk the property, do geotechnical surveys, and conduct an environmental study. It had a land planner lay out possible developments. It went through the public process for a docket permit. (App. 408–09.) Nowhere in that “extensive” process by “multiple professionals” did anyone uncover Hoyler’s claimed

ownership. (App. 32.) If this sophisticated landowner did not discover it, few purchasers likely would have.

Other things also cut against any indication the marsh had a private owner. For one, nothing in the marsh itself gave any indication that someone other than the State owned it. (App. 421–22.) For another, thirteen plats—all from after 1979—prepared by various surveyors did not show Hoyler’s claim. (App. 30, 651, 653, 655, 657, 659, 661, 663, 665, 667, 669, 671, 673, 675.) Nor did printed commercial maps of the paper records or then-existing GIS (or geographic information system) record show the marsh as privately owned.² (App. 31, 451–52.)

Third, forcing a third party to search for a potential private owner of marsh amounts to forcing that third party to prove a negative, given that this type of land is typically owned by the State. The third party would have to search all the records with the register of deeds to see whether anyone has ever claimed to own a particular piece of marsh, and then, upon finding none, take that as sufficient proof that no private owner exists.

Fourth, the rule that “silence or acquiescence will not work an estoppel when the party seeking estoppel has constructive notice of the public records that disclose the

² Newer developments might make the GIS database easier to use for determining owners of marshes (as happened here, when Merry Land uncovered Hoyler’s claim after it had closed on the property (App. 450)), but given the how much development has already occurred along the South Carolina coast before such updates occurred, the Court should give special consideration to the burden of identifying private owners of marshes before these improvements were made. Whether these changes require a different rule for marshes with no development on adjacent property is another question the Court can reserve for a future case.

true facts” makes little sense here. *S.C. Dep’t of Transp. v. Horry Cty.*, 391 S.C. 76, 84, 705 S.E.2d 21, 25 (2011). This rule was not conceived in this context, in which property in question is typically owned by the State. Without signs of ownership or the expectation that marsh is privately owned, someone may not have any indication that searching for a potential private owner is necessary. To require that someone always search for a marsh’s potential private owner drives up costs. And given the relative dearth of private owners of marsh, imposing that cost widely is inefficient.

These considerations are admittedly stronger *after* the first time a third party seeks to build a dock across marsh that is privately owned. A private owner of marsh might not ought to be required to monitor who is buying adjacent uplands and what those purchasers’ plans may be. (Yet when a permitting process for a dock is as “very public” as Merry Land’s was, such monitoring would not be hard. (App. 30.)) Thus, how to resolve a case between a claim of private ownership of marsh and the first person seeking to build on that marsh is a difficult question. But it is a question that can be decided in a later case.

Here, it is enough to hold that when a purported owner watches multiple structures be built across marsh without saying anything, that person is estopped from objecting to a person who obtained a permit to build a dock from building that dock. This rule protects the settled expectations of uplands owners who had no knowledge of marsh being privately owned. And it prevents the upheaval that would accompany a belated claim of ownership, after docks were built and other developments were already planned.

2. State law provides a way to assert ownership of marsh generally.

To assert his claim of ownership against third parties, a person in Hoyler's position could put up a "no trespassing" sign. He could find another way to signal the marsh was privately owned, such as a sign that said "Hoyler's Private Marsh." He could bring a trespass claim against a person trying to build a dock. Or he could simply assert his claim against the State, which (if he prevailed) would ensure no one could build a dock (or any other structure) across the marsh without his permission.

S.C. Code § 48-39-220 allows a person claiming title to marsh to bring a claim to determine his right "as against the State." S.C. Code § 48-39-220(A). The Attorney General must inform the Department of Health and Environmental Control of those claims and how they are resolved. *Id.* § 48-39-220(D). If the person's claim is successful, the Department of Health and Environmental Control may not allow anyone to obtain a permit for a dock without the owner's permission. *Id.* § 48-39-140(B)(4); *see also* S.C. Code Regs. 30-2(I)(4). By following this procedure, a person who owns marsh can effectively assert that interest, and a person interested in developing adjacent land and building a dock can do exactly what Merry Land did: not close on the land until it knows if a permit can be obtained.

The permissive, rather than mandatory, nature of § 48-39-220 is irrelevant in this circumstance. *See McIntyre v. Sec. Comm'r of S.C.*, 425 S.C. 439, 447, 823 S.E.2d 193, 197 (Ct. App. 2018) (observing that "may" is generally a permissive term). This section gives a person the option of whether to assert title to marsh "as against the State." S.C. Code § 48-39-220(A). It does not relieve a person of the obligation to assert

his claim against other private parties. This Court has long required one private party to assert its claim of title against another private party to avoid being estopped from doing so when he “sees another dealing with property in a manner inconsistent with his rights, and makes no objection.” *McClintic*, 228 S.C. at 383, 90 S.E.2d at 366.

Hoyler in fact tried to employ this procedure here after learning that Beaufort River Development’s predecessor had applied for a permit. He learned of this application process no later than June 2007, (*see* App. 58), but he did not bring a claim against the State under § 48-39-220 until November 2007, (*see* App. 57). And his challenge to this permit was only after three other docks had been built and Merry Land’s permit had been approved. In other words, it was far too late. For thirty years he had claimed to own this land, but he did not speak up, despite this process being available. *See* 1977 S.C. Acts No. 123, § 22. He is therefore estopped from objecting to Beaufort River Development’s permit to build a dock or the docks of anyone else in that same position.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,



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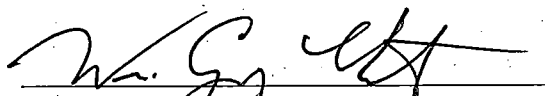
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CERTIFICATE OF COMPLIANCE

This Brief of *Amicus Curiae* complies with Rules 208(b) and 211, SCACR, as
required by Rule 213, SCACR.



Wm. Grayson Lambert

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CERTIFICATE OF SERVICE

This Brief of *Amicus Curiae* was served on all counsel of record via first class

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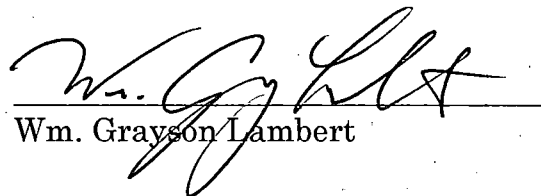
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