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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
HON. MARVIN H. DUKES
MASTER IN EQUITY

APPELLATE CASE # 2023-000438

GEORGIA HARRISON, BARBARA HARRISON, JOYCE ELLEN HARRISON, WILLIAM S. HARRISON, III, STANLEY ROBERTS AND DIANA MENDHEIM INDIVIDUALLY AND AS AGENT AND ATTORNEY IN FACT,

RESPONDENTS

vs.

STEPHANIE LORRAINE KIRKLAND, GARY LAMONT KIRKLAND, KIETA NICOLE WHITE, CHERYL KIRKLAND, WILLIAM CHARLES KIRKLAND, PAULETTE KIRKLAND, PAUL T. ALLBRIGHT, CHRISTOPHER KIRKLAND AND SHAWN KIRKLAND,

DEFENDANTS

OF WHOM STEPHANIE LORRAINE KIRKLAND, GARY LAMONT KIRKLAND, KEITA NICOLE WHITE AND CHERYL KIRKLAND,

APPELLANTS

MOTION TO SUBSSTITUTE AND /OR AMENDED APPELLANTS' INITIAL BRIEF

Appellants respectfully request this Court for leave to file its substitute Initial Brief to correct a technical error with submission of the document.

On June 20, 2023, Appellants' counsel timely filed Initial Brief. On the morning of June 21, 2023, counsel discovered he uploaded the wrong document and notified the clerk immediately. The substituted brief was provided to the clerk immediately and served on all parties on June 21, 2023.

Appellants now seek leave of the Court to file said substituted Initial Brief. A copy of the substituted Initial Brief is being submitted herewith as Exhibit 1. The only change between the submission of the substituted brief served on counsel for respondents and provided to the clerk of the Court on June 21, 2023 is the updated caption of the case in response to the Court's July 3, 2023 communication.

No prejudice will result to Respondents as Respondents received a copy of the correct Initial Brief on June 21, 2023.

WHEREFORE, Appellants respectfully request this Court to grant leave to file the substituted Initial Brief, or if the court prefers the substituted Initial Brief may be designated as the Amended Initial Brief of the Appellants.

. Respectfully submitted,

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July 5, 2023
Hilton Head Island, SC

STATE OF SOUTH CAROLINA
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PAUL T. ALLBRIGHT, CHRISTOPHER KIRKLAND AND
SHAWN KIRKLAND,

DEFENDANTS

OFWHOM STEPHANIELORRAINEKIRKLAND,
GARY LAMONT KIRKLAND, KEITA NICOLE WHITE AND
CHERYL KIRKLAND,

APPELLANTS

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF CASE

This is an action filed by the Respondents to quiet title filed under S.C. Code Ann. § 15-67-10 *et seq.* and to Partition the land by sale, pursuant to S.C. Code Ann. § 15-61-10 *et seq.* and to quiet title under the Pinckney Act (S.C. Code Ann. § 15-61-310, *et seq*.) The Summons and Complaint were filed on November 24, 2020, and the Complaint advised the court and the defendants in November of 2020, of a pending contract that had been entered into by the Respondents to sell the property at issue to Rotunda Land & Development Group, LLC, a Georgia limited liability company ("Rotunda") for $9,100,000.00. See the Affidavit of Andre Johnny White (the "White Affidavit") filed in support of the Respondents' Return to the Appellants' original Motion for Stay filed on March 28, 2022, and Exhibits A and B thereto.

The property at issue is a tract of approximately 26.462 acres located on the north end of Hilton Head Island in Beaufort County (the "Property"), which has been through two previous quiet title actions pursuant to South Carolina Rule of Civil Procedure 71 E. Given that this suit included a partition action, the Circuit Court was empowered to determine the title and interest in the real property of the several parties to the action. In response to the Complaint, counsel for some of the Appellants/Defendants filed an Answer on January 7, 2021. The Answer generically refers to Defendants but does not identify which Defendants the Answer is on behalf of or whether all named Defendants appeared as not all Defendants were served in the case. The case was then referred to the Beaufort County Master in Equity.

On May 21, 2021, counsel for the Plaintiffs and prior counsel for some Defendants presented what was styled as a joint Consent Order to the Court purportedly evidencing a written agreement between them that the Property is owned in indivision by the Plaintiffs, the represented Co-Owners, and the Defendants, and that Consent Order provided a detailed "Exhibit A" setting forth the mutually agreed upon undivided interest percentages of each party. The Master in Equity signed and filed the Consent Order on May 21, 2021. See Exhibit E to the White Affidavit. At that time, the Respondents owned an undivided approximately 99.192707 percent interest in the Property and the Appellants owned an undivided 0.807293 percent interest in the Property.

Once the partition portion of the case had been purportedly resolved by the May 21, 2021 consent order and all owners of the property specifically identified by percentage ownership, the parties and counsels moved forward under the (Clementa C. Pinckney Act) § 15-61-310 S. C. Code of Laws Ann. *et. seq.* to determine the fair market value of the 26.462 acres and on September 15, 2021, the court entered an order pursuant to § 15-61-360 B, S.C. Code Ann, establishing the fair market value of the 26.462 acres at $9,100,000 despite Respondents own acknowledgment that the only appraisal set the value at 9,756,100. *See* Plaintiffs Memorandum in Support of Motion to Set Fair Market Value dated August 30, 2021.

By Order dated October 20, 2021, the lower court established the fair market value of the property at $9,100,000 and required Defendants to pay $8,993,359.10 into the court by December 22, 2021. **(October 20, 2021 Order, p 4-5.)**

Appellants, pursuant to Rule 52(b), Rule 54(b), Rule 59 (a)(2) and (e), and Rule 60(b)(2), SCRCP, moved the lower to alter or amend the Orders of the court entered on January 20, 2022, October 20, 2021and May 21, 2021 in the following particulars:

> 1. To amend the findings of fact and conclusions of law or make new findings and conclusions and direct the entry of a new judgment in the case herein;
> 2. Request the court to reconsider matters properly encompassed in a decision on the merits;
> 3. To rule upon motions that have not been addressed upon the merits of the issues raised in this proceeding;

4. To set forth the court's findings, the reasons for those findings and conclusion of law;
5. To open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law;
6. Receive newly discovered evidence; and
7. Make new findings and conclusions and direct the entry of a new judgment.

On January 6, 2022, the Court heard Defendants' Motion for Relief & Extension of Time & Realignment of Heirs, and Defendants. Attached thereto was the transcript of said hearing in its entirety. **(Jan. 6, 2022 Tr. p. 15, line 15 – p. 16, line 18**). The Court specifically ruled during the January 6, 2022 hearing that the provisions of the October 20, 2021 order were unappealable because no motion for reconsideration was filed, such that the order of October 20, 2021 could not be modified. **(Jan. 6, 2022 Tr. p. 15, line 15 – p. 16, line 18**).

On January 20, 2022, the Court entered an order generally denying relief without making specific findings, rulings and conclusions of law as required by Rule 52(a), SCRCP, and without sufficiently addressing:

1. Defendants' Motion to modify the terms of the October 20, 2021 order. Additionally, the Court did not rule on Defendants' Motion for Relief of Judgment and for Extension of Time to Tender Purchase Price and Right of First Refusal filed December 22, 2021;
2. Defendants' Amended Supplemental Motion for Relief of Judgement and for extension of time to Tender Purchase Price under Right of First Refusal filed January 5, 2022; and
3. Defendants' Objections to Proposed Order filed January 11, 2022.

To the extent that the January 20, 2022 order addressed its inability to modify the October 20, 2021, it was in error. *See* Rule 54(b), *cited above.* Appellants' foregoing appeal includes an appeal of the orders of May 21, 2021 and October 22, 2021 orders, neither of which were appealable at the time they were issued but are now subject to appellate review (combined with an appeal from a final order) pursuant to S.C. Code Ann. §14-3-330(1), (2) and S.C. Code Ann. §14-3-330(3).

At the heart of this matter is a determination of how a court, in equity, may effectuate the purpose and intent of the Pinckney Act. As specifically set forth in Defendants' motion to the lower court dated December 22, 2022, and the hearing on January 6, 2022, Defendants within a 60-day window identified a partner to purchase the heir property and participate in the development of the property. The proposal Defendants put forth to the Plaintiffs put Plaintiffs in a better position than the contract Plaintiffs previously brought before the court. Additionally, defendants' developer partner has the financial wherewithal to quickly close on the purchase of the property once technical impediments are removed. **(May 15, 2023 Tr. p. 51, line 6 – p. 54, line 22**). Appellants requested specific finding of facts, conclusions of law and rulings of the Court set forth below.

