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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable Marvin H. Dukes, III, Master-in-Equity
Appellate Case No. 2019-001894
Case No. 2007-CP-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 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.....Defendants

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

RESPONDENT MERRY LAND PROPERTIES, LLC'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. Code Ann. §48-39-220 (Thomas Reuters West 2013).

S.C. Code Ann. §49-1-10 (Thomas Reuters West 2013).

S.C. Code Reg. §30-2(l) (Thomas Reuters West 2013).

Books, Learned Treatises, and Other Authority

1 Farnham on Waters, 130.

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

Melissa K. Scanlan, *Shifting Stands: A Meta-Theory for Public Access and Private Property Along the Coast*, 65 S.C. L.Rev. 295, 307-13 (2014)

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).

I. INTRODUCTION

Pursuant to Rule 242(f) of the *South Carolina Supreme Court Rules*, Respondent Merry Land Properties, LLC ("Merry Land") hereby submits the following Return to the Petition for Certiorari submitted by Petitioner H. Marshall Hoyler ("Hoyler").

II. RESPONSE TO PETITIONER'S ARGUMENT

STATEMENT OF FACTS

In the underlying action, Hoyler claims title to a parcel of marshland in Beaufort County, referred to here as the "Disputed Marsh". The Respondent, State of South Carolina ("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 ("Port Royal Property") seeking to construct a multi-family residential development with deep water access across and through the Disputed Marsh.

On November 8, 2007, Hoyler brought an 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 November 20, 2007.[2] Merry Land's interest was based on (a) its development plans for the Port Royal Property which adjoined the Disputed Marsh and (b) the issuance of two separate permits[3] which

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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. 61-71*).

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 ("USACE"), respectively. These permits will expire in May, 2021.

authorized construction of a community marina to facilitate deep water access via the Disputed Marsh. (*R. pp. 694-714*). 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 January 31, 2011. (*R. p. 166)*. During that hearing, the Master-in-Equity recognized there were approximately 36 additional abutting and/or adjoining landowners, including Merry Land, whose respective interests may be adversely affected by a judicial determination in the case.[4] The Master-in-Equity stopped the hearing and orally directed Hoyler 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, Hoyler appealed the joinder order. The Court of Appeals and this Court denied the appeal and returned the matter to the Master-in-Equity to consider Hoyler's still-pending reconsideration motion which was denied on February 15, 2013.[6]

Hoyler then filed two additional appeals seeking review of the Master-in-Equity's joinder order. The second appeal, filed on March 15, 2013, was dismissed by the Court of Appeals on the grounds that it was interlocutory and premature. Hoyler filed the third appeal while his second reconsideration motion was still pending before the Master-in-Equity. That appeal was dismissed on August 20, 2013, as was Hoyler's subsequent Petition for Rehearing. In 2015, three years after the Master-in-Equity issued the joinder

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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. 8-14*).

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

order, 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 hearing in this case on November 19, 2015.

After taking the matter under advisement, the Master-in-Equity issued a written order on May 27, 2016, denying 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 Hoyler relied upon to establish his predecessor's interest. Hoyler appealed this decision and the Court of Appeals affirmed the lower court. (*R. pp. 857-881*). A Petition for Rehearing was filed by Hoyler on August 23, 2019. (*R. pp. 882-898*). It was denied on October 17, 2019. (*R. pp. 940-942*).

STANDARD OF REVIEW

The nature of the underlying issue controls whether a suit is legal or equitable.[1] 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. Hoyler filed the original action giving rise to this case in accordance with S.C. Code Ann. § 48-39-220:

> **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

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

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 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.

In addition to the procedures of § 48-39-220, DHEC promulgated a regulatory process to address private claims of ownership of public tidelands. In accordance with S.C. Code Reg. 30-2(I) the following procedures are applicable:

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.
>
> (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 Section 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 R.30-2(l).

