

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

69129

APPEAL FROM HAMPTON COUNTY  
Court of Common Pleas

J. Martin Harvey, Special Referee

RECEIVED

JUL 18 2013

Court of Appeals Case Tracking No. 2011193506 SC Court of Appeals  
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 of July 3, 2013, 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 delicti” 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 Salkéhatchie 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, and certainly that they are good for fishing. 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 Appellants' 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 delicti" 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 the 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, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011).

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, 395 S.C. at 470; 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.

The issue preservation approach utilized by the Court in this case threatens to take a process – partition – that is by its nature non-adversarial (or, at most, minimally adversarial) and turn it into a process in which parties and counsel must behave as though they are relating to one another in a context as adversarial as a contested liability automobile wreck case, a breach of contract dispute, or murder trial. That is not what partition is supposed to be. The opinion in this case sows the seeds of war where all that should grow is peace.

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).

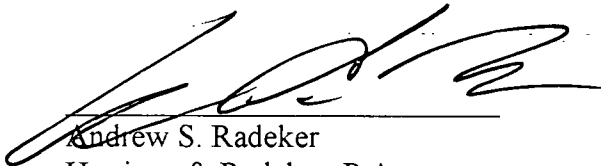
This is an appropriate case for *en banc* rehearing. The issue preservation determinations at stake are critically important to this Court – and not just to maintain uniformity of decisions, but also to ensure that justice is done.

**IV. This case may have been given short shrift by this Court.**

The Court’s July 3 opinion barely differs at all from its vacated May 15 opinion, a copy of which is attached, even though that opinion was (incorrectly) rendered by a different set of judges. The July 3 opinion contains no substantive differences in how it treats the issues and very little in the way of *any* difference at all. The content of the opinion differs by what are probably less than 10 words. It does not appear that the Court gave this case the consideration it merits.

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew S. Radeker", written over a horizontal line.

Andrew S. Radeker  
Harrison & Radeker, P.A.  
Post Office Box 50143  
Columbia, South Carolina 29250  
(803) 779-2211  
Attorney for Appellants

July 18, 2013

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE  
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING  
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

v.

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

Appellate Case No. 2011-193506

---

Appeal From Hampton County  
James Martin Harvey, Jr., Special Referee

---

Unpublished Opinion No. 2013-UP-197  
Heard December 11, 2012 – Filed May 15, 2013

---

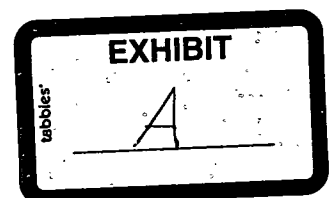
**AFFIRMED AS MODIFIED**

---

Andrew Sims Radeker, of Harrison & Radeker, P.A., of  
Columbia, for Appellants.

Demetri K. Koutrakos and Mary Dameron Milliken, of  
Callison, Tighe & Robinson, L.L.C., of Columbia, and  
Kevin Angus Brown, of Anderson & Brown, L.L.C., of  
Hampton, for Respondents.

---



**PER CURIAM:** This is a partition action brought by brothers, William Jeff Weekley and Christopher L. Weekley, Sr., hereinafter collectively Respondents, against their brothers, John Lance Weekley, Jr. and Marcus Earl Weekley, Sr., hereinafter collectively Appellants. Appealing from the order of the Special Referee, Appellants assert various errors by the referee including, making the particular division, considering improper offsets to Respondents in making the division, failing to consider offsets in favor of Appellants, and finding the parties stipulated the accounting cause of action would be decided by the Probate Court. We affirm as modified.

1. Appellants contend the Special Referee erred and made an unfair partition by dividing the property so that all of the best hunting and fishing land was allocated to the Respondents, in violation of S.C. Code Ann. § 15-61-50. They maintain no findings were made by the referee showing why it would be impracticable to give each set of brothers some of the land that each demonstrated was most valuable to them, with all receiving some of the land at the back, i.e. land abutting the swamp. We disagree.

