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

Case No. 2007-CP-07-00596

Patricia S. Tenney, ... Respondent,

v.

The South Carolina Department of Health
and Environmental Control, Office of
Ocean and Coastal Resource Management
and the State of South Carolina . . . . Appellants.

FINAL BRIEF OF APPELLANT STATE OF SOUTH CAROLINA

HENRY D. MCMASTER
Attorney General

J. EMORY SMITH,
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680

ATTORNEYS FOR THE STATE

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 5

ARGUMENT 7

SUMMARY 7

I. THE ISLANDS AT ISSUE ARE MARSH ISLANDS UNDER *COBURG V. LESSER* 8

A. *Coburg*'s Rule and Application Here 8

B. The Master Improperly Distinguished and Limited *Coburg* 9

1. *Coburg* applies to marsh islands along tidal rivers 9

2. *Coburg* is not limited by size 11

3. Coburg is not distinguishable on the basis of deeds 11

4. The Master erred in questioning *Coburg I*'s reliance on *McCullough v. Wall* 12

II. SECTION 15-3-380 DOES NOT APPLY AND FORTY YEARS OF TITLE CANNOT DEFEAT THE STATE'S PRESUMPTION OF OWNERSHIP 14

III. THE 1865 TAX SALE DOCUMENT DOES NOT GIVE RESPONDENT TITLE TO THE PROPERTY 15

IV. THE COURT ERRED IN ADDRESSING PERMITTING ISSUES 17

A. The Issues Are Not Before the Court 17

B. The Master Erred in Ruling that Respondent Has Satisfied the Regulatory Requirements for a Dock 18

CONCLUSION.....19

TABLE OF AUTHORITIES

CASES

All Saints Parish v. Protestant Episcopal Church, 358 S.C. 209, 595 S.E.2d 253 (Ct. App.,2004) 14

Coburg, Inc. v. Lesser, 309 S.C. 252, 422 S.E. 2d 96 (1992)(*Coburg I*) ..... 3, 7, *passim*

Coburg, Inc. v. Lesser, 318 S.C. 510, 458 S.E. 2d 547 (1995)(*Coburg II*) ..... 4, 7, *passim*

DeTreville v. Smalls, 98 U.S. 517 (1878) 15

Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 489 S.E.2d 223 (Ct. App.,1997).....14

Hobonny Club v. McEachern, 272 S.C. 392, 252 S.E. 2d 133 (1979) 9

Law v. South Carolina Dept. of Corrections, 368 S.C. 424, 629 S.E.2d 642 (2006).....17

McCullough v. Wall, 4 Rich. 68, 38 S.C. L. 68 (1850).....12

McQueen v. South Carolina Coastal Council, 354 S.C. 142, 580 S.E. 2d 116, 119 (2003) 9

State v. Hardee, 259 S.C. 535, 193 S.E. 2d 497, 499 (1972) 16

State v. Nichols, 161 Wash.2d 1, 162 P.3d 1122, 1123, n. 1 (2007) 6

State v. Pacific Guano Co., 22 S.C. 50, 86 (1884) 10

State v. Pinckney. 22 S.C. 484 (1885) 15

State v. Yelsen Land Co., Inc., 265 S.C. 78, 216 S.E.2d 876 (S.C. 1975) 14

Waters v. South Carolina Land Resources Conservation Com'n, 321 S.C. 219, 467 S.E.2d 913, 917 (1996) **17**