> 1. The Plaintiffs' Complaint on its face admits that there are at least two un-probated estates, with unknown heirs, which have not been established to include persons who are or may be under some disability or a minor and

thus the Complaint is subject to being dismissed pursuant to SCRCP 12(b)(4).

2. There are at least four un-probated estates of heirs, two coming into existence since the Publication of the Summons and with unknown heirs, which have not been established to include persons who are or may be under some disability or a minor and thus the Complaint should be dismissed pursuant to SCRCP 12(b)(6).

3. Defendants sought a ruling that the Plaintiffs have failed to join necessary parties and, therefore, the Complaint should be dismissed pursuant to SCRCP 12(b)(7).

4. Defendants sought a finding of fact or ruling that an evidentiary hearing has not been provided to the Defendants, though requested and as required to receive evidence pertaining to their factual denials of Paragraphs 1, 2, 3, 4 11, 14, 15, 20 22, 26, 27 28, 29,30, and 31, of the Complaint.

5. Defendants sought a finding of fact and ruling by the Court that the Plaintiff's Complaint never requested the court to certify that the co-tenants be bestowed or endowed with the fee simple absolute title to the property subject to this action.

6. Defendants sought a finding of fact and ruling by the Court whether the title to the property subject to this action has been at all times from the commencement of this action and remains "Heirs Title" property.

7. Defendants sought a finding of fact and ruling by the Court that the present title status of the property does not meet the "marketable title standard as set forth in *Scalise Dev., Inc. v. Tidelands Investments., LLC,* 392 S.C. 27, 707 S.E.2d 440 (Ct. App. 2011). (Principle that to have the cloud on the title removed is to receive fee simple title to property. *Clark v. Hargrave*, 323 S.C. 84, 87, 473 S.E.2d 474, 476 (Ct. App. 1996). *May v. Jeter,* 245 S.C. 529, 534, 141 S.E.2d 655, 658 (1965)*, Major v. Penn Community. Services., Inc.,* 395 S.C. 175, 717 S.E.2d 70 (Ct. App. 2011)).

8. Defendants sought a finding of fact and ruling by the Court whether the contract tendered by Defendants in

which Defendants would maintain an equity participation in the development of the property is more consistent with the legislative goals and purposes of the Clementa Pinckney Act than the straight contract for purchase proffered by the Plaintiffs under which they would be bought out and then permanently removed from their heritage land.

9. Defendants sought a finding of fact and ruling by the Court whether that Defendants had demonstrated a sufficient showing of its capabilities and financial resources to fulfill the purchase of the property.

10. Defendants sought a finding of fact and ruling by the Court whether a deed of conveyance either with or without marketable title was in preparedness to be delivered to Defendants or their designee on December 23, 2021.

11. Defendants sought a finding of fact and ruling by the Court whether the Property was available to be mortgaged by Defendants on December 23, 2021.

12. Defendants sought a finding of fact and ruling by the Court whether a conflict of interest exist with counsel for the Plaintiffs who represents parties both in this action and in one or more of the open estates; (see Affidavit of Keita White) especially where the relief sought by their clients solely seeks to confirm the percentage ownership among the family heirs and not clear the title to the land knowing that without a marketable title and is unjust impediment has been created to prevent Defendants or their designee from purchasing the property.

13. Did the Court commit an abuse of discretion as a matter of law by not granting the Defendants request for 45 days to have a hearing to receive testimonial evidence to determine the heirs of the estates of the four deceased heirs and to tender the purchase price, with the Defendants depositing ten percent (10%) down with the court and also paying to the Plaintiffs the amount of 9.7 million in lieu of the appraisal price?

14. Did the Court commit an abuse of discretion as a matter of law by not granting the Defendants an extension of time to tender the purchase price in light of the fact that

> the Clementa C. Pinckney Act provides for a minimum of 60 days for heirs exercising their Right of First Refusal to complete the purchase especially where the 60 day period allotted to the Defendants is commercially impossible to achieve, especially considering the large purchase price and the cloudy title encumbered upon the property rendering it useless for loan collateral purposes?
> 15. Have the Defendants property rights under the provisions of Article 1 § 3 of the SC Constitution and the enumerated Amendments of the U.S. Constitution been infringed upon by having been denied due process of law and the equal protection of the laws in this proceeding?

On January 20, 2022**,** the Court denied Defendants' Motion for Relief of Judgment and for Extension of Time to Tender Purchase Price Under Right of First Refusal and Motion for Realignment of Parties filed on December 22, 2021.

Defendants filed a Motion for Reconsideration of January 20, 2022 Order, and the Court denied said motion by Order dated March 7, 2022.

On March 1, 2022, Defendants/Appellants filed a Notice of Appeal with South Carolina Court of Appeals regarding the Court's Orders of March 7, 2022, January 20, 2022, October 20, 2021, and September 15, 2021, designated as Appellate Case No. 2022-000277 ("Appeal 1"). On March 1, 2022, the Defendants filed an Amended Notice of Appeal.

Appellants filed a Motion to Stay with the South Carolina Court of Appeals. On June 23, 2022 the Appellate Court denied the Appellant's motion seeking an automatic stay intended to stay the sale of the Property. On November 1, 2022,

the Appellate Court denied the Appellants' petition for a supersedeas intended to block the sale of the Property pursuant to Court's Order dated October 20, 2021. Thereafter, the South Carolina Supreme Court, by its Order January 25, 2023 in Appellate Case No. 2022-001628, denied Appellants' motion for a writ of mandamus regarding stay of the sale of the Property.

Defendants/Appellants filed its Motion for a Stay and Waiver of Supersedeas Bond with the lower Court. On November 7, 2022, the lower Court denied said motion for a stay and waiver of supersedeas bond intended to block the sale of the Property. The November 7, 2022 Order authorized the execution of a Master's Deed conveying title to the Property. Defendants thereafter filed a Motion for Reconsideration of lower Court's November 7, 2022 Order. On March 8, 2023, the Court denied Defendants' Motion for Reconsideration of its Order of November 7, 2022.

On March 13, 2023, the Defendants filed the foregoing Notice of Appeal with the South Carolina Court of Appeals regarding the lower Court's Orders of November 7, 2022 and March 8, 2022.

On March 15, 2023, Appellants' First Appeal was dismissed by the South Carolina Court of Appeals, and that case was remitted to lower Court on April 5, 2023.

On April 5, 2023, the lower Court held a status conference. Plaintiffs petitioned the lower Court to issue a Master's Deed. Plaintiffs represented numerous times that they were prepared to close on the Rotunda contact (over Defendants' objection); however, the reality is that Plaintiffs are unable to close on the sale of the property without the Court's assistance to get marketable title. This is the same assurance and direction that the Defendants sought from the Court in December 2021. At that time, Defendants were advised by the Court that the Court was not prepared to take any action at all and that Defendants would receive only what Plaintiffs could transfer to them. (**See Transcript, January 6, 2023 at 37:12 – 38:11).** Now that Plaintiffs and Rotunda are attempting to secure title insurance, they, too, need assistance from the Court. Plaintiffs' counsel represented in status conference held April 5, 2023 that the Rotunda contract required the parties to close on April 21, 2023. **(See Transcript, April 5, 2023 at 10:17-21).** Defendants objected to Plaintiffs' proposed Master's Deed because it failed to acknowledge the pending appeal.[1] After the objection was raised, counsel for Plaintiffs and Rotunda questioned whether the title company would issue title insurance given the pending appeal. Rotunda is not prepared to close without marketable title to the Property.

[1] Defendants maintain that the Court's proposed entry of a Master's Deed for the Rotunda contract is improper and inconsistent with the law and spirit of the Pinkney Act.

Defendants have maintained throughout this litigation that they wish to purchase the Property and stand ready and capable to close immediately. Defendants secured funding to purchase the Property before December 22, 2021. However, Defendants must use, as collateral, the clear, fee simple title to the Property. Without having a clear, marketable title to the Property, Defendants have been prohibited from purchasing the Property. In essence, this litigation primarily requests that the lower Court clear title to the property by issuing a fee simple title to the Property. The lower Court has refused to issue an Order declaring the fee simple absolute title to the Property is vested in the parties to this action as tenants in common.

Defendants have been prepared to promptly deposit the full purchase price of the Property into the Court's registry and complete the purchase of the Property since December 22, 2022. Defendants thus respectfully requested that the lower Court enter an order renewing Defendants' right of first refusal to purchase the Property under S.C. Code Ann. § 15-61-310, *et seq*. (the "Pinckney Act").