"The partition procedure must be fair and equitable to all parties of the action." *Zimmerman v. Marsh*, 365 S.C. 383, 386, 618 S.E.2d 898, 900 (2005). See also S.C. Code Ann. § 15-61-50 (2005) ("The court of common pleas has jurisdiction in all cases of real and personal estates held in joint tenancy or in common to make partition in kind or by allotment to one or more of the parties upon their accounting to the other parties in interest for their respective shares or, in case partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest, by the sale of the property and the division of the proceeds according to the rights of the parties."). "[P]artition in kind is favored when it can be fairly made without injury to the parties." *Anderson v. Anderson*, 299 S.C. 110, 114, 382 S.E.2d 897, 899 (1989). While equitable considerations, such as length of ownership and sentimental attachment to property, may be considered in a partition action, the pecuniary interests of all of the parties is the determining factor in deciding whether to require a judicial sale or to allow a partition by allotment. *Zimmerman*, 365 S.C. at 388, 618 S.E.2d at 901.

In *Campbell v. Jordan*, 382 S.C. 445, 675 S.E.2d 801 (Ct. App. 2009), this court considered a challenge on appeal to a partition in kind. There, we held the Special Referee properly partitioned the property in a manner that was fair and equitable to all the parties, where the referee considered the parties' emotional attachment to the land, the parties' respective living situations, and the parties' preference for a

partition in kind rather than a judicial sale. *Id.* at 451, 675 S.E.2d at 804. Further, though the appellants in *Campbell* argued they had an emotional attachment to a particular portion of the land and thus it had a greater inherent value to them, we noted the appellants failed to assert that the referee erred in assigning property values or in assigning ownership interest shares to each party. *Id.* at 451-52, 675 S.E.2d at 804-05. See *Wilson v. McGuire*, 320 S.C. 137, 139 n. 2, 463 S.E.2d 614, 616 n. 2 (Ct.App.1995) (stating that the allocation of a preselected tract to one heir is not prejudicial to other heirs unless evidence is presented to demonstrate that the preselected tract is more valuable than the other tracts).

Here, the referee recognized the highest and best use of the property was recreational. However, he further recognized that some of the 210.48 acres was valued at \$1,700 per acre, while other acreage was valued at \$2,000 per acre, and divided the property with these differing values in mind. In making the division, he took into consideration that the property containing the home-site, which was awarded to Appellants as everyone agreed would be proper, had a value of \$2,000 per acre. He thereafter divided the remainder of the property based upon these economic valuations. Appellants do not challenge these valuations placed on the acreage. Rather, they object to the referee's failure to award them land toward the rear, abutting the swamp. Though Appellants' attachment to the swamp area of the property and their desire to use it for recreational purposes is an equitable consideration, 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. Further, the referee had other equitable matters to take into consideration which resulted in the division he made. First, he divided the property in such a way as to allow Appellants to remain on the home-site. Second, he allotted to each set of brothers one of the two areas of historical family significance: the home-site and the boat landing. Third, and importantly, he divided the property in a manner to address the safety concerns raised by Respondents. Specifically, the record shows there is clear animosity amongst these brothers, and their history shows not only the threat of the use of guns, but the actual firing of weapons by Appellants while Respondents and their family members were in the vicinity. The referee considered the Appellants' use of guns in certain areas in determining the appropriate division of the property. Therefore, because there is no contention the referee failed to properly divide the land itself based upon the economic value of the different acres, and inasmuch as he accomplished many of the equitable considerations, we hold 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.