Though an action to quiet title is generally equitable, *id.*, "[t]he determination of title to real property is a legal issue."**8** When an action concerns title to real property, the action is at law.**9** Indeed, "[a]n action to determine ownership of tidelands pursuant to [S]ection 48-39-220 is an action at law."**10** A 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."**11**

Rule 242(b) of the South Carolina Appellate Court Rules enumerates five reasons for which the Supreme Court may grant a writ of certiorari. Hoyler's Petition presents six

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

9 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).

10 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).

11 State *ex rel.* Lyon, Atty. Gen. v. Columbia Water Power Co., *et al.* 82 S.C. 181, 63 S.E.884 (1909), citing Grant v. State, 395 S.C. 225, 717 S.E.2d 96 (2011) (emphasis added).

questions for review, all relating to Hoyler's singular premise that the Court of Appeals' decision is in direct conflict with prior decisions of the South Carolina Supreme Court. In short, Hoyler has not asserted any consideration or reason other than that stated in SCACR 242(b)(3) as the basis for his request for review. Hoyler has failed to establish the existence of any conflict between long-standing precedent in South Carolina adjudicating marsh ownership and the decisions of the lower court and the Court of Appeals.

A. ***There is No Conflict Between the Decision of the Lower Court and the Opinion of the Court of Appeals and Prior Decisions of this Court Regarding the State's Presumption of Title in Tidelands.***

Hoyler asserts the Court of Appeals misconstrued long-standing South Carolina law regarding the State's presumption of title in tidelands. As set forth in the Petition, Hoyler argues that due to a grant of the Disputed Marsh from the State, the State had a burden to show that it regained title to the tidelands.

Hoyler relies on State v. Evans.[12] Hoyler's reliance is misplaced. The issue in Evans was not the fact of a conveyance by the State, as Hoyler suggests, but rather, whether the transfer, made to the land commissioner as an individual, constituted a transfer to the State. As this Court emphasized "[i]n this case it will be observed that the plaintiff did not rest its claim upon its sovereignty, as in the cases of State v. Pacific Guano Co., 22 S.C. 50, and State v. Pinckney, *Id.* at 484, but, on the contrary, claimed as a purchaser the land which had been previously granted by the state. This being so, the state, like any other purchaser, was bound to establish its title before any recovery could

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12 State v. Evans, 33 S.C. 184, 11 S.E. 697 (1890).

be had."[13] The focus in Evans was on the State's claim that it had regained title to the land at issue by purchase from the grantee to the land commissioner. The "real question" recognized in the case was whether the purchase by the land commission reinvested title in the State.[14]

Hoyler's Petition provides no explanation or argument as to how the Court of Appeals erred in relying on State v. Pacific Guano Co.[15] and cases following it, which addressed the State's presumption of title in tidelands. State v. Pacific Guano Co. was specifically distinguished by the Court in Evans. As is noted by the Court of Appeals, South Carolina has long recognized and adopted the public trust doctrine with regard to tidal marsh. (*R. pp. 863-864*). This doctrine has been a vital part of the jurisprudence of South Carolina, as in many other states, for centuries, even pre-dating the beginning of "our republic." (*R. p. 864*).[16] "Historically, the State holds presumptive title to land below the high water mark. As stated by the Court in 1884, not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all citizens of this State."[17] When property is bounded by a tidal navigable waterway "the boundary line is the high water mark, in the absence of more specific language showing that it was

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13 State v. Evans, 33 S.C. at 184, 11 S.E at 697.

14 State v. Evans, 33 S.C. at 184, 11 S.E at 698.

15 State v. Pacific Guano Co., 22 S.C. 50 (1884).

16 *See* FN 10, citing McQueen v S.C. Coastal Council, 354 S.C. 142, 149-50, 580 S.E.2d 116, 119-20; Grant, 395 S.C. at 230-231, 7171 S.E.2d at 99-100; Query, 371 S.C. at 410-11, 639 S.E.2d at 46; *see also* State v. Pacific Guano Co.., 22 S.C. 50, 55-56 (1884); Commonwealth v. City of Roxbury, 75 Mass. 451, 478-79 (1857); Melissa K. Scanlan, *Shifting Stands: A Meta-Theory for Public Access and Private Property Along the Coast*, 65 S.C. L.Rev. 295, 307-13 (2014); 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).