On May 10, 2023, Plaintiffs uploaded its proposed Master's Deed which the lower Court instructed Plaintiffs to prepare on April 5, 2023 during status conference held by Court. The Court instructed Plaintiffs to provide a proposed Master's Deed in response to Plaintiffs' representation that sale of the Property could be accomplished by April 21, 2023 and for sure by May 1, 2023. Having failed to satisfy this timeframe, Defendants filed Motion to Renew Right of First Refusal.

Plaintiffs have maintained that Defendants' failure to post full purchase price with the Court without any clarification about how Defendants will get title to Property was fatal to their right of first refusal. If Defendants are held to strict deadline despite the Pinckney Act's intent to provide the heirs with purchase rights, Plaintiffs, too, must be judged by the same standard. Additionally, as set forth in Defendants' Motion to Reinstate Right of First Refusal, the pre-packaged contract with a third party – Rotunda Land and Development Corporation LLC ("Rotunda") is counter to the Pinckney Act.

On May 17, 2023, Plaintiffs tendered an amended Master's Deed to the undersigned counsel. Defendant's renewed their previous objections and additional objections to Plaintiff's May 17, 2023 amended Master's Deed. Defendants took the position that in the event the lower Court was not inclined to reinstate Defendants' right of first refusal, the Property must be sold on open market or via auction – not a prepackaged contract as Plaintiffs entered with Rotunda.

On May 24, 2023 and over the objection of Defendants, the Court entered a Master's Deed purportedly transferring Defendants' interest in the property. The Master's Deed fails to provide a deadline for Plaintiffs to close on the sale of the Property and essentially holds the Property in abeyance into perpetuity. This violates Defendants' due process rights and is an unlawful taking.

On June 6, 2023, the lower Court entered an order stating a follows:

> *Under South Carolina Appellate Court Rule 205, "Upon the service of the notice of the appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241." However, nothing in the Rules prohibits a lower court from proceeding with matters of the case not affected by the appeal, including enforcing matters not stayed by the appeal. SCACR 205 and 241. The Plaintiffs having filed their Notice of Appeal of my November 7, 2022 Order authorizing the closing of the sale of the real property, I respectfully find that this Court is without jurisdiction to now consider the Defendants' pending Amended Motion To Enforce Right Of First Refusal Under Pinckney Act And Alternative Relief.* **(June 6, 2023 Order**).

If the lower Court lacks jurisdiction to hear Defendants' request to reinstate its right of first refusal because the November 7, 2023 Order authorizing the closing of the sale of the Property is currently before this Court, the lower Court, likewise, lacks jurisdiction to enter a Master's Deed regarding the same Property.

To date, Plaintiffs have still not closed on the sale of the Property.

STANDARD OF REVIEW

An action to "Quiet Title" is an action in equity and the standard of review is "De Nova review as prescribed by *Article V, § 5* of the South Carolina Constitution. The reviewing court may make findings in accordance with its own view of the preponderance of the evidence. *Dean v. Kilgore* , 313 S.C. 257 , 437 S.E.2d 154 (Ct.App.1993).

A partition action is an action in equity and upon an appeal from an equitable action, this court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Doe v. Clark*, 318 S.C. 274, 457 S.E.2d 2nd 336 (1995).

When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. *Corley v. Ott* , 326 S.C. 89, 485 S.E.2d 97 and *Consignment Sales, LLC v. Tucker Oil Co.,* 391 S.C. 266, 705 S.E.2d 73 (Ct. App. 2010).

An issue regarding statutory interpretation (Clementa C. Pinckney Act "Right of First Refusal" is a question of law. *Jeter v. S.C. Dept. of Transp.*, 369 S.C. 433, 633 S.E.2d 143 (2006). In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464, (2006); *Hagood v. Sammerville*, 362 S.C. 191, 607 S.E.2d 707 (2005).

Fifth and Fourteenth Amendment and Article I § 3 violations under the SC Constitution in this case should be reviewed *de novo* pursuant to *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

ARGUMENT 1

SOUTH CAROLINA LAW DOES NOT ALLOW A PARTY TO AVOID STATUTORY JURISDICTIONAL PREREQUISITES REQUIRED BY S.C.

CODE ANN. § 15-61-310, *ET SEQ*. KNOWN AS THE CLEMENTE C PINCKNEY ACT BY SIMPLY ENTERING A CONSENT ORDER.

The Pinckney Act contemplates a trial will be set (§ 15-61-370(B) and states that cotenant shall have until ten days prior to trial setting to elect option to purchase property. Once valuation of the property is established, Plaintiffs were required to serve all co-tenants, this relates to even cotenants who have not made an appearance in the case. § 15-61-370(A). The Pinckney Act even contemplates that a cotenant in default still has the ability to purchase the heir property. No service by publication occurred prior to the court's order purporting to quiet title. Months after the purported quieting of title, the court ordered publication. See Affidavit of Maria Belbus Parker, individual designated by the court to procure publication in October 20, 2021 order. Ms. Parker sets forth that publication was made on October 25, 2021 and November 8, 2021. Defendants seek a ruling that the court's May 21, 2021 Order is void, set aside and of no further effect.

Here there were multiple prerequisite jurisdictional requirements that were not satisfied. *First*, the personal representatives or administrators of the four open estates of deceased heirs were not served in the action. *Second*, a Lis Pendens was not filed. *Third*, there was no publication of process made on unknown parties prior to the entry of the consent order. *Fourth*, a Guardians *Ad Litem* had been appointed to represent the interests of unknown heirs, persons under disability, miners or a person is serving in the armed forces of the United States. *Fifth*, no notice signs were erected

or placed upon the property (the type used by Counties to notify the public that a tax lien has been placed upon the property) to notify all persons, especially adjoining land owners, that an action to quiet title to the property had been commenced. S.C. Code § 15-61-340. A corollary to this would be *Sixth*, failure to join adjacent landowners in the action to eliminate or address any issues pertaining to the correct boundaries to the property. *Seventh*, an evidentiary hearing as required by §15-61-330 which is the prerequisite before a final order can be rendered has not been held.

§ 15- 61 – 330 reads as follows:

> *In an action to partition real property under Article 1, upon motion of a party or from statements contained in the pleadings, the court shall determine, in a preliminary hearing held after the filing of the action, whether the property is heirs' property.* ***If the court determines that the property is heirs' property, the partition of the heirs' property is governed by the provisions of this article, unless all cotenants otherwise agree in a record.*** (Emphasis added)

The Defendants made the court and parties aware of this deficiency by formal motion (*See Defendants Motion for Instructions*) and repeatedly at the Conference Hearings *(Transcripts)* The lower court erred in proceeding with purported quieting of title while at least four open probate matters were pending related to heirs to subject *property?* It is undisputed by Respondent that at least three estates were pending related to deceased heirs of subject property. When there are pending probate matters, the probate court has subject matter jurisdiction related to partition of property. *Byrd v. Johnson*, 417 S.C. 474, 790 S.E. 2d 200 (Ct. App. 2016).

While it is true that all co-tenants can agree as to the determination of heirs, the court lacked evidence before it at the time May 21, 2021 order was issued that no other parties held a claim to subject property. (§ 15-61-330)(c) ("Preliminary hearing is required unless all cotenants agree in a record.")

The May 21, 2021 Order is void for failure to submit proof of all co-tenants in agreement as to representations regarding heirs to subject property. Upon a court's determination that subject property is heirs property, the court is required to order notice by publication ten (10) days after court determines subject property is heir property ("If the property is determined "heirs property" at the hearing per § 15-61-330.) Publication of process was not made prior to the first hearing as required by S.C. Code § 15-61-340. These are prerequisites necessary to bestow jurisdiction upon the court to enable it to preside over all claims pertaining to the partition action. This jurisdictional defect is not cured by the issuance of an Order for Publication after joinder of the pleadings, though a late publication is better than none at all the jurisdictional defect remains intact. There was error therefore by the Master in Equity by denying Appellants' Rule 12(b) SCRCP Motion to Dismiss for lack of jurisdiction and Rule 19 SCRCP Motion to Dismiss on grounds of non-joinder of necessary parties.

The purported order to quiet title dated May 21, 2021 void for failure of court to require notice of pending matter via publication prior to purported quieting of title

when record at the time order entered lacked evidence of service of Defendant Heirs Stephanie Kirkland and Gary Lamont Kirkland.(See Index)

Prior to entry of May 21, 2021 Order, Respondents failed to serve all defendants. Pursuant to Affidavit of Non-Service on Stephanie Kirkland, dated January 1, 2021, Summons for Stephanie Kirkland and Complaint for Quiet Title were placed in the hands of process server Anabela Pinto on November 25, 2020. Attempts to serve were made on November 27 and 28, 2020. On January 21, 2021, said process server filed the foregoing Affidavit of Non-Service. No affidavit regarding service (or attempts to serve) Defendant Gary Lamont Kirkland is present in the court's docket. To the extent that the October 22, 2021 order stated there had been a revocation of a power of attorney, how can the order be valid without the filing of the revocation of power of attorney and a determination of the validity of the revocation of the power of attorney?

