

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from the Court of Appeals

S.C. SUPREME COURT

Appellate Case No.: 2023-001472

**Donray Curtis Jones, Cynthia Denise
Jones, Emma Kelly Washington, and
Troy Eliazer Washington**

Petitioners,

vs.

Yvonne J. Robinson,

Respondents,

**RETURN OF RESPONDENT YVONNE J. ROBINSON TO THE PETITION FOR
WRIT OF CERTIORARI**

November 7, 2023

s/ Scott F. Talley

Scott F. Talley, Esquire SC Bar No.: 70364

TALLEY LAW FIRM, P.A.

291 S. Pine St.

Spartanburg, South Carolina 29302

Attorney for Respondent Yvonne J.

Robinson

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QUESTIONS PRESENTED

1. **DID THE APPELLATE COURT ERR BY RULING THAT CONSIDERATION OF THE APPELLANTS RIGHT OF FIRST REFUSAL IS NOT PRESERVED FOR APPELLATE REVIEW?**
2. **DID THE APPELLATE COURT ERR BY RULING THAT WHETHER THE MASTER ERRED BY FAILING TO ORDER AN APPRAISAL OF THE PROPERTY AT ISSUE IS NOT PRESERVED FOR APPELLATE REVIEW?**
3. **DID THE APPELLATE COURT ERR BY RULING THAT WHETHER THE MASTER ERRED BY GRANTING ROBINSON'S PETITION FOR A PARTITION IN KIND IS NOT PRESERVED FOR APPELLATE REVIEW?**
4. **DID THE APPELLATE COURT ERR IN AFFIRMING THE MASTER'S RULING TO AWARD ATTORNEY'S FEES TO THE RESPONDENT?**

STATEMENT OF THE CASE

On January 14, 2020 Plaintiff initiated this action by filing a Lis Pendens, Summons and Complaint. On January 16, 2020 an Amended Complaint was filed wherein Plaintiff sought a Partition in Kind, or in the alternative a reformation of the Warranty Deed recorded in Deed Book 84, at Page 1920, Cherokee County Register of Deeds. Based on said deed, the property subject of this action was owned by Plaintiff owning one-third interest, Appellants, Donray Curtis Jones and Cynthia Jones owning one-third interest, and Appellants, Emma Kelly Washington and Troy Eliazar Washington owning one-third interest. Appellants filed their answer to the Amended Complaint on or about October 12, 2020 stating that, their intention was the same as it is to this present day; for the land to remain undivided with each party having a one-third interest in the land. On or about October 15, 2019, Respondent Robinson had Cole Land Surveying, LLC

perform a survey of the subject property showing division into three separate parcels. The plat of this survey was recorded on November 7, 2019 in Cherokee County Register of Deeds. On February 24, 2020 the Court issued its Partition Order dated February 19, 2020, which was served on the Defendants/Appellants. On May 29, 2020, prior to the first scheduled hearing in this matter, Appellants did file a document with the Clerk of Court for Cherokee County indicating that they wanted to purchase the 1/3 interest of the Plaintiff in the subject property. This matter came to trial and the Court issued an Order filed December 4, 2020 partitioning the subject property in kind pursuant to the October 15, 2019 survey of the property by Cole Surveying. In addition, the Court ordered the Appellants to pay two-thirds of the attorney's fees/costs incurred by Respondent. This appeal followed.