STATUTES

S.C. Code Ann §48-39-140 (Supp. 2008) 4, 16, 17

S.C. Code Ann. 15-3-380 (2005).....14

S.C. Code Ann. §15-3-380 (2005).....4

OTHER AUTHORITY

Black's Law Dictionary (8th ed. 2004), cf. 13

Black's, littoral 13

Merriam-Webster OnLine, http://www.merriam-webster.com/dictionary/situate 10

Ops. Atty Gen., December 9, 2003.....17

Rule 8, SCRCP.....13

Rule 8(b), SCRCP.....14

S.C. Code Ann. Vol 23 A, Reg. 30-2 (Supp. 2008).....4, 17, 18

STATEMENT OF ISSUES

1. Whether the island at issue in this case is "situate within marshland " and subject to the presumption of State ownership under *Coburg, Inc. v. Lesser*, 309 S.C. 252, 422 S.E. 2d 96 (1992)(*Coburg I*)? *See also Coburg, Inc. v. Lesser,* 318 S.C. 510, 458 S.E. 2d 547 (1995)(Coburg II).
2. Whether the Circuit Court improperly distinguished this case from *Coburg I and II* and attempted to limit those decisions?
3. Whether the Circuit Court improperly questioned *Coburg I*'s reliance on *McCullough v. Wall*, 4 Rich. 68, 38 S.C. L. 68 (1850), and whether that authority properly applies to *Coburg I*.
4. Whether the Circuit Court erred in ruling that forty years of record title can overcome the State's presumption of ownership under S.C. Code Ann. 15-3-380 (2005)?
5. Whether §15-3-380 was before the Circuit Court?
6. Whether §15-3-380 is applicable when Respondent has produced no grant to the property?
7. Whether the 1865 Tax sale document gives Respondent title to the property?
8. Whether a tax deed from the government such as the one at issue can overcome the State's presumption of ownership of tidelands property?
9. Whether the tax sale document at issue applies to the island at issue?
10. Whether permitting issues were before the Court including, but not limited to,

whether a sovereign grant may be required to satisfy §48-39-140 and Reg. 30-(2)(B)?

11. Whether the Master erred in ruling that Respondent was entitled to a permit when she has not overcome the State's presumption of ownership by proving that she had a grant to the property at issue?

STATEMENT OF THE CASE

By a Complaint dated February 27, 2007, Respondent brought this action to quiet title to Little Jack Rowe Island, an island in Beaufort County. R. v. 1, p. 51. In her Complaint, she also contended that she was entitled to an order declaring that Defendant South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM) must process her dock permit application for the island to conclusion. She alleged that OCRM and the State of South Carolina have denied her the equal protection of the laws. The State filed an Answer to the Complaint dated April 25, 2007, alleging, among other defenses, that it had presumptive title to the island and that Respondent's dock permit application had not been processed because she had not produced a sovereign grant for the property. R. v. 1, p. 69. The Respondent filed an Amended Complaint dated April 27, 2007, including laches and estoppel as allegations. R. v. 1, p. 83. The State answered the Amended Complaint by Answer dated May 11, 2007. R. v. 1, p. 95. The Defendant South Carolina Deparmtent of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM) filed an Answer to the Amended Complaint dated February 6, 2008. R. v. 1, p. 117.

Respondent filed a Motion for Summary Judgment dated September 20, 2007, contending that the State had no claim of title to the property at issue, that she was entitled to have her permit application processed, that failure to process the application denied her the equal protection of the laws and that equity required title to be quieted in her. R. v. 1, p. 123. The State submitted Exhibits in opposition to the Motion (R. v. 1, p. 128) and filed its own Motion for Summary Judgment dated January 31, 2008 (R. v. 1, p. 126), alleging, among other grounds, that the State had title to the property at issue, that Respondent had failed to exhaust administrative remedies, and that Respondent's claims were barred by the defense of ripeness. Following a hearing on February 6, 2008, by Order dated March 7, 2008, the Master denied the Motions for Summary Judgment of both Respondent and the State except that the Court ordered OCRM to complete processing of Respondent's application and to grant or deny the permit application. R. v. 1, p. 45.

The March 7 Order also granted the State's Motion to Amend its Answer. R. v. 1, p. 45. The State's Amended Answer to the Amended Complaint dated January 31, 2008, was filed on March 10, 2008, and including several additional affirmative defenses such as failure to exhaust administrative remedies and ripeness. R. v. 1, p. 106.

The trial in this case was held on May 13, 2008. R. v. 1, pp. 24 and 174. Oral argument was held on July 30, 2008. R. v. 1, p. 24 (Order, November 13, p. 1[1]).

The Court issued an Order dated November 13, 2008, granting judgment to the Respondent on grounds that Little Jack Rowe Island is not a marsh island under *Coburg, Inc.*

[1] Although this Order refers to the dates of May 12 and July 31, the parties believe that the actual dates were the 13th and the 30th.

v. Lesser, 309 S.C. 252, 422 S.E. 2d 96 (1992)(*Coburg I*) and *Coburg, Inc. v. Lesser*, 318 S.C. 510, 458 S.E. 2d 547 (1995)(Coburg II), that Respondent was entitled to have title to the island quieted in her under the forty year limitation statute, S.C. Code Ann. §15-3-380 (2005), that she had title pursuant to Federal tax certificate, and that she was qualified for a dock permit under §48-39-140 (Supp. 2008) and S.C. Code Ann. Vol 23 A, Reg. 30-2 (Supp. 2008). R. v. 1, p. 50. The Court found that Respondent had failed to show that the Appellants had denied her the equal protection of the laws. R. v. 1, pp. 41 and 44. The State received written notice by mail of the Judgment in Civil Case on December 1, 2008, and only emailed notice of the Order on November 13, 2008.