The three estates with interest in the Property are opened in the probate court for Beaufort County. Additionally, the court failed to permit Appellants an evidentiary hearing, though requested and as required to receive evidence pertaining to their factual denials of Paragraphs 1, 2, 3, 4 11, 14, 15, 20 22, 26, 27 28, 29,30, and 31, of the Complaint and thus making the court's May 21, 2021 Consent Order void and of no further effect. **(Def. Jan. 31, 2022 Motion for Reconsideration, p 5.)**

Further, the court failed to issue a finding of fact and ruling regarding whether the title to the property subject to this action has been at all times from the commencement of this action been and remains "Heirs Title" property. **(Def. Jan. 31, 2022 Motion for Reconsideration, p6.)**

Here the Respondents failed to join necessary parties and, therefore, the Complaint should be dismissed pursuant to SCRCP 12(b)(7). **(Def. Jan. 31, 2022 Motion for Reconsideration, p 3.)**

The docket lacks any evidence of the establishment of heirs related to the pending probate matters referenced in the Complaint and no publication was perfected prior to the Consent Order and the Order of October 20. 2021.

When statutory jurisdictional prerequisites are not complied with, subsequent orders of the court retain no validity and become null and void for lack of subject matter jurisdiction.

ARGUMENT 2

THE ORDER OF THE COURT DATED OCTOBER 20, 2021 WAS NOT A FINAL ORDER WHEN (1) A PROVISION WITHIN THE ORDER CALLED FOR THE PUBLICATION OF THE SUMMONS AND COMPLAINT (2) THE FORM 4 ORDER SHEET ACCOMPANIED ITS FILING DID NOT STATE THAT THE ORDER ENDED THE CASE AND (3) WHERE THE COMPLAINT STATED A CAUSE OF ACTION TO QUIET TITLE THAT HAD NOT BEEN PROSECUTORIAL DEVELOPED AND WAS NEVER WITHDRAWN AND THE DEFENDANTS ANSWERED AND PARTICIPATED IN THE ACTION RELYING UPON THE RELIEF BEING GRANTED AS PRAYED FOR IN THE COMPLAINT AND (4) THE ORDER AS WRITTEN CONCLUDED THE PROCEEDING WITHOUT EVER HAVING THE PREREQUISITE

EVIDENTIARY HEARING REQUIRED UNDER THE PROVISIONS OF THE PINCKNEY ACT.

There are numerous reasons why this order was not a final order as Rule 54(b) SCRCP specifically provides that "*any order. . . however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . is subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of all the parties."*

a. This was not a Consent Order as the Defendants filed a response in opposition to the provisions in its proposed order form.

(Response in Opposition)

b. The Order was not raised by motion as required by *Rule 7(b)* (1) SCRCP and the filing fee of $25.00 paid to the Clerk of Court as required by *§ 8-21-320 S.C. Code Ann*. as amended, effective July 1, 2002, by H4431, R470, which requires a filing fee of $25 for all motions in a Court of Common Pleas and Family Court unless exempted under the Order of the South Carolina Supreme Court dated June 26, 2002 that allows for the waiver of the fee only when forma pauperis has been granted under Rule 3(c) SCRCP that is not present in this instance.

RULE 7, reads as follows:

PLEADINGS ALLOWED: FORM OF MOTIONS: Motions and Other Papers.

(1). An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

c. The October 20, 2021 Order is not a final order as a provision in the Order required that the publication of the Summons and Complaint be made to give prospective notice of the proceeding to unknown heirs, minors, persons under disability and those who may be in the Military Services; of their right to appear in the action and state their claims upon the property.

d. An evidentiary hearing as required by *§15 –61–330* which is the prerequisite before a final order can be rendered has not been held. § 15-61 – 330 reads as follows:

i. In an action to partition real property under Article 1, upon motion of a party or from statements contained in the pleadings, the court shall determine, in a preliminary hearing held after the filing of the action, whether the property is heirs' property. If the court determines that the property is heirs' property, the partition of

the heirs' property is governed by the provisions of this article, unless all cotenants otherwise agree in a record.

ii. This Article supplements the provisions of Article 1 and if the provisions of this Article differ from the provisions of Article 1, the provisions of this Article control for partitions of heirs' property.

e. The order of October 20, 2021 is not a final order or judgment as a judgment that determines what law is applicable but leaves questions of fact unsettled is not a final judgment for appeal purposes. *Watson v. Underwood,* 407 S.C. 443 756 S.E. 2d 1 55.

ARGUMENT 3

AN OXYMORON OF MEANING EXISTS TO CLASSIFY THE ORDER OF THE COURT DATED OCTOBER 20, 2021 AS A FINAL ORDER WHEN (1) THIS ORDER IS NOT A FINAL ORDER AS A PROVISION IN THE ORDER REQUIRED THAT THE PUBLICATION OF THE SUMMONS AND COMPLAINT BE MADE TO GIVE PROSPECTIVE NOTICE OF THE PROCEEDING TO UNKNOWN HEIRS, MINORS AND PRESENT THEIR CLAIMS, PERSONS UNDER DISABILITY AND THOSE WHO MAY BE IN THE MILITARY SERVICES; OF THEIR RIGHT TO APPEAR IN THE ACTION AND STATE THEIR CLAIMS UPON THE PROPERTY; (2) NO FORM FOR ORDER ACCOMPANIED ITS FILING STATING THAT THE ORDER ENDED THE CASE AND (3) WHERE THE COMPLAINT STATED A CAUSE OF ACTION TO QUIET TITLE HAD BEEN BROUGHT AND WAS NEVER WITHDRAWN AND FOR THE DEFENDANT ANSWERED AND PARTICIPATED IN THE ACTION RELYING UPON THE RELIEF BEING GRANTED AS PRAYED FOR IN THE COMPLAINT AND (4) THE ORDER CONCLUDING THE PROCEEDING WITHOUT HAVING AN PREREQUISITE EVIDENTIARY HEARING.

Here is how this is an oxymoron. The Court was correct in asserting that it lacked jurisdiction to hear the Appellants' Motion for Reconsideration and other relief for lack of jurisdiction by the court but lacked jurisdiction for reasoning different from that articulated by the court. The court was stating that it lacked jurisdiction because a Rule 59 SCRCP motion is required to be filed within ten days next from the filing of the "Final Order," (Order of October 20, 2021) which the appellant did not do. The Appellants' position is that the court at the time it issued the "Final Order" did not have jurisdiction to issue the Order for the reasons set forth supra (Argument 1) and the action should be dismissed for lack of subject matter jurisdiction. But assuming *arguendo* that the Court had retained jurisdiction of the action, was its Order of October 20, 2021 the Final Order of the case.

The Appellants' position is that the Final Order of the Court was yet to come. The ultimate relief sought in this case was to "quiet title" to the property. A final order would rule upon this issue. This order would more accurately be classified as an interlocutory order.

The Court had not issued a finding of fact and ruling regarding whether the title to the property subject to this action has been at all times from the commencement of this action been and remains "Heirs Title" property. A jurisdictional requirement under the Pinckney Act. **(Def. Jan. 31, 2022 Motion for Reconsideration, p6).**

Ordinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits. *Weil v. Weil*, 299 S.C. 84, 382 S.E.2d 471 (Ct. App. 1989) *and Shelley's Iron Works, Inc, v. City of Union*, 403 S.C. 560, 743 S.E. 2d 778 (2013).

ARGUMENT 4

THE COURT ERRED IN RULING THAT THE TEN (10) DAY FILING RESTRICTIONS IMPOSED UPON RULE 59 SCRCP MOTIONS THAT IT LACKED JURISDICTION TO HEAR THE DEFENDANTS MOTION BROUGHT UNDER RULE 59 AND 60 SCRCP IN RESPONSE TO THE ORDER OF OCTOBER 20, 2021, AND THE REVIEWING COURT MAY NOW CONDUCT A DE *NOVA* REVIEW OF THESE MATTERS SET FORTH IN THE MOTIONS.

The pivotal or most significant point that determines this question is whether the October 20, 2021, order was a final order. Appellants have shown in their prior Arguments (supra) that this order do not qualify as a final order that would jettison the application of the Rule 59, SCRCP, 10 day jurisdictional filing restriction. In any event, the court should have heard Appellants' Rule 60 SCRCP motion, and the issues raised in the Rule 59 SCRCP motion as a Rule 60, SCRCP motion.