2. Appellants' Issues 2 through 5 are based upon arguments that are not properly preserved for our review. Many of these issues were never raised to the referee in any manner. Further, even assuming arguendo that some were raised by virtue of the evidence submitted, none were ever ruled upon by the referee, in spite of the fact that Appellants made a motion to alter or amend and could have properly raised the matters at that time. See *Pikaart v. A & A Taxi, Inc.*, 393 S.C. 312, 324, 713 S.E.2d 267, 273 (2011) ("A matter may not be presented for the first time on appeal; rather, it must have been both raised to and ruled upon by the court below."); *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 311, 698 S.E.2d 773, 779 (2010) (holding, in order for an issue to be properly preserved for appeal, it must have been both raised to and ruled on by the trial court, and where the trial court's order did not address appellant's argument and appellant did not bring the absence of this issue to the trial court's attention in a motion to alter or amend, the issue was not preserved); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (noting the losing party generally must both present his issues and arguments to the trial court and obtain a ruling before those issues and arguments will be reviewed by an appellate court); *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding an issue is not preserved where the trial court does not explicitly rule on an argument and the appellant fails to make a Rule 59(e), SCRCP motion to alter or amend the judgment on that ground). See also *In re Estate of Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) (holding when a party receives an order granting relief not previously contemplated or presented to the trial court, the aggrieved party must move to alter or amend the judgment, pursuant to Rule 59(e), SCRCP, in order to preserve the issue for appeal).

3. In their last issue, Appellants contend the Special Referee erred in finding that there was a stipulation that an accounting cause of action would be decided by the Probate Court. In his order, the Special Referee stated, "The parties stipulated that the [Respondents'] second cause of action for accounting would be deferred to the consideration of the Probate Court." The parties agreed only to bifurcate the partition and accounting causes of action, proceeding on the partition action and leaving the record open as to the accounting matter. They clearly never stipulated the accounting cause of action would be heard by the Probate Court. Respondents agree the stipulation between the parties was simply that the two causes of action would be bifurcated, and concede there was no stipulation that it be heard by the Probate Court. Respondents consent to a hearing before the court of proper jurisdiction. Accordingly, we modify the referee's order to reflect that there was no stipulation that the accounting matter would be considered by the Probate Court.

but only that the causes of action would be bifurcated and the hearing left open as to the accounting issue.<sup>1</sup>

**AFFIRMED AS MODIFIED.**

**HUFF, THOMAS, and GEATHERS, JJ., concur.**

---

<sup>1</sup> We note this issue was not raised to or ruled upon by the referee either. However, inasmuch as Respondents concede the error, we find modification of the referee's order proper on this point. We decline to address what court is the proper court of jurisdiction, as that matter was not raised to or ruled upon by the referee and Respondents have not conceded any particular court has jurisdiction.

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

RECEIVED

JUL 18 2013

SC Court of Appeals

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

v.

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

PROOF OF SERVICE

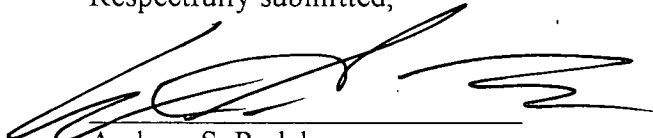
I certify that I served the foregoing petition for rehearing on counsel for the Respondent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Kevin A. Brown, Esq.  
Anderson & Brown, LLC  
P.O. Box 576  
Hampton, SC 29924

Mary Dameron Milliken, Esq.  
Demetri K. Koutrakos, Esq.  
Callison Tighe & Robinson, LLC  
P.O. Box 1390  
Columbia, SC 29202

July 18, 2013

Respectfully submitted,



Andrew S. Radeker  
Harrison & Radeker, P.A.  
Post Office Box 50143  
Columbia, South Carolina 29250  
(803) 779-2211  
Attorney for Appellants

LAW OFFICES  
**HARRISON & RADEKER, P.A.**  
923 CALHOUN STREET  
COLUMBIA, SOUTH CAROLINA 29201

James C. Harrison, Jr.\*  
Andrew S. Radeker  
F. Casey D. Cornwell  
\* Mediator/Arbitrator

P.O. Box 50143  
Columbia, SC 29250  
(803) 779-2211  
(803) 779-6700 (FAX)

July 18, 2013

**VIA HAND DELIVERY**

The Hon. Jenny Abbott Kitchings  
Clerk of Court, Court of Appeals of South Carolina  
Edgar Brown Building  
1205 Pendleton Street  
Columbia, South Carolina 29201

**RECEIVED**

JUL 18 2013

SC Court of Appeals

**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.  
Demetri K. Koutrakos, Esq.  
Kevin A. Brown, Esq.