17 McQueen v. S.C. Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003).

intended to go below the high water mark, and the portion between high and low water mark remains in the State in trust for the benefit of the public."[18] Following this precedent, the Court of Appeals correctly upheld the lower court's decision to consider the 1891 Plat as part of the Grant.[19]

B. ***There is No Conflict Between the Decision of the Lower Court and the Opinion of the Court of Appeals and Prior Decisions of this Court Regarding Interpretation of the Deed at Issue or Effectuating the Intent of the Grantor, Which Required Consideration of the 1891 Plat As A Component of the Grant.***

Hoyler asserts, in summary, that the State clearly *intended* to convey marshland to him, and that this alone is sufficient to convey title to the property in question. This does not follow South Carolina precedent, which has established two requirements for proving ownership of tidelands or marshlands: (1) showing that the claimant's predecessors in title possessed a valid grant, and (2) that the grant's language was sufficient to convey title to land below the high water mark.[20] The substance of the Petition makes clear Hoyler's misunderstanding that ownership in this case may be

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

19 In South Carolina, 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, Inc. v. McEachern, 272 S.C. 392, 252 S.E.2d 133 (S.C.1979), *citing* Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975); Lynch v. Lynch, 236 S.C. 612, 115 S.E.2d 301 (1960). Also, as set forth in Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 252 S.E.2d 133 (S.C.1979): "[T]he area between the usual high water line and the usual low water line remains in the State, unless there is '... specific language, either in the deed or on the plant, showing that it was intended to go below high water mark ...' State v. Hardee, 259 S.C. 535, 543, 193 S.E.2d 497, 500 (1972).

20 Lowcountry, 347 S.C. at 103, 552 S.E.2d at 782.

determined solely upon interpretation of the deed at issue only, without reference to the plat specifically referenced therein.**21**

The Court of Appeals correctly upheld the lower court's decision denying Hoyler's action to quiet title, which was not based on interpretation of the grant contained in the deed alone, but also on interpretation of the 1891 Plat, wherein the lower court found uncertainty in the boundary of the grant 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. 36, para. 41*).

This Court established the 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**

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21 *See* Petition, p. 11 (emphasis added); Hoyler's reference is to the State Grant dated July 28, 1891, in which the State of South Carolina ed property to Mr. James M. Crofut ("the 1891 Grant"). The 1891 Grant included reference to a plat dated April 19, 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. 261, l. 3-p. 262, l. 7*).

are any rules of law or public policy requiring a different conclusion.[22]

"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."[23] "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 discerned from the Deed as a whole, ***was to show the boundaries, metes, courses and distances*** of the property conveyed. ..."[24]

Accordingly, in this case, the lower court and the Court of Appeals appropriately considered applicable South Carolina law when the 1891 Plat was identified as part of the deed that, therefore, required consideration. It would contravene South Carolina law to disregard it. Moreover, it was appropriate to require a sufficiently full and definite description which identified the property to be conveyed, in order to find a valid conveyance of public trust tidelands. Due to the State's presumption of ownership, any deed from the State purporting to convey tidelands to a private individual must be strictly

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

23 Bennett v. Investors Title Ins. Co., 370 S.C. 578, 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 ...' ")).

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

construed against the grantee and in favor of the public. (*R. pp. 863-864*).**25** Regarding this point, it has been clarified that *the claimant must show the language of the conveyance to be 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. (*R. p. 865*).**26** To require otherwise would have directly contravened well-settled rules governing alienation of the public trust.