ARGUMENT 5

THE JUDICIAL DOCTRINE OF *STARE DECISIS* AND THE FIFTH AND FOURTEENTH AMENDMENTS OF THE US CONSTITUTION AND THE PROVISION GUARANTEE OF EQUAL PROTECTION CLAUSE TO THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1

§ 3 OF THE SC CONSTITUTION PROHIBITION AGAINST THE TAKING OF PROPERTY WITHOUT DUE COMPENSATION WOULD PROHIBIT THE MASTER IN EQUITY FROM WITHHOLD CONVEYANCE OF THE PROPERTY WHEN THE DEFENDANTS WERE IN THE PROCESS OF EXERCISING THEIR "RIGHT OF FIRST REFUSAL AND AFTERWARDS AGREE TO CONVEY THE LAND TO FACILITATE THE PLAINTIFFS PURPORTED CONTRACT OF SALE.

The Court objected to a Master's Deed for the proposed sale of the property when the Defendants were attempting to exercise their Right of First Refusal. (Tr.) The court would now, by the principle of *Stare Decisis* , be precluded from taking an opposite position, especially where the Court is aware that a Master's Deed for the property subject to this action cannot convey fee simple marketable title and for the same reason did not grant the Defendant's request for a Master's Deed. Additionally, for the Court to grant this relief to the Plaintiffs while having previously denied it to the Defendants would constitute an inequity and impinge upon the Defendants constitutional right for the equal application and equal protection of the laws administered by the Court. It would be a travesty of justice and judicial bias for the Court to grant the issuance of a Master's Deed.

SECOND: Without an order decreeing the fee simple title on the property, the only title the court could convey would be a quit-claim deed that would not be commercially acceptable.

THIRD: That to issue a Master's Deed would be in violation of Rule 71, SCRCP. This rule states that "Prior to the filing of the master's report or final order

of judgment, the judge or master shall assure that the plaintiff and all other claimants have complied with the statutes pertaining to the filing of notices of Lis pendens." The Plaintiffs have not filed a Lis Pendens in this action that would constitute both a procedural and jurisdictional defect.

FOURTH: That required and indispensable parties have not been joined in this action that constitutes another jurisdictional defect. There are Four (4) non probated estates of deceased persons possessing an undivided interest in the property subject to this action in violation of Rule 71(d)(1), SCRCP. This rule states the following: Parties to Partition Actions. In addition to the requirements of these rules for the joinder in an action of all parties in interest, pursuant to Rule 17(f) no partition of real property of a deceased person shall be had unless the legal representative or representatives of such deceased person be made parties to the action and it be made to appear to the court that the debts of such deceased person are fully paid or that the personal estate in the hands of the personal representative or representatives is sufficient for the payment of the debts of such deceased person. Likewise, the adjoining land owners have not been joined as parties to this action. There being made parties is mandatory and compulsive to provide the court with a factual basis upon which to rule that the boundaries of the property are correct.

If the partition action involves real property of a deceased person whose estate has not been administered or is not being administered at the time of the bringing of

the action, then all known encumbrancers of the estate of the deceased person shall be made parties to the action and no decree in partition shall be entered unless due provision is made for the payment of the debts found due such encumbrancers. In all actions for partition, all heirs at law or devisees of the deceased person shall likewise be made parties. The Plaintiffs who commenced and prosecuted this action have failed to do this which constitutes a personal jurisdictional defect in this proceeding.

FIFTH: Another jurisdictional defect falls under Rule 71(e). This Rule states the following: Actions When Title Is at Issue. In foreclosure or partition actions when title to real property is at issue the court or master to whom the action is referred shall take testimony and receive evidence as to the title and interest in the premises of the several parties. In all such actions the judge or master shall ascertain the rights and interests of the several parties and set forth in the report or order of judgment the conveyances or probate estates, if any, through which the rights or interests were acquired. The Plaintiffs have failed to convene and the Court "Sua Sponte" has not held an evidentiary hearing pursuant to *§ 15-61-330* in this proceeding to come into compliance with the provisions of this rule.

SIXTH: It would be an injustice perpetrated upon our citizenry for the Court to convey the property by Master's Deed as many would misconstrue a Masters' deed equivalent to a warrant deed that conveys marketable title. Additionally, the completion of an action to quiet title, not as it is in the present case, infers that all

the clouds, imperfections and impediments upon the title have been removed and what remains is the naked unencumbered fee simple absolute marketable title.

A perfect example of this is the prior action to quiet title to this same tract of land. (See Case # 2008-CP-07-0452.) In this case the Master in Equity in his *Final Order* of the case stated the following; "*I now conclude as a matter of law: a) The property which is the subject of this action is now owned in fee simple absolute by the following persons, having the respective ownership shares as outlined below:"* (Order of the Court)

ARGUMENT 6

AN UNCONSCIONABLE REQUIREMENT IMPOSED BY COURT IN ORDER TO EXERCISE RIGHT OF FIRST REFUSAL IS A VIOLATION OF DEFENDANTS' DUE PROCESS RIGHTS

The terms issued by the court to the defendants to deposit $8.9 million dollars with the court in order to exercise their right of first refusal is so outrageously unconscionable by their terms by these terms that it effectively eliminated the defendants exercise of their right of first refusal as provided by the Clemente C Pinckney Act constitute an unlawful deprivation of property rights as provided by Article 3 tit. 1 § three of the South Carolina Constitution.

An order setting forth unconscionable conditions is a denial of due process of law and in this case unreasonably effectuated the denial to the defendants of exercising their right of first refusal to buy the property from the petitioning heirs.

Unconscionability is defined as unfair or oppressive to one party in a way that suggests abuses during its formation, a court may find it unconscionable and refuse to enforce it. A contract is most likely to be found unconscionable if both unfair bargaining and unfair substantive terms are shown. An absence of meaningful choice by the disadvantaged party is often used to prove unfair bargaining. § 37 - 5 – 108 Code of Laws of South Carolina and *Holler v. Holler*, 364 S.C. 256, 612 S,E, 2d 469 (Ct. App 2005), *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37, (Ct. App. 2013). This was done despite the defendants demonstrating to the court that they had the financial resources to pay the purchase price of Nine Million.

The Pinckney Act defines "manifest Prejudice" or "manifest injury" as " a result that is obviously unfair or shocking to the conscience and is direct, obvious, and observable when considering the factors under § 15-61-390(A). Manifest injustice may be shown by enumerating the unreasonable risk for the Appellants to have deposited 8.9 million dollars with the court, especially where the Appellants produced adequate evidence of their financial capability to purchase the property; save only, that the court have decreed the fee simple title upon it.

The court was in error and abused its discretion as a matter of law, when setting the conditions for the defendants to exercise their "Right of First Refusal" as provided under § 15-61-35 of the Clementa C. Pinckney Act by requiring Defendants to deposit with the clerk of court the sum of 8.9 Million Dollars, within 60 days next

to the order dated October 21, 2021 into an non-interest bearing account under the conditions where no provision was made in the order as to when they would receive a deed, and if so; would it be a warranty deed and what entity or person(s) would make the conveyance and would the deposit be refundable and/or applied to the purchase price.

ARGUMENT 7

IF COURT GRANTS PARTITION BY SALE OF HEIR PROPERTY, PROPERY MUST BE SOLD ON OPEN MARKET, SEALED BID OR AUCTION, NOT BY A PRE-PACKAGED CONTRACT.

The Pinckney Act provides that upon filing a petition for partition of real property owned by joint tenants or tenants in common, the court shall provide for non-petitioning joint tenants or tenants in common[2] who are interested in purchasing the property to notify the court of that interest no later than ten days prior to the date set for the trial of the case; a joint tenant or tenant in common that properly notifies the court prior to the deadline "must be allowed to purchase the interests of any cotenant who requested a partition by sale…" S.C. Code Ann. §§ 15-61-330(A); 15-61-370(B). In other words, non-petitioning joint tenants or tenants in common have a right of first refusal to purchase subject property. The purchase price for the interests of a cotenant that requested a partition by sale is the value of the entire

[2] For purposes of the Pinckney Act, heirs and devisees are included within the definition of joint tenants and tenants in common. S.C. Code Ann. § 15-61-25.

parcel determined by the Court pursuant to § 15-61-360 multiplied by the cotenant's fractional ownership of the entire parcel. S.C. Code Ann. § 15-61-370(C).