The State and OCRM each moved to Alter or Amend the Judgment on, respectively, December 4 and 9, 2008. R. v. 1, pp. 135 and 166 The State's Motion included as grounds issues related to those in the Statement of Issues herein (p. 1, *supra*). This Court issued an Order on January 26, 2008, in response to the Motions which substituted for the November 13, Order. R. v. 1, p. 1. The January Order made some modifications in the November Order, but still maintained the same grounds for its decision noted above as to the November 13, Order.

The Appellant State received written notice by email of the January 26 Order on January 28, 2009. The State served a Notice of Appeal by mail on February 24, 2009, as to the November and January Orders and the March Order. OCRM served a Notice of Appeal as to the January Order on February 25, 2008. The State served an Amended Notice of Appeal by mail on February 27, 2008 updating the caption and adding counsel for OCRM and phone numbers.

The Supreme Court denied the State's Motion for Certification of this appeal.

STATEMENT OF FACTS

This case is about the ownership of a 15.45 acre island in Beaufort County known as Little Jack Rowe Island. R. v. 2, pp. 312 and 316 (Pl. Exs. 3A, 3D). The island is bordered by marsh on more than three sides and the Cooper River on part of the fourth. R. v. 2, pp. 316 (Pl. Ex. 3D), 411 (Pl. Ex. 4), 443 (Pl. Ex. 7), and 524-526 (St. Exs. 1-3). Except for an adjacent island, Jack Rowe[2], Little Jack is more than a half mile from the nearest island or other land mass. R. v. 2, p. 524 (St. Ex. 1). The island has also been identified as Jack Crowe Island. R. v. 2, p. 411 (Pl. Ex. 4).

Respondent has not produced a grant of the sovereign to the Island so as to establish ownership. For ownership, she relies on a title chain going back to an 1865 tax sale document for "Savage Island" (R. v. 2, p. 354 (Pl. Ex. 3W)). Although some evidence and testimony was offered to attempt to show that Little Jack Rowe Island was at some point in time considered part of Savage, the more specific evidence shows Savage to be completely separate from Little Jack Rowe. R. v. 2, pp. 354 (Pl. Exs. 3W), 445 (Pl. Ex. 7(nautical chart)), 508 (Pl. Ex. 18), 523 (Pl. Ex. 30); Pl. Ex. 32 filed separately; v. 1, p. 157, l. 4 - p. 160, l. 4; p. 261, l. 15- p. 271, l. 26); note 3 *infra*. One of Respondent's attachments to her dock permit application shows Savage as a separate island. R. v. 2, p. 445 (Pl. Ex. 7, nautical chart). Plaintiff's Exhibit 30 (R. v. 2, p. 523) shows Savage to be a separate group

[2] Little Jack Rowe and Jack Rowe Islands are separate. *See* R. v. 1, pp. 2 and 3(Order pp. 2 & 3); R. v. 2, pp. 524 - 526 (St's Exs, 1-3), p. 414 (St.'s Ex. 6) & pp. 445 and 446 (Pl's Ex. 7 (plat and nautical chart)).

of islands about 1.75 - 3.5 miles to the northeast of Little Jack Rowe or "Jack Crow" with Hoophole Islands intervening. (conflicting scales are on the map, because they are combined (R. v. 1, p. 278, ll. 9 - 17)).[3] An 1808 survey (R. v. 2, p. 509 (Pl. Ex. 18)) shows a "Jack Island" (not Jack Rowe / Crow) separate from and near Savage and Hoophole Islands which appears to be consistent with the general location of those islands on Exhibit 30. R. v. 1, p. 215, l. 7 - p. 216, [unnmbered top line]).[4] Therefore, not only is the 1865 tax sale document not a grant from the State, it lacks sufficient clarity for the Court to determine that it conveyed the property in question.