The case relied upon by Hoyler does not involve a plat referenced by a deed nor does the case address interpretation of a plat.**27** Hoyler cited 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 the Court of Appeals. Finally, Hoyler failed to note that Gardner v. Mozingo actually *supports* that the 1891 Plat must be considered to determine the grantor's intent in saying "...the deed must be construed *as a whole and effect given to every part if it can be done consistently with the law.*"**28**

In considering an action filed pursuant to S.C. Code Ann. § 48-39-220, this Court is guided by the principles of common law established in long-standing precedent. "Land lying between the usual high water mark and the usual low water mark on a navigable

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25 *See* FN 11, citing Query, 371 S.C. at 411, 639 S.C.2d at 456-57; *accord* Estate of Tenney, 393 S.C. at 106, 712 S.E.2d at 398 ("In areas subject to the public trust doctrine, presumption of State ownership 'may be overcome only by a showing of specific grant for the sovereign[,] which is strictly construed against the grantee.'" (quoting McQueen, 354 S.C. at 149 n.6, 580 S.E.2d at 119 n.6)); Grant, 395 S.C. at 229, 717 S.E.2d at 98.

26 *See* FN 14, citing 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 (noting that the lower court contrasted the plat to the disputed property with the precise plats in Hobonny Club and highlighting expert testimony stating that the 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 (emphasis added).

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

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

watercourse enjoys a unique status since it is held by the State in trust for public purposes. One asserting title to this land must prove a specific grant from the sovereign which is strictly construed against the grantee."[29] "Title to land between the high and low water marks remains in the State and is held in trust for the benefit of the public."[30] "Despite the special status accorded tidelands, the government, and specifically the King of England, had the power to grant, and did in fact grant, tidelands to subjects, who exercised private ownership."[31] "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."[32]

Additionally, as relates to an assertion of private ownership of navigable tributaries, South Carolina courts are bound to follow established legal principles set forth in State *ex rel.* Lyon, Atty. Gen. v. Columbia Water Power Co., *et al.*, 82 S.C. 181, 63 S.E. 884 (1909). "Navigable water is a public highway which the public is entitled to use for the purposes of travel either for business or pleasure. ... The public is entitled to the free, uninterrupted, and unobstructed use of every part of the stream from bank to bank and throughout the length of the channel, which at the ordinary stage of the water is of such depth and of such accessibility with respect to the current or main body of the stream as to be capable of navigation by boats, or of valuable floatage in connection with the main body of the stream, either up and down or across, or from the main stream on to any particular part in question, or thence on to the body of the stream and this whether such

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

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

31 State v. Holston Land Co., 272 S.C. 65, 68, 248 S.E.2d 922, 924 (1978).

32 Grant v. State, 395 S.C. 225, 717 S.E.2d 96, 98 (2011).

part has never been used, and whether there is any present or anticipated necessity for using it."[33] In accordance with S. C. Code Ann. § 49-1-10, "All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of all accidental obstructions and all navigable water courses 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 citizens of the United States, without any tax or impost therefor, unless such tax or impost be expressly provided for by the General Assembly."

Hoyler has not demonstrated valid reasoning or justification for this precedent to be ignored. Further, had Hoyler invoked the procedure outlined in S.C. Code Ann. § 48-39-220 at any point after 1979, when he acquired interest in the Disputed Marsh, both DHEC and the South Carolina Attorney General's office would have had a record of his ownership claim. Hoyler failed to do so, however, choosing to sleep on those rights until Merry Land contacted him regarding the Disputed Marsh. (*R. pp. 431, l. 20–p. 433, l. 20*). Before 2007, Merry Land had no way to know of 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. 420, l. 20–p. 421, l. 2; R. pp. 653, 657*).

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

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33 Quoting from 1 Farnham on Waters, 130.

available tax records, tax maps, deeds, and Beaufort County's GIS records. (*R. pp. 438-457*). 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. 300-338; R. pp. 649-679).*

C. ***There is No Conflict Between the Decision of the Lower Court and the Opinion of the Court of Appeals and Prior Decisions of this Court Regarding Resolution of Latent Ambiguities in a Deed.***

Here, again, Hoyler asserts the lower court and Court of Appeals inappropriately interpreted the deed and Grant at issue by giving due consideration to the 1891 Plat. Although Hoyler repeatedly restates a position that this was improper, he fails to justify his position or reference any legal authority to demonstrate why long-standing precedent, which clearly establishes the Plat at issue in this case to be part of the Grant, should be disregarded.