If a joint tenant or tenant in common elects to buy all interests of its cotenants that requested partition by sale, the court shall notify the petitioning party of that fact; the petitioning party then shall notify all other parties of that same fact. S.C. Code Ann. § 15-61-370(D). Once notices are properly sent, the court shall set a date, not sooner than sixty days after the date the notice was sent, by which purchasing joint tenants or tenants in common must pay their apportioned price into the registry of the court. S.C. Code Ann. § 15-61-370(E). If apportioned amounts are properly and timely paid, the court shall issue an order reallocating the interests and disbursing the amounts held by the court to the persons entitled to them. *Id*.

After receiving the Notice, Defendants/Appellants worked in good faith to secure the purchase of the Property, despite the fact that Plaintiff disregarded Defendants' right of first refusal and had already entered into an agreement to sell the Property to Rotunda. Because the Pinckney Act expressly allows the Court to grant the Defendants more than sixty days to put forth the funds to purchase the Property, and because of the complexity and value of the Property, Defendants requested a longer time period than sixty days to deposit the funds in accordance with the statute to complete due diligence. That request was denied. Defendants were able to secure full funding for the Property's purchase by December 22, 2021, but

requested the Court issue a marketable, clear title to the Property in order for Defendants to put forth the Property as collateral. That request was also denied. Defendants have put forth their best efforts in comporting with the Pinckney Act. The Pinckney Act's right of first refusal was promulgated so that properties, such as the Property, could remain in the interest of its cotenants if cotenants so chose. The intent to give cotenants an opportunity to maintain their interests in properties is particularly imperative here with the Property remaining one of the last undeveloped areas of this size and value on Hilton Head Island.

Additionally, Plaintiffs maintained throughout the litigation that it would be impractical for it to honor Defendants' right of first refusal under the Pinckney Act given the advanced stage of the deal with Rotunda. However, any resulting damage to Plaintiffs or Rotunda in the Court's honoring of Defendants' right of first refusal under the Pinckney Act is directly because of Plaintiffs' own failure to notify Defendants of their intent to sell the Property until almost a year after commencing this suit and because Plaintiffs prematurely entered into the contract with Rotunda before honoring Defendants' right of first refusal under Pinckney Act. Additionally, Plaintiff concedes that the Court's November 7, 2022 Order does not require that the sale be to Rotunda.[3] Furthermore, Rotunda cannot close on the Property despite

[3] See Transcript, April 5, 2023 status conference at 23:9-24 ("Mr. Taylor: Your Honor, your order of November 7th authorizes partition of the property by sale, it does not restrict it to Rotunda. And, in fact, Rotunda is technically not a party to this action. What it authorizes is the prevailing plaintiffs to move forward with the partition by sale. And,

numerous times representing that it was prepared to close immediately. Plaintiffs' and Defendants' interests are aligned in completing the sale of the Property; Plaintiffs want to sell and Defendants want to buy at the fair price.

Additionally, the spirit of the Pinckney Act provides that cotenants may have up until ten days prior to the trial setting to elect to purchase the subject property. S.C. Code Ann. § 15-61-370(B). Defendants have expressed their intent to purchase the Property well before trial in this lawsuit. If Defendants had slightly more time, as allowed by statute, to complete the minimal due diligence as a condition to secure funding for the purchase of the Property, and if the Court had issued marketable title to the Property, Plaintiffs would have had no choice but to terminate the Rotunda contract, pursuant to the Pinckney Act right of first refusal, the deal with Rotunda and sell the Property to Defendants anyway.

Because Defendants complied with all Pinckney Act notice requirements in expressing Defendants' good faith intent to purchase the Property; because the Pinckney Act's purpose is to allow cotenants the right to purchase other cotenants' interests as a right of first refusal; because Defendants are prepared to purchase the Property; and because any harm to Plaintiffs as a result of the Court's honoring of

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quite candidly, ***we would not be restricted to Rotunda***, but we certainly in all good faith are representing to the Court that's exactly who we're closing it to, it's simply a new entity that has been created by the assignment, which we'll be glad to provide. (Emphasis added)

Defendants' right of first refusal results from Plaintiffs' own premature entry of an agreement to sell the Property to a third party, Defendants respectfully request that this Court reinstate their rights under the Pinckney Act to purchase the Property.

If the Court does not reinstate Defendants' right of first refusal, the proper protocol is for the Court to order an open-market sale or action. According to Pinkney Act (S.C. Code §15-61-400(A)), "If the court orders a sale of heirs' property, ***the sale must be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group."*** (*emphasis added*).

The Master in Equity exceeded jurisdictional authority by issuing a Master's Deed conveying the defendants interest in the property against their consent is not in compliance with and violative of S.C. Code § 15-61-400.

This statue reads as follows:

Section 15-61-400 - Sale of heirs' property; open-market sale; sale by sealed bids

(A) *If the court orders a sale of heirs' property, the sale must be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group*

(B) *If the court orders an open-market sale and the parties, not later than thirty days after the entry of the order, agree on a real estate broker licensed in this State to offer the*

property for sale, the court, upon consultation with the parties, shall appoint the broker and establish a reasonable commission. If the parties do not agree on a broker, the court shall appoint a disinterested real estate broker licensed in this State to offer the property for sale and shall establish a reasonable commission. The broker shall offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.

(C) *If a broker appointed under subsection (B) obtains within a reasonable time an offer to purchase the property for at least the determination of value:**(1)** the broker shall comply with the reporting requirements in Section 15-61-410;**(2)** the sale may be completed in accordance with state law other than this article; and**(3)** the commission of the real estate broker must be paid from the proceeds of the sale.*

(D) *If the broker appointed under subsection (B) does not obtain within a reasonable time an offer to purchase the property for at least the determination of value, the court, after a hearing, may*

(1) *approve the highest outstanding offer, if any;*

(2) *redetermine the value of the property and order that the property continue to be offered for an additional time; or*

(3) *order that the property be sold by sealed bids or at an auction.*

(E) *If the court orders a sale by sealed bids or an auction, the court shall set terms and conditions of the sale. If the court orders an auction, the auction must be conducted pursuant to procedures governing judicial sales and auctions.*

(F) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled to a credit against the price in an amount equal to the purchaser's share of the proceeds. that requires a public sale or auction.

As this statute plainly sets forth without any ambiguity or exceptions, in the absence of an agreement among all the parties in interest, a Master's Deed for sale of the property directly to a third party is not contemplated or permitted nor is there in existence any other statute that authorizes a sale of property subject to partition by a Master's Deed. The Pinckney Act is exclusive within its provisions.

The Master in Equity was in error ruling over the vehement objections of the Appellants by ordering the property to be sold to Rotunda with the Master in Equity facilitating this transaction by the issuance of a Master's Deed conveying the Appellants interest in the property to Rotunda.

Rather than an open-market sale, the Plaintiffs brought in a premature contract to sale the Property. Plaintiffs cannot circumvent the Pinckney Act by prematurely entering into a contract with Rotunda prior to filing suit and prior to Defendants being appraised of their right of first refusal. If the court orders an open-market sale, the parties are first tasked with trying to jointly agree upon a broker. S.C. Code §15-61-400(B). If the parties cannot agree on a broker within thirty days after entry of order, ". . .the court shall appoint a disinterested real estate broker licensed in this State to offer the property for sale and shall establish a reasonable commission." S.C. Code §15-61-400(B).

"If the court orders a sale by sealed bids or an auction, the court shall set terms and conditions of the sale." S.C. Code §15-61-400(E). The auction must be conducted in accordance with procedures governing judicial sales and auctions. S.C. Code §15-61-400(E).

In the event the court does not reinstate Defendants' right of first refusal and proceeds with an order to sale the Property, the proper protocol is to order either an open-market sale, sealed bid or auction. Defendants exercised their right of first refusal and should have first opportunity to purchase the Property pursuant to the Pinckney Act and other South Carolina law governing the exercise of rights of first refusal.

ARGUMENT 8

THE DEPRIVATION OF DEFENDANT'S RIGHT OF FIRST REFUSAL IS A DEPRIVATION OF A PROPERTY RIGHT AND AMOUNTS TO A DUE PROCESS VIOLATION AND VIOLATION OF EQUAL PROTECTION UNDER THE LAW

The underlying action for Partition, Quiet Title and Sale is state action whereby the Master in Equity, an official of the State of South Carolina, issued a Master's Deed to partitioning heir to the detriment of Appellants property right. The Court's conveyance of the Master's Deed to facilitate Respondents purchase and sale agreement with Rotunda amounts to a wrongful taking of property rights and is violative of the due process of law and equal protection of the law provisions of

Article 1 Sections 3 and 13 of the SC Constitution and the Fifth and Fourteenth Amendment of the U.S. Constitution and 42 U.S.C. § 1983?

