THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

J. Martin Harvey, Special Referee

Court of Appeals Case Tracking No. 2011193506
Circuit Court Case No. 2009-CP-25-245

William Jeff Weekley and Christopher L. Weekley, Sr.,.....Respondents,

v.

John Lance Weekley, Jr. and Marcus Earl Weekley, Sr.,.....Appellants.

PETITION FOR REHEARING OR REHEARING *EN BANC*
AND MEMORANDUM IN SUPPORT

Appellants hereby move and petition, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an Order granting rehearing or rehearing *en banc* in this case and submit the memorandum below in support of the same. Appellants respectfully submit that the Court may have overlooked or misapprehended certain points, as the following shows:

I. Appellants did challenge the special referee's acreage valuations, and the land abutting the swamp is worth more than the other land for more than just sentimental reasons.

The Court's opinion in this case gives as a basis for its result that "Appellants do not challenge [the special referee's] valuations placed on the acreage[,]" that "Appellants fail to assert that the referee erred in assigning property values or show that the land allotted to them is of less economic value than that allotted to Respondents[,]" and that "because there is no contention the referee failed to properly

divide the land itself based upon the economic value of the different acres . . . he properly partitioned the property in a manner that was fair and equitable to all the parties in spite of the fact that Appellants did not receive any property abutting the swamp." The Court further characterizes the value Appellants place on the land abutting the swamp as sentimental, apparently to the exclusion of Appellants' argument that the land abutting the swamp is the most valuable land on the property, period.

While Appellants certainly do place a high sentimental value on the land abutting the swamp, they also argued – and the record shows – that that land is the most valuable part of the property, in contravention of the findings of the special referee. Appellants were not required to say "These acres are worth $XXXX per acre, not $YYYY per acre" in order to challenge the special referee's valuations. No magic words were required to do so. See e.g. Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (issue was preserved even though defendant did not use the exact words "corpus delecti" in his request for directed verdict); In re: Robert D., 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000) *overruled on other grounds by* State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012) (although party did not specifically mention any constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation). As noted in Appellants' reply brief, in response to the Respondents' contention that "Appellants have not claimed that the division ordered by the Special Referee resulted in a greater value of property being awarded to Respondents than to Appellants" and that "[t]he respective values of the property awarded Appellants and Respondents has not been challenged[,]" Appellants pointed out that this contention is without support in the record or in

Appellants' brief. (Initial Brief of Respondents pp. 14, 16.) The Court has now made the same error that the Respondents did. As stated in Appellant's brief, "[t]he special referee's declaration that the agricultural fields are the most valuable land on the property is against the weight of the evidence and assumes that the land has a different highest and best use than that shown by the undisputed testimony of the Respondents' own expert." (Initial Brief of Appellants p. 9); (R. pp. 3, 4, 5, p. 42 ln. 3-4, 10-21.) This was the underpinning for the Special Referee's division, and it was unsupported by the preponderance of the evidence, which shows the swamp land is the most valuable. (R. pp. 3, 4, 5, p. 42 ln. 3-4, 10-21.)

Respondents' expert witness gave undisputed testimony that the highest and best use of the land involved in this case is for outdoor recreation, such as hunting and fishing. (R. p. 3, p. 42 ln. 10-21.) The parties' testimony was that outdoor recreation was what they used the land for. (R. p. 105 ln. 22-23, p. 113 ln. 3-16, p. 132 ln. 13-25, p. 133 ln. 1-3, p. 153 ln. 8-10, p. 155 ln. 9-10, p. 156 ln. 15-25, p. 157 ln. 1-7, p. 188 ln. 3-5.) The testimony was that it is the land abutting the Salkehatchie River swamp that is most attractive for hunting. (R. p. 156 ln. 15-25, p. 157 ln. 1-7.) Moreover, this Court can certainly take judicial notice that wild animals drink water and frequent places with water, making unpeopled areas near water generally good for hunting. See Rule 201, SCRE.

Much of the testimony and evidence concerned how the land with swamp access should be divided. (R. p. 68 ln. 2-9, p. 84 ln. 10-11, p. 156 ln. 15-25, p. 157 ln. 1-7, pp. 208-09, 249-50.) All the proposed divisions of the property allocated some portion of the land with swamp access to both "camps" of brothers. (R. pp. 208-09, 249-50.) In addition, Marcus testified that the land bordering the swamp is

just as valuable as the obviously valuable road frontage. (R. p. 156 ln. 22-24.) Its value was so apparent to the parties that Respondent Jeff Weekley testified to the importance of all parties being allocated some swamp access. (R. p. 84 ln. 5-11.)

All of this is noted in Appellant's initial brief. Appellants respectfully submit that this Court overlooked or misapprehended that Appellants did make the challenges and contentions that the Court, as a basis for its decision, stated that they did not make. This appears to have been material to the Court's decision, and this error warrants rehearing.

II. The Court takes too stringent a view of issue preservation.

The Court held that four of Appellants' issues on appeal were not preserved for review. This is too stringent a view of issue preservation, a doctrine that in its growing complexity and rigidity threatens to overtake both justice and reason in our judicial system.

A party need not use "magic words" in arguing an issue in order for it to be preserved for appellate review. See e.g. Toole, 260 S.C. at 240; Russell, 345 S.C. 128 (issue was preserved even though defendant did not use the exact words "corpus delecti" in his request for directed verdict); Robert D., 340 S.C. 12 (although party did not specifically mention any constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation).