Although the State objects to consideration of permitting issues because they are not properly before the Court, subject to those objections, the State notes that Respondent applied for a permit on September 7, 2005. R. v. 2, p. 443 (Pl. Ex. 7). That application

---

[3] One of Respondent's witnesses testified that a Mills Atlas photo in the Courthouse hall showed "Savage Island" as being bound by the Cooper River. The actual map is not in the Record, but this Court may take judicial notice of the Mills map. Courts routinely take judicial notice of maps. *State v. Nichols*, 161 Wash.2d 1, 162 P.3d 1122, 1123, n. 1 (2007) The Mills Atlas map of the Beaufort District shows an area as "Savage Islands" (emphasis added) extending over four miles from the May River to the Cooper River and nearly two miles wide. David Rumsley Collection, http://www.davidrumsey.com/luna/servlet/detail/ RUMSEY~8~1~23857~860024: Beaufort-District, -South-Carolina-- of Beaufort. The map's use of the plural is significant in describing Savage Islands because it refers to an area of marsh and small islands. The map does not even depict the island at issue which would comprise only 15 acres of a roughly eight square mile "Islands" area. When the 1865 tax sale document refers to "Savage Island" it does not clearly include the whole area encompassed by the Mills Atlas description and is more likely to refer to the separate Savage Island group shown on Exhibit 30. R. v. 2, p. 523.

[4] Also, at least one gap exists in the title chain to the 1865 Tax deed in that a Sheriff's deed to John Womack (R. v. 2, p. 350 (Pl. Ex. 3U)) lists the seller as unknown although the deed references the 1865 tax deed; however, Respondent's real estate expert testified that he did not consider the Sheriff's deed to be a title defect. R.v. 1, p. 191, ll. 19 - 26.

was denied because she failed to produce a sovereign grant to the island. R. v. 2, p. 456 (Pl. Ex. 8). DHEC has denied a Final Review Conference, and Respondent has appealed the denial to the Administrative Law Court where that appeal is still pending. R. v. 2, pp. 456, 527, 529 (Pl. Ex. 8; Def. Exs. 4 and 5).

Although the State raises on appeal issues regarding the Master's conclusions and findings regarding title to the island and Respondent's dock permit application, the State agrees with the Master's decision in favor of Appellants regarding equal protection. R. v. 1, pp. 19 & 23. The State also agrees with his allowing the State to amend its answer as set forth in the Master's March 7, 2008, Order. R. v. 1, p. 49.

ARGUMENT

SUMMARY

This Court set forth a simple rule in *Coburg I, supra,* which is that "ownership of islands situate within marshland follows ownership of the marshland." 422 S.E. 2d at 97. Because the State is the presumptive owner of the marsh, the State is the presumptive owner of islands situate within marshland. *See, Id.* and *Coburg II.* That presumption can be overcome by proof of a sovereign grant applicable to the property.

The *Coburg* rule clearly applies to the fifteen acre island at issue which is surrounded by marsh on more than three sides and tidal river part of the fourth. No other body of land is within a half mile of it except for an adjacent island. Therefore, to proove ownership, the Respondent is required to provide proof of a sovereign grant applicable to the island at issue, but she has failed to do so.

Rather than apply *Coburg*, and let the Appellate Courts determine if it should be narrowed or limited, the Master chose to narrow and limit the rule himself. He created exceptions not set forth in *Coburg* by ruling that *Coburg* did not apply to islands this large or islands bordering on tidal waterways. He questioned the authority on which *Coburg* relied. The Master had no authority to impose these limits on *Coburg* and question the underpinnings of that decision.

The Master also improperly addressed the question of whether the Respondent had met the property ownership requirements of Appellant OCRM. Respondent could bring a proceeding before the Administrative Law Court as to those requirements and has done so. The Master lacked the authority to make that determination in this proceeding

I.

THE ISLANDS AT ISSUE ARE MARSH ISLANDS UNDER *COBURG V. LESSER*

A.