In an action for Partition, Quiet Title and Sale, the Master in Equity presiding with the powers of a Circuit Court Judge bestowed to that state office under S.C. code §14-11-10-310, whether within or without the jurisdictional powers granted to that state office, did by tendered Master's Deed, convey the property interest held by the Appellants, a group of Black indigenous natives of Hilton Head Island, SC without their consent and under their expressed opposition, to Rotunda LLC, a Georgia Company, whom they never had contract with, contrary to law. This act by the Master in Equity constitutes "State Action" used to facilitate the wrongful taking of property rights. This action is indeed violative of the due process of law and the equal protection of the law provisions of Article 1 Sections 3 and 13 of the SC Constitution and the Fifth and Fourteenth Amendment of the U.S. Constitution and also codified as U.S. Code § 1983.

THE STATE ACTION IS WRONGFUL

Assuming, arguendo that the Master in Equity had acquired jurisdiction, **(**Appellant will set forth the facts and reasons that the Master in Equity was without jurisdiction supplemented by erroneous rulings of error**)** the Master in Equity, did not follow the statutory requirements of the Pinckney Act, namely S.C. Code §15-16-400 that requires an open market sale. The sole and only authorized

power legislatively granted to a Master in Equity to sell property in connection with foreclosure proceedings and in all other proceedings solely with the consent of the parties. S.C. Code§ 14-11-160.

THE APPELLANTS HAVE LOST A PROPERTY RIGHT

The property is encumbered with" heirs title." The action below was instituted for the purposes of Partition, Quiet Title, and Sale. By a denial of due process, the proceeding was terminated by the Master in Equity without continuing the proceeding to obtain a decree of fee simple marketable title. Instead, the Master in Equity, after setting unconscionable terms for the non-petitioning Appellants to exercise their "right of first refusal" by depositing 9.1 Million Dollars with the court within 60 days without benefit of receiving a Master's Deed despite their proffering sound proof of financial resources to complete the purchase deprived Appellants of property rights. When the Appellants did not meet these conditions, the Master in Equity subsequently ordered that the partitioning heirs, being the Plaintiffs/Respondents, would sell the property to a developer purchaser, Rotunda LLC, who had contracted with them to buy the Property prior to the commencement of this action. The Master in Equity denied issuing a Master's Deed to the Appellants at the time they desired to exercise their Right of First Refusal to purchase the property. Afterwards the prior ruling was reversed and the Master in Equity then under a third court order to the same effect, issued a Master's Deed on March 24,

2023 conveying all of the interest held by all the heirs to be held in trust by Plaintiff's attorney until such time as Rotunda, LLC would tender the purchase price. These facts establish that Rotunda, for no consideration being paid to the Appellants, holds an indefinite perpetual, in perpetuity, offer to buy the Property at any time of its choosing; while the order denies the Appellants the right to purchase it The first order was issued on October 20, 2021. No closing occurred. A second order in March 2023 was issued. No closing occurred. The most recent order of June 7, 2023 was issued. As of June 19, 2023 no notice of a closing date has been rendered to the court. This is a taking of property rights by a state official.

THE VALUE OF APPELLANTS INTEREST HAS BEEN DIMINISHED

This action was commenced for the purpose of partition quieting title and sale of the property. In what the Appellants have alleged as an improper denial of due process of law by the Master in Equity, the action below was terminated by the challenged classification of the October 20 2021 Order of the Master in Equity as a final order as many hearings and subsequent rulings were made afterwards. The gravamen point is that the Master in Equity refused to proceed with the judicial process necessary to quiet title to the property. By these judicial proceedings, the cloud upon the title of the property commonly referred to as heirs title would be removed once a evidentiary determination has been made that definitely establishes who all the heirs are and an allocation made as to their respective percentage interest

with no outstanding liens or encumbrances. At this stage, a Master in Equity could properly issue an order stating that the designated heirs, now converted to tenants in common, hold a undivided interest with fee simple absolute marketable title to the property. Property vested with fee simple title is freely transferrable as the grantor can warrant the title and title insurance companies will issue policies of title insurance and lending intuitions will accept the property as collateral for the purchase price. For this reason, property vested with fee simple title is more easily marketable and therefore more valuable than similar property encumbered with "heirs title." Because the Master in Equity has refused to continue with the proceedings, the Appellants cannot obtain fee simple title to their property. This is a taking of property rights by state action and additionally a denial of Appellants constitutional right to Petition their government for relief.

The property rights taken from the Appellants would inure as an unjust enrichment and inequitable profit to Rotunda.

But for the intercession of this court, Rotunda could purchase this property held for over a century by the native indigenous ancestors of the Appellants, and immediately thereafter commence a quiet title anew without having to join any of the heirs as parties because they would have acquired their interest by the Master's Deed. It is easily and reasonably foreseeable that the Master in Equity, especially with all opposing parties not involved with the action, would at that time grant them

the fee simple title to the property and upon that event the value of the property would tremendously escalate in value. This amounts to a further taking of a property right from the Appellants that would accrue to Rotunda as a proximate result of this state action.

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of the US Supreme Court. *Shelley v Cramer 334 U.S.1 at 14.*

State action generally arises out of a person acting on behalf of the government or performance of a duty that is traditionally carried out by the state. *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 620 (1991). 29. 168 AM. JUR. 2D Constitutional Law § 800 (1998).

Coinciding with the Section 1983 "color of state law" requirement is the Fourteenth Amendment's "state action" requirement. Remedies for violations of Section 1983 and the Fourteenth Amendment differ, with the former providing civil relief and the latter providing equitable relief. With most parties instituting suits interested in both types of remedies, Section 1983 issues are presented in many "state action" cases. According to the Supreme Court in *Lugar v. Edmondson Oil Co.*, the scope of Section 1983 is slightly broader than the Fourteenth Amendment's "state action" requirement. 457 U.S. 922 (1982). For the most part, however, liability

under Section 1983's "color of state law" requirement is equivalent to that of state action under the Fourteenth Amendment.

The analysis of the above Fourteenth Amendment cases set forth a required two-step inquiry: (1) Is state action involved, and then, (2) is that state action unconstitutional? The state action determination "has always depended on a baseline establishing the legitimate or at least ordinary functions of government" and the courts have "relied on common law baselines like those expounded in the case of *Lochner v. New York*, 198 U.S. 45. In *Lochner* the case was predicated upon state action via a private contracts. In this case, we are concerned with property rights and a suspect classification of minority citizens.

If the Court were to and should conclude that the state actors were responsible, it should proceed to determine whether that state action was unconstitutional. The amendment simply states that "no State shall" violate equal protection or due process principles. If the words are given their ordinary meaning, then state action should be understood as any action taken by a state or a state actor using authority derived from the state, regardless of whether the action is authorized by, or contrary to, law.

The settled construction of the Fourteenth Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. The theory of the Amendment

is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power. *Home Tel. & Tel. Co. v. City of Los Angeles,* 227 U.S. 278, 287 (1913). *Ex parte Virginia*, 100 U.S. 339, 346-47 (1879).

In *Edmonson v. Leesville Concrete Co*., Inc., 500 U.S. 614 (1991), the U.S. Supreme Court ruled that, "Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints."

According to the United States Supreme Court, "[o]ne great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law."' By focusing the judiciary's attention on state action, this doctrine limits the courts' power to regulate private interests and ensures that states and state actors respect individual liberties. Regardless of "[w]hether this is good or bad policy, it is a fundamental fact of our politica.

While the text and the spirit of the Pinckney Act favors Defendants' renewal of their right of first refusal to purchase the Property, South Carolina case law supports Defendants' position as well. Under well-established South Carolina law, a property owner is generally required, when he or she decides to sell, to first offer the property to the holder of a right of first refusal. *Webb v. Reames,* 485 S.E.2d 384, 385 (S.C. App. 1997). A right of first refusal constrains a real property owner's power of alienation of the property to a certain degree by requiring the owner to offer the property first to the holder of the right. *See Cnty. Of Jackson v. Nichols*, 623 S.E.2d 277, 280 (S.C. App. 2005).