Hoyler further asserts that the lower court should not have admitted the testimony of Merry Land's surveyors because it "tended to create" an ambiguity that was absent upon consideration of the deed alone.**34** At the hearing, the first surveyor, Donald Cook, was presented by Merry Land 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.*

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34 *See* Petition, p. 16.

471, l. 14-17). These deficiencies materially impacted Mr. Cook's ability to replicate the parcel reflected in those two plats. (*R. p. 471*). 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. 472, l. 2-8*).

Merry Land then presented deposition testimony[35] of a second surveyor, Jim Gardner, the surveyor who initially analyzed the 1891 Plat and earlier plat at Merry Land's request.[36] Mr. Gardner indicated multiple areas of uncertainty and ambiguity on the 1891 Plat which impaired the ability to re-create the marsh parcel.

Hoyler misconstrues the evidence in the record for this case. Contrary to Hoyler's assertions, Merry Land's surveyors only *explained* ambiguities they perceived upon examination of the 1891 Plat. The surveyors did not "create" any ambiguities but rather, identified them. Hoyler's Petition fails to specify how anything was "created" by this testimony. He resorts to attacking admission of the testimony as cover for his lack of any rational explanation to justify disregarding the ambiguities themselves. This is clearly nothing more than an attempt at an end around Hoyler's actual problem – that the 1891

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35 With the Master-in-Equity's permission, Mr. Gardner's deposition was taken after the hearing and then presented for consideration.

36 Mr. Gardner was questioned regarding his qualifications and Appellant's counsel had no objection to Mr. Gardner testifying as an expert. (*R. p. 532 (page 4), l. 8-page 8, l. 5*). Mr. Gardner described the earlier plat as the source of the 1891 Plat, which he believed to be a copy. (*R. p. 534 (page 11), l. 23–page 12, l. 4*).

Plat was properly considered part of the Grant by the lower courts in accordance with established South Carolina precedent.

As the Court of Appeals noted, "[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." (*R. p. 869*). 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, under South Carolina law, became part of the deed. In other words, while the grant stated in the deed reflected the intent to convey, the 1891 Plat it referenced "effectively made the deed ambiguous," as the Appellate Court noted. (*R. p. 869*).

Hoyler failed to accurately quote applicable precedent which, when fully reproduced, easily distinguishes this case 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, not 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."**37**

Here, there was an ambiguity identified within the deed. Once the deed was determined to be ambiguous based on the 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. (*R. p. 869*).

D. ***There is No Conflict Between the Decision of the Lower Court and the Opinion of the Court of Appeals and the Use of Metes and Bounds Over***

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

Natural Monuments to Determine the Parcel Boundaries and Prior Decisions of this Court.

Hoyler claims the lower court should have relied on the natural monuments described in the deed to locate the boundaries of the Disputed Marsh. The Master-In-Equity's finding was that the Disputed Marsh could not be accurately located on the ground. The Master 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. (*R. p. 871*).

The lower court and the Court of Appeals appropriately considered the testimony of Merry Land's surveyors regarding the insufficiencies of the 1891 Plat, the Supreme Court's emphasis on mathematical certainty in Hobonny Club Inc., v. McEachern[38] 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.

In Hobonny Club, Inc. v. McEachern,[39] 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, this 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

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

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

> 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.**40**

The opinion continues on to conclude "these plats were incorporated into the grants and show with precision where the boundaries of the tracts conveyed lie."**41** Here, following this precedent, the Master-In-Equity found that the deed's "express reference to the 1891 Plat" and the plat's specific directions in bearings and distances overrode the use of natural monuments to fix the location of the Disputed Marsh, as Hoyler's expert chose to do. (*R. p. 871*).