Coburg's Rule and Application Here

As noted in the Summary, *supra*, (*Coburg I*) set forth a simple rule regarding ownership of marsh islands. "[O]wnership of islands situate within marshland follows ownership of the marshland." The Supreme Court reiterated this rule three years later in *Coburg II*, 458 S.E. 2d aat 548("Title to islands situate within marshland follows title to the marshland".). The Court did not define or limit marsh islands beyond this description of them as being islands "situate within marshland." The island at issue is a marsh island subject to this rule because it is situate in marshland as the aerials at State's exhibit 1- 3 so clearly demonstrate. R. v. 2, pp. 524 - 526.

This island is subject to presumptive State ownership because, under numerous decisions of the Supreme Court, the State is the presumptive owner of the marshland. Title to lands lying between the mean high water mark and mean low water mark is held by the State in trust for public purposes absent a grant from the State or the King of England. *See, eg., McQueen v. South Carolina Coastal Council,* 354 S.C. 142, 580 S.E. 2d 116, 119 (2003); *Hobonny Club v. McEachern*, 272 S.C. 392, 252 S.E. 2d 133 (1979). Because the State is the presumptive owner of the marsh, it is the presumptive owner of Little Jack Rowe island in that ownership of that marsh island follows ownership of the marsh.

B.

The Master Improperly Distinguished and Limited *Coburg*

The Master distinguished and limited *Coburg* on bases not indicated or authorized by the *Coburg* decisions. He lacked authority to do so and should be reversed. The instant case falls squarely within the *Coburg* cases and the opinions in those cases provide no basis for distinguishing the instant case.

1.

***Coburg* applies to marsh islands along tidal rivers**

The Court's Order[5] suggests that Little Jack Rowe Island is not "situate within marshland " for purposes of the *Coburg* decisions because it borders on a river on one side. R. v. 1, p. 1 . In fact, aerials of Little Jack Rowe shows that it barely touches the river and that more than 90 per cent of it borders on the marsh. R. v. 2, pp. 524 -526 (St. Exs. 1-3).

[5] Unless otherwise qualified or explained, all references in this brief to the Master's ruling or order are to his January, 2009, Order.

"Situate" means "having a site; located." *Merriam-Webster OnLine*, http://www.merriam-webster. com/dictionary/situate. "Within" means "in or into the interior: inside." *Id.* http://www.merriam-webster.com/ dictionary/within. These terms are inclusive of Little Jack Rowe when it is surrounded on more than three sides by marsh and a tidal waterway on part of the fourth side. The State is the owner of the beds of tidal rivers such as the Cooper River absent a statute conveying the property (*State v. Pacific Guano Co.*, 22 S.C. 50, 86 (1884)), and therefore owns the tidal marsh and river bottom on all four sides of Little Jack Rowe.

Moreover, this Court may judicial notice that the islands at issue in *Coburg* bordered on Wappoo Creek, which is part of the Intracoastal Waterway. R. v. 1, pp. 143, 145, 146 and 157 (March 31, 1991, Order of the Master, reversed on other grounds in *Coburg I*, pp 2, 4 & 5; Coburg Pl. Ex 32, attached as exhibit to Order). *Coburg II*' s Opinion also makes that location of the islands clear by stating that a permit had been issued "to build a walkway over the marsh to the larger island and from there to a floating dock on the creek." 458 S.E. 2d at 457. Therefore, the *Coburg* islands are situated similarly to the island at issue in the present case but are still "islands situate in marsh." Moreover, when the State is the owner of the river bottom and the presumptive owner of the marsh, it is the presumptive owner of the island to the same extent as if the island were surrounded by marsh on four sides.

2.

***Coburg* is not limited by size**

This Court erred in stating that the Coburg "appears to apply to the type of small marsh islands commonly referred to as 'hummocks'" and erred in limiting that decision on the basis of the size of the islands at issue. R. v. 1, pp. 15 and 22. *Coburg* contains no such limitations on the size of marsh islands[6] and does not even use the term hummock. *Coburg* does not contain any description of the size of the islands at issue in those cases other than characterizing them as "small" in *Coburg II.* Although the islands in *Coburg* appear to be smaller than Little Jack Rowe according to the scale of Exhibit 32 to the *Coburg* Order (R. v. 1, p. 157), that decision did not limit ownership to islands of any certain size and requires only that they be "situate within marshland. " *Coburg I*. Moreover, the plat of the islands and surrounding marsh in Coburg bears a strong resemblance to a plat of the island at issue in the instant case. Compare, Ex 32 (R. v. 1, p. 157), and Pl. Ex 7, 11/1/05 plat. (R, v. 2, p. 446).