A right of first refusal is only unenforceable if it unreasonably restrains alienation. *Wise v. Poston*, 316 S.E.2d 412, 415 (S.C. App. 1984); Restatement (Third) of Property: Servitudes §3.4. South Carolina courts consider the following factors in determining whether rights of first refusal are enforceable: (a) the legitimacy of the purpose of the right of first refusal, (b) the price at which the right of first refusal may be exercised, and (c) the procedures for exercising the right of first refusal. *Clarke v. Fine Housing, Inc.*, 882 S.E.2d 763, 767 (S.C. 2023) (citing Restatement (Third) of Property: Servitudes §3.4 cmt. f). "If the right to purchase is on the same terms and conditions as the owner may receive from a third party, if the procedures for exercising the right are clear, and if the period within which it must be exercised is relatively short, the right of first refusal is valid unless the purpose is

not legitimate." Restatement (Third) of Property: Servitudes § 3.4 cmt. f. Courts typically only deem rights of first refusal to be invalid where the right of first refusal sets forth no mechanism to determine the price of the property or where the right of first refusal period is unreasonably long. *See Clarke v. Fine Housing*, 882 S.E.2d at 766-767; *see also Mitchell v. Albertelli*, 2023 WL 292918 (S.C. App. 2023). Otherwise, rights of first refusal are honored and taken seriously.

Here, the Defendants' right of first refusal is valid and should be enforced. It is for a legitimate purpose – Defendants wish to retain the Property in which they hold interest as heirs. As stated above, Defendants' purpose in purchasing the Property is even more important because the Property is one of the last remaining undeveloped areas of this size on Hilton Head Island; the nature of the Property's ownership is critical.

Further, Defendants' purchase of the Property is pursuant to the payment terms set by the Court under the Pinckney Act, which is a fair and adequate figure. Defendants have no issues with paying the amounts set by the Court to purchase the Property. Additionally, the Defendants' right of first refusal is not for an unreasonable time period; the South Carolina legislature, per the Pinckney Act, has approved non-petitioning cotenants to elect to invoke their rights of first refusal and purchase respective properties as late as ten days prior to trial on a matter to partition property.

Because South Carolina law favors honoring rights of first refusal and because Defendants' right of first refusal does not unreasonably restrain alienation of the Property and Plaintiffs' Property rights, Defendants respectfully request the Court grant the Motion and enter an order allowing Defendants to invoke their right of first refusal to purchase the Property as they intend.

CONCLUSION

The Respondents have pursued a course of conduct designed to defeat the purposes espoused under the Pinckney Act. If Respondents are permitted to transfer the Property to Rotunda, Defendants will be deprived of a property right.

Defendants being permitted to exercise their "Right of First Refusal" to buy the Property will aid legacy land owners and the people of South Carolina, similarly situated, who are burdened with "heirs title property the opportunity to hold on to their property against the forces of gentrification. The Defendants strive to not only hold on to their land but, through partnering with a developer, retain an equity ownership in the property and make its usage available to the general public. This would fulfill the purposes of the Act as enacted by our legislatures.

There have been multiple procedural and due process of law discrepancies in this case along with demonstrated abuse of discretion committed by the lower court and foundational jurisdictional infractions committed during the course of this proceeding. The Order of October 20, 2021 should be set aside and the case

remanded for further proceedings including the filing of a Lis Pendens and serving a copy of the Summons and Complaint upon all the adjacent landowners. Upon the completion of this, the MIE shall make a determination as to heir property status, confirm heirs and vest fee simple title. Upon the court issuing such a decree, the Defendants shall thereafter have a period of 75 days to purchase the Property from the petitioning heirs. The conveyance shall be by the petitioning heirs conveying their interest in the property to the Defendants.

Respectfully submitted,

The Houston Law Firm LLC
1000 Main Street, Suite 200 C
Hilton Head Island, SC
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June 20, 2023
Hilton Head Island, SC
By: S/ Charles E. Houston Jr. Charles E. Houston Jr.
SC Bar # 2663 Fed. Bar # 1961
Attorney for Appellants

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
HON. MARVIN H. DUKES
MASTER IN EQUITY

APPELLATE CASE # 2023-000438

GEORGIA HARRISON, BARBARA HARRISON,
JOYCE ELLEN HARRISON, WILLIAM S. HARRISON, III,
STANLEY ROBERTS AND DIANA MENDHEIM INDIVIDUALLY
AND AS AGENT AND ATTORNEY IN FACT,

RESPONDENTS
vs.

STEPHANIE LORRAINE KIRKLAND, GARY LAMONT
KIRKLAND, KIETA NICOLE WHITE, CHERYL KIRKLAND,
WILLIAM CHARLES KIRKLAND, PAULETTE KIRKLAND,
PAUL T. ALLBRIGHT, CHRISTOPHER KIRKLAND AND
SHAWN KIRKLAND,

DEFENDANTS

OF WHOM STEPHANIE LORRAINE KIRKLAND,
GARY LAMONT KIRKLAND, KEITA NICOLE WHITE AND
CHERYL KIRKLAND,

APPELLANTS

MOTION TO SUBSSTITUTE AND /OR AMENDED APPELLANTS' INITIAL BRIEF

Appellants respectfully request this Court for leave to file its substitute Initial Brief to correct a technical error with submission of the document.

On June 20, 2023, Appellants' counsel timely filed Initial Brief. On the morning of June 21, 2023, counsel discovered he uploaded the wrong document and notified the clerk immediately. The substituted brief was provided to the clerk immediately and served on all parties on June 21, 2023.

Appellants now seek leave of the Court to file said substituted Initial Brief. A copy of the substituted Initial Brief is being submitted herewith as Exhibit 1. The only change between the submission of the substituted brief served on counsel for respondents and provided to the clerk of the Court on June 21, 2023 is the updated caption of the case in response to the Court's July 3, 2023 communication.

No prejudice will result to Respondents as Respondents received a copy of the correct Initial Brief on June 21, 2023.

WHEREFORE, Appellants respectfully request this Court to grant leave to file the substituted Initial Brief, or if the court prefers the substituted Initial Brief may be designated as the Amended Initial Brief of the Appellants. (See Exhibit 2)

. Respectfully submitted,

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chouston@houstonlawfirm.net

By: /s/ *Charles E. Houston Jr.*
Charles E. Houston Jr.
SC Bar # 2663 - Fed. Bar # 1961
Attorney for Appellants

July 5, 2023
Hilton Head Island, SC

RECEIVED
Jul 05 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
HON. MARVIN H. DUKES
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APPELLATE CASE # 2023-000438

GEORGIA HARRISON, BARBARA HARRISON, JOYCE ELLEN HARRISON, WILLIAM S. HARRISON, III, STANLEY ROBERTS AND DIANA MENDHEIM INDIVIDUALLY AND AS AGENT AND ATTORNEY IN FACT,

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vs.

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DEFENDANTS

OF WHOM STEPHANIE LORRAINE KIRKLAND, GARY LAMONT KIRKLAND, KEITA NICOLE WHITE AND CHERYL KIRKLAND,

APPELLANTS

PROOF OF SERVICE

I hereby certify that this law firm represents the Appellants in the above captioned matter and that on the date below at Hilton Head Island South Carolina I served a copy of the foregoing **MOTION TO FILE SUBSTITUTE AND/OR AMENDED INITIAL BRIEF OF APPELLANTS** and the **PROOF OF SERVICE** on the following persons by electronic mail to their AIS email addresses on June 20, 2023 and by U S mail, first class postage prepaid, on July 5, 2023.

Documents served:

(1) Proof of Service
(2) Initial Brief of Appellants: Exhibit 1
(3) Amended Brief of Appellants: Exhibit 2
(4) Motion to file Substitute and/or Amended Initial Brief of Appellants

Parties Served:

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PO Box 6028
Hilton Head Island, SC 29938-6028

And

Thomas C. Taylor, Esq.
Law Office of Thomas C. Taylor, LLC
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Attorneys for Respondents on appeal

This 5th day of July 2023.at Hilton Head Island, SC

By: S/ *Charles E. Houston, Jr.*
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THE
HOUSTON
LAW FIRM LLC

Charles E. Houston, Jr.

July 5,, 2023

Hon. Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: ***Georgia Harrison v. Stephanie Kirkland***
Appellate Case # 2023-000438
Motion to File Substitute and /or Amended Initial Brief

Dear Ms. Kitchings:

I am enclosing for filing with the Court the Appellants Motion to File Substitute and /or Amended Initial Brief along with Exhibits 1 and 2, the Proof of Service and our check for $50.00 to cover the filing fee.

By copy of this letter the Proof of Service these items are being served upon all counsels of record.

Thank you in advance for your attendance to this filing. If you have any questions, please do not hesitate to contact my office.

With kind regards, I am,
Respectfully,
The Houston Law Firm LLC

s// Charles E. Houston Jr.
Charles E. Houston Jr.
Attorney for Appellant
SC Bar# 2663 - Fed Bar1961

cc:
Thomas Taylor, Esquire
Chester Williams, Esquire Encls: as stated

Encls: as stated

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