The Master'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 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

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

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

> 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.**42**

Hoyler misunderstands South Carolina precedent regarding the rules for determining disputed boundaries. 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 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 the Court of Appeals noted, the lower court did consider the testimony of Hoyler's surveyor expert, but discounted it based on a conclusion that he 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. (*R. p. 871*).

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

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

E. ***The Decision of the Lower Court and the Opinion of the Court of Appeals, Which Consider the 1891 Plat as Part of the Grant, Do Not Conflict With Prior Decisions of this Court.***

Hoyler asserts the lower court and the Court of Appeals allowed the 1891 Plat to control over the grant, the implication being that the 1891 Plat should have been completely disregarded in favor of relying solely on the language of the grant as sufficient to convey the Disputed Marsh.

However, as is discussed in several of the foregoing sections, both the lower court and the Court of Appeals are bound by precedent 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, cited by Hoyler, since 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.**44** Specific examples discussed in Smith were a plat that indicated courses and distances which were the reverse of those described on the grant**45** and a distance stated on a plat as 65 which measured on the ground around 300.**46** 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 is nothing if not

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

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

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

consistent in again overlooking 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.

As is discussed herein, South Carolina law requires deeds to contain sufficient and specific description of land, *i.e.*, one that can be applied to the land with no discrepancies or inconsistencies, to be considered valid.[47] Hoyler suggests the grant in this case should be sustained, *i.e.*, considered valid, because all the experts testifying at trial could generally locate the parcel described in the deed. He further asserts that his expert was the only one asked to locate the parcel "as a person of ordinary prudence acting in good faith" would do it, and that his expert was able to close the plat and locate the parcel with little difficulty.

Here again, Hoyler has mischaracterized the experts' testimony. It is true that Hoyler's expert, Lorrick Fanning, claimed ability to locate the parcel. But, Hoyler neglected to explain that his expert did so by "re-creating" the boundaries of the 1891 Plat by using the 1882 Plat and mean high water and mean low water at its location in December, 2010. (*R. pp. 556-557; R. p. 287, l. 20-p. 289, l. 21*). His expert rejected the bearings and distances stated on the 1891 Plat for the eastern and western boundaries but did use bearings and distances to establish the northern and southern boundaries (*R. p. 367, l. 6-24*). And, Mr. Fanning admitted that he "manipulated" the location of the northern and southern boundary lines to get to 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

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[47] *See* section C, above.

> section that is described on this plat fit into the land section network. (*R. p. 289, l. 13-21; R. p. 344, l. 1-15* (emphasis added)).

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. 535 (page 17), l. 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. 536 (page 19), l. 20*). In other words, Mr. Gardner attempted to do the same task asked of Mr. Fanning with the same technology, *i.e.*, re-create the plat. Mr. Gardner's ultimate conclusion, however, was that the plat could not be closed. 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. 535 (page 15), line 23-page 16, line 3*).

This evidence was considered by the Master-In-Equity, who subsequently found Mr. Fanning's efforts of re-creation unreliable. The Court of Appeals indicated that it also considered the evidence presented by Mr. Fanning but agreed with the lower court's assessment of Fanning's testimony. (*R. p. 872*). While Hoyler may not agree with this assessment, the record confirms that both the lower court and the Court of Appeals considered the evidence presented by Mr. Fanning but determined Merry Land's experts to be more reliable.

III. CONCLUSION

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

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
DEC 27 2019
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable Marvin H. Dukes, III, Master-in-Equity
Appellate Case No. 2019-001894
Case No. 2007-CP-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 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.....Defendants

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

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I, Mary D. Shahid, Esq., hereby certify that on 20 December 2019, I served one copy each of the Return to Petition for Writ of Certiorari submitted by Respondent Merry Land Properties, LLC on counsel for the Petitioner and the Respondent via the United States Mail, postage pre-paid, and addressed as follows:

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27 December 2019