3.

***Coburg* is not distinguishable on the basis of deeds**

The Master erroneously held that "there is no reference in *Coburg I and II* to a specific deed or history of record title for the two small islands . . ." at issue. R. v. 1, p. 13 (Order, p. 13). This statement of the Circuit Court is completely wrong. The *Coburg II* opinion shows that a title chain was in evidence by expressly stating that the "Coburg asserts ownership based on a 1967 deed which it traces back to a 1703 grant . . . ." , 458 S.E.

[6] Subject to the State's objection, Respondent's own Exhibit 10 (R. v. 2, p. 460 (Report p. 1)), a Department of Natural Resources "Hammock Island Report," shows that the acreage of Little Jack Rowe is well within the acreage range of "hammocks (=hummocks)" described in that Report.

2d at 548. Moreover, the 1991 Order states that "[t]he islands have been in Coburg's chain of title since at least 1843" and describes a lengthy title chain to the property. R. v. 1, p. 152 (Order, p. 11 ¶12).

The Order also erroneously states that "if Coburg dairy was in possession of a deed to the islands, it would not have had to resort to presumptive ownership based on its claim of ownership to the marsh. . . ." R. v. 1, p. 15. In order to establish ownership of the island, Coburg had to have a grant to the surrounding marsh to overcome the State's presumptive ownership. Because the Court found that the grant at issue did not convey marsh, Coburg was unable to overcome the State's presumption. *Coburg II.* Only a grant, not a deed, can overcome the State's presumptive ownership of tidelands property. *Coburg II*[7].

4.

The Master erred in questioning *Coburg I*'s reliance on *McCullough v. Wall*

The Master appeared to question *Coburg I*'s reliance on *McCullough v. Wall*, 4 Rich. 68, 38 S.C. L. 68 (1850), which addressed ownership of a rock island in a non-tidal river. *McCullough* held that "islands in rivers, like rocks (which are only small islands) fall under the same rules concerning ownership which apply to the soil covered by the river." That case determined that, unless otherwise granted or deeded, owners of land on each side of a non-tidal stream own the river bottom to the center of the river, and their ownership of islands in the stream follows accordingly.

[7] "[T]here is no evidence of specific language in the grant showing an intent to convey the land below the high water mark of Wappoo Creek. [footnote omitted] Title to the marshland therefore remained in the sovereign at the time of this conveyance. . .Title to islands situate within marshland follows title to the marshland." *Coburg II,* 458 S.E. 2d at 548.

Coburg's reliance on the ownership of the marsh to determine the ownership of islands therein is certainly consistent with *McCullough*' s reliance on the ownership of the river bottom to determine ownership of river islands. Accordingly, *Coburg* properly drew on *McCullough*'s authority. Moreover, *Coburg's* reference to *McCullough* was by "cf" which does not mean that the authority is an exact match. "As a citation signal, cf. directs the reader's attention to another authority or section of the work in which contrasting, analogous, or explanatory statements may be found." *Black's Law Dictionary* (8th ed. 2004), cf.

The Master said *McCullough*'s "rule of riparian ownership seems incongruous to the littoral environment adjacent to Little Jack Rowe Island." This statement is difficult to understand. "Littoral" means " [o]f or relating to the coast or shore of an ocean, sea, or lake." *Black's*, littoral. The environment in the instant case is the same as the environment in *Coburg* of islands situate in tidal marsh. No basis or authority exists for the Master to limit the *Coburg* decisions on the basis of *Coburg I'* s "cf" reference to *McCullough*. He also lacked authority to distinguish the tidelands authority cited in the *Coburg* decisions. *See,* R. v. 1, p. 14, n. 10. Only an Appellate Court has authority to limit the *Coburg* cases and the authority on which they rely.

II

SECTION 15-3-380 DOES NOT APPLY AND FORTY YEARS OF TITLE CANNOT DEFEAT THE STATE'S PRESUMPTION OF OWNERSHIP

The Master erroneously ruled that forty years of record title can overcome the State's presumption of ownership. The Court cites S.C. Code Ann. 15-3-380 (2005), but this statute was not pleaded as was required, and therefore, was not before the Court. *See* Rule 8,

SCRCP[8].