This is particularly so in a partition action. Partition proceedings are not designed to produce wins and losses; rather, a partition in kind must be made fairly and impartially. S.C. Code Ann. § 15-61-50 (2005); Few v. Few, 242 S.C. 433, 441, 131 S.E.2d 248, 252 (1963). The result of a partition action must be fair to all parties, regardless even of whether they are in default. See S.C. Code Ann. §§ 15-61-50 and 15-61-100 (describing available relief in partition action in terms of fairness to all

parties, making no distinction as to whether parties in default). A partition action is not a traditional adversary proceeding. See Campbell v. Jordan, 382 S.C. 445, 455, 675 S.E.2d 801, 806 (Ct. App. 2009). As such, in partition cases there is often not much argument and much more presentation of testimony and evidence in a way that is outside the traditional adversary process. A partition action "is more precisely described a proceeding quasi in rem[.]" Id. The overarching purpose of a partition action is fair division of land or the proceeds of land. See Zimmerman, 618 S.E.2d at 901; Few, 242 S.C. at 441-42. An unfair division of property as part of a partition in kind requires reversal. See Few, 242 S.C. at 441-42; Pruitt v. Pruitt, 298 S.C. 411, 414, 380 S.E.2d 862, 864 (Ct. App. 1989). "Partition is an action in equity and, accordingly, the partition procedure must be fair and equitable to all parties of the action." Pruitt, 298 S.C. at 414. Our Supreme Court not long ago quoted a 1908 case with approval, stating that in "a partition case 'there is hardly any question in relation to property which [the appellate] Court may not determine incidentally for the purpose of doing complete justice[.]'" Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408, 413 (2011) (quoting Vaughan v. Lanford, 81 S.C. 282, 62 S.E. 316 (1908)). As the Supreme Court noted in Judy, "this rule is just and in accordance with the principle that, when all the parties and the property are before the court of equity, it will do full justice before releasing its hold." Id. at 414 (also quoting Vaughan, 81 S.C. at 289; internal quotation marks and quotation-related punctuation omitted).

With *de novo* factual review and the overarching principle of fairness to all parties in mind, our courts have taken, as they should, a liberal approach to issue preservation in partition cases. See, e.g., Vaughan, 81 S.C. at 289; Pruitt, 298 S.C. at 414-15. The Court in this case should have recognized that nature of the proceeding in determining whether issues were preserved. Our Supreme Court has noted that

"civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party" in the context of issue preservation. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772, 780 (2004). The Supreme Court recently remarked upon "the need to approach issue preservation rules with a practical eye and not in a rigid, hypertechnical manner." Herron v. Century BMW, Op. No. 26805 (S.C. Sup. Ct. re-filed Dec. 19, 2011) (Shearouse Adv. Sh. No. 45 at 18, 26).

In this partition case, applying issue preservation rules "in a rigid, hypertechnical manner" appears to be what happened. Id. This is against the weight of precedent and, if applied across the board, could prevent just results from being reached in the cases before this Court.

As noted in Appellants' reply brief, the issues subject of Appellants' appeal were raised to the Special Referee, who ruled on them. That is all that is required for issue preservation. Herron, (Shearouse Adv. Sh. No. 45 at 21, 22, 26); Elam, 602 S.E.2d at 779-80. They need not have been presented in any particular way. See e.g. Toole, 260 S.C. at 240; Russell, 345 S.C. 128 ; Robert D., 340 S.C. 12.

Appellants respectfully submit that this Court overlooked or misapprehended these principles and took to stringent a view of issue preservation in this case. Rehearing should be granted so that the Court may reach the merits of the issues.

III. This case may warrant an *en banc* rehearing.

An *en banc* rehearing "ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR. "[W]hile Rule 219 lists certain grounds on which rehearing *en banc* may be granted, it provides only that rehearing *en banc* '*ordinarily* will not be

ordered' except upon the listed grounds. Rule 219, SCACR (2007) (emphasis added). The Court of Appeals has discretion as to whether or not to accept rehearing[.]" Williamson v. Middleton, 383 S.C. 490, 494, 681 S.E.2d 867, 869 (2009).

This is an appropriate case for *en banc* rehearing. The issue preservation determinations at stake are critically important to this Court – and not just to maintain uniformity of decisions, but also to ensure that justice is done.

IV. This case may have been decided by the wrong panel of judges.

The Court's opinion states that it was decided by Judges Huff, Thomas, and Geathers. The undersigned begs the Court's forgiveness for his inability to remember with exactitude the panel of judges who heard oral argument in this case; however, to the best of his recollection, Chief Judge Few was on that panel. If the Court's decision was made by the wrong panel of judges, it would appear that rehearing is warranted for that reason.

WHEREFORE Appellants pray for an Order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

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May 30, 2013

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PROOF OF SERVICE

I certify that I served the foregoing petition for rehearing on counsel for the Respondent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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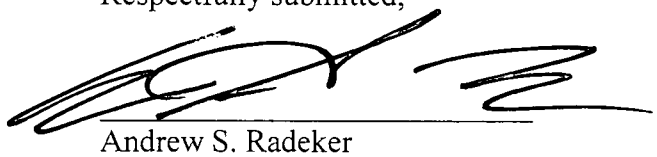
May 30, 2013

Respectfully submitted,



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May 30, 2013

VIA HAND DELIVERY
The Hon. Jenny Abbott Kitchings
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RE: William Jeff Weekley, et al. v. John Lance Weekley, Jr., et al.
Case No.: 2009-CP-25-245
Case Tracking No. 2011193506

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and seven copies of a petition for rehearing, with attached proof of service thereof. Also enclosed is this firm's check in the amount of $25.00 as the motion fee.

Kindly file these documents and return a file-stamped copy thereof to the bearer of this letter. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
HARRISON & RADEKER, P.A.

Andrew S. Radeker

ASR/

Enclosures

cc: Mary Dameron Milliken, Esq.
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