Moreover, §15-3-380 is inapplicable because Respondent has produced no grant to the property. A claim of possession cannot be made under this statute when no grant has been made of the island. *See, State v. Yelsen Land Co., Inc.,* 265 S.C. 78, 216 S.E.2d 876 (S.C. 1975). *Yelsen* held that the statute now codified as §15-3-380 did not bar the State's claim to tidelands because the grants at issue did not convey the tidelands in question. As stated in *Yelsen*, 216 S.E. 2d at 879:

> The possession, which [the defendants] assert to defeat the right of action of the State, is based upon the presumption of possession which follows the establishment of legal title. Since, as previously pointed out, the foregoing grants did not convey the tidelands in question, there could be no basis for appellants' claims of possession or the assertion of the bar of the statutes.

Similarly, the State is the presumptive owner of Little Jack Rowe Island under *Coburg* because it is the presumptive owner of the marsh, and Respondent has not produced a grant to that Island. Accordingly, as in *Yelsen*, "there could be no basis for [Respondent's] claims of possession or the assertion of the bar of the statutes." 216 S.E. 2d at 879.

III

THE 1865 TAX SALE DOCUMENT DOES NOT GIVE RESPONDENT TITLE TO THE PROPERTY

[8] The claim under this statute is similar to one of limitation (*Yelsen) or* one of adverse possession. *All Saints Parish v. Protestant Episcopal Church,* 358 S.C. 209, 595 S.E.2d 253 (Ct. App.,2004). When used by a defendant, adverse possession is an affirmative defense. *Getsinger v. Midlands Orthopaedic Profit Sharing Plan,* 327 S.C. 424, 489 S.E.2d 223 (Ct. App.,1997). A statute of limitations is also an affirmative defense. Rule 8(b), SCRCP. Affirmative defenses must be pleaded. Rule 8. Similarly, when Respondent was relying on this statute, the claim under this statute must have been pleaded in the Complaint.

A tax deed from the government cannot overcome the State's presumption of ownership of tidelands property. *See, State v. Pinckney*. 22 S.C. 484 (1885). Only a sovereign grant may overcome that presumption and no such grant has been produced. *Pinckney* recognized that, under the federal Direct Tax statutes, a tax certificate cannot convey land not subject to taxes. *See DeTreville v. Smalls*, 98 U.S. 517 (1878). The Court held that "[b]y the laws both of the United States and of this state ungranted vacant land is not taxable and therefore cannot be sold for taxes." Accordingly, *Pinckney* affirmed the State's ownership of marsh that a tax sale certificate had attempted to convey to an individual. The marsh in that case was vacant and nothing showed that the title of the State had been previously granted. As stated in *Pinckney*:

> If there is land within the descriptive boundaries that at the time of the sale belonged to the state, that land was not subject to taxes, and was not and could not, therefore, be conveyed by the certificate . . . . Therefore the marsh land, between low water and ordinary high water, was not conveyed by the certificate. If it has not been conveyed by the state, it is still the property of the state. Any other land within the description, that had not been conveyed by the state, was the property of the state at the date of the certificate, and was not, therefore conveyed by the certificate.

Little Jack Rowe Island belonged to the State at the time of the tax sale document and now because no grant from the State has been proved as to the property. Therefore, this land "was not and could not be conveyed by the certificate." *Pinckney.* Although the Master found that marsh islands were conveyed by the tax certificate in *Pinckney*, those islands were the subject of sovereign grants. The island at issue in the instant case is public trust property under *Coburg* and is not the subject of a grant that has been produced. Accordingly, under *Pinckney*, the island could not be conveyed by the tax sale document.

Even if, *arguendo,* the tax sale document were not barred by *Pinckney,* it does not

apply to Little Jack Rowe. The tax sale document was to Savage Island. Pl. Ex. 3W. As discussed in the Statement of Facts, although some evidence and testimony was offered to attempt to show that Little Jack Rowe Island was at some point in time considered part of Savage, the more specific evidence shows Savage to be completely separate from Little Jack Rowe. The 1865 document should be strictly construed in favor of the State, but even if, *arguendo*, such a construction is not required, the document is simply not clear enough to show a conveyance of a State owned island. *Cf. State v. Hardee,* 259 S.C. 535, 193 S.E. 2d 497, 499 (1972).[9]

IV

THE COURT ERRED IN ADDRESSING PERMITTING ISSUES

A

The Issues Are Not Before the Court

Although the Master acknowledged that the denial of Respondent's permit application was not before the Court, his Order nevertheless proceeds to discuss and opine on permitting including reaching a conclusion that Respondent had satisfied the legal requirements contained in §48-39-140 and Reg. 30-2 (Supp. 2008) for demonstrating ownership of the island at issue so as to qualify for a permit for a dock. To the extent that the Order addresses permitting, Respondent's permit application, and in particular, questions

[9] When State lands are at issue, the 1865 document should be held to the same standard of strict construction given to grants of land by the State even though it is not a State grant. Under that precedent, "[a] deed or grant by the State of South Carolina is construed strictly in favor of the State and general public and against the grantee. . ." *State v. Hardee*, supra, 193 S.E. 2d at 499. Under a strict construction or even if *arguendo,* such construction is not required, the 1865 document does not convey State land.

as to whether something less than proof of a sovereign grant will satisfy §48-39-140 and Reg. 30-(2)(B), these matters were not properly before the Master because permitting is not before the Court.

Respondent cannot complain in this proceeding about the permitting process when she has not exhausted the administrative remedies through that process. *See Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 629 S.E.2d 642 (2006). OCRM has denied Respondent's permit application, DHEC has denied a Final Review Conference, Respondent has appealed the denial to the Administrative Law Court, and that appeal is still pending. R. v. 2, p. 456 (Pl. Ex. 8), p. 411 (Def. Exs. 4), p. 412 (Def. Ex. 5). Therefore, the permitting issues were not before the Court when Respondent had not exhausted her administrative remedies. For the same reasons, this matter was not ripe for a decision as to permitting. *Waters v. South Carolina Land Resources Conservation Com'n*, 321 S.C. 219, 467 S.E.2d 913, 917 (1996).

B.

The Master Erred in Ruling that Respondent Has Satisfied the Regulatory Requirements for a Dock

The Master erred in ruling that Respondent had satisfied the legal requirements for a permit contained in §48-39-140 and Reg. 30-2. Regulation 30-2(B)(4) requires an applicant to provide a certified copy of the deed under which the applicant claims title. *See* also, §48-39-140(B)(4). The Regulation provides for the receipt of comment regarding the application and provides for a process for objections from adjoining critical area landowners. Reg. 30-2(E) and (I). *See* also, §43-39-140(B)(4). The State most certainly can assert ownership of the island against the application under the *Coburg* decisions. *See Ops. Atty*

Gen., December 5, 2003.

Obviously, an applicant cannot build a dock on property that he or she does not own. Respondent cannot build a dock on this island when she has not overcome the presumption of State ownership, and requesting proof of a grant for property that is the subject of a permit application is entirely proper and consistent with State law. *See, Ops. Atty Gen*. (December 5, 2003). When the island at issue is subject to a presumption of State ownership, Respondent cannot overcome that presumption by production of a deed without a grant. A grant is necessary to ensure that Respondent would not be building on property that she does not own. Respondent has failed to produce that grant and prove ownership. Therefore, she is not entitled to a permit.

OCRM's counsel stated that if Respondent is able to establish title to the property in this case, OCRM will issue her a permit. R. v. 1, p. 8 (Order, p. 8, citing R. v. 1, p. 174, l. 19 - p. 175, l. 8 (Tr. p. 20, l. 19- p. 21, l. 8)). Because the Master's Order is erroneous and is under appeal, Respondent has not yet established title.

CONCLUSION

The island in question falls squarely within the *Coburg* decisions and is subject to a presumption of State ownership. Respondent has failed to overcome that presumption because she has failed to produce a sovereign grant. The Master's Order does not avoid this result because the Master erred in trying to limit and distinguish the *Coburg* decisions and criticize their supporting authority. The 1865 Tax Sale document does not provide Respondent with title because it did not convey State marsh and islands. Section 15-3-380 also cannot benefit Respondent when she does not have a grant to the property. For these

reasons, as well as those set forth above, the Order of the Master should be reversed as to these issues.[10]

Respectfully submitted,

HENRY D. MCMASTER
Attorney General
J. EMORY SMITH, JR.
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680
By:_____

November 2, 2009

ATTORNEYS FOR THE APPELLANT STATE

[10] As noted *supra*, the State does agree with the Master's decision regarding equal protection and allowing amendment of the Complaint.