ARGUMENT

1. THE APPELLATE COURT DID NOT ERR BY RULING THAT CONSIDERATION OF THE APPELLANTS RIGHT OF FIRST REFUSAL WAS NOT PRESERVED FOR APPELLATE REVIEW

Appellants rely upon S.C. Code § 15-61-25 in arguing that they had a right of first refusal to purchase the property of the Respondent. While it is admitted that the Appellants, at least 10 days prior to the trial of the matter, submitted a statement of their interest in purchasing the property, the cited statute contemplates a scenario where the petitioning party, like Plaintiff/Respondent in this matter, is seeking to sell the property. Herein, Respondent asked for partition in kind. R15. The process set forth in S.C. Code § 15-61-25(B), wherein the parties cannot reach agreement, states that the "value of the interest or interests to be sold shall be determined" by appraisers. Here, no filing submitted by either party sought a sale of the entire parcel of property. Furthermore, prior to issuing its final order, the trial court afforded the parties

an opportunity to try to resolve the matter, in the spirit of S.C. Code § 15-61-25, yet the parties were not able to agree. While they never formally asked for any formal appointment of appraisers, the Court did allow the parties time prior to issuing the final order to see if they could resolve the price issue. The Appellants never put a price on the subject property, but they did send letters dated October 25, 2020 asking if Respondent would sell her interest and at what price. R56. Further, Appellant Jones stated in that letter that they were willing to purchase at a fair price so that nobody suffers damage, etc., and that time was of the essence so a prompt response was necessary. Respondent, on October 28, 2020, as to the price, was willing to take \$72,000.00. R57. On November 3, 2020, Appellants replied that the Court would have to settle the matter. R58. The Court then issued its order December 4, 2020. R7.

"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" § 15-61-50. (citing Campbell v. Jordan, 675 S.E.2d 801, 382 S.C. 445 (S.C. App. 2009).

"The special referee had jurisdiction to partition the property pursuant to Section 15-61-50 and incidentally to allot certain portions of the property to the respective parties in the action." (citing Campbell v. Jordan, 675 S.E.2d 801, 382 S.C. 445 (S.C. App. 2009). At no point did the Appellants claim, demand or ask the Court to exercise their alleged right of first refusal.

2. NO APPRAISAL WAS REQUIRED TO BE PERFORMED NOR WAS ONE DEMANDED BY THE APPELLANTS; THUS, THE APPELLATE COURT DID NOT ERR IN RULING THAT SAID ISSUE WAS NOT PRESERVED FOR APPELLATE REVIEW

If Appellants desired to have the property appraised and sold as they now argue, that matter was not raised in any responsive pleading or at trial. Other than the May 2020 filing wherein they

state they desire to purchase the property interest of the Respondent, nothing else was done. Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the appellate court with a platform for meaningful review. Wilder Corp. v. Wilke, 330 SC 71, 497 S.E.2d 731 (1998). It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Honea v. Honea, 292 SC 456, 357 S.E.2d 191 (Ct. App. 1987).

Appellants did not try to get an appraiser appointed or find any value for the portion of property that they wanted to purchase. They never paid any money into the Court during the pendency of the action, or take the steps necessary to protect their rights, even when afforded the opportunity after the trial of this matter. In Appellants' appeal on page 8, the Appellants acknowledge that the Judge extended yet another opportunity to decide on a price without further ruling of the Court. Appellants' reliance on S.C. Code §15-61-25 is incorrect due to the fact that the amended complaint in this matter sought to partition the property in kind, and not sell it, as contemplated by said statute. S.C. Code § 15-61-50 was the partition procedure as requested by the Plaintiff in the amended complaint and based on the survey which was attached as an exhibit to the complaint and entered into evidence at the hearing.

On page 10 of the Petition for a Writ of Certiorari, the Appellants/Petitioners admit they "did not argue for an appraisal at the hearing" and also acknowledge that despite the Court's grant of time to try to resolve the matter by agreement, the parties were unable to do so. The Court then proceeded to partition the property in-kind, which was the relief requested in the pleading before the trial court.

3. THE APPELLATE COURT DID NOT ERR BY RULING THAT APPELLANT'S NOW CHALLENGE TO THE MASTER'S GRANTING THE PETITION FOR PARTITION IN KIND WAS NOT PRESERVED FOR APPELLATE REVIEW

It is clear pursuant to S.C. Code § 15-61-50, that the Court has jurisdiction in a matter such as this to make partition in kind or by allotment to more than one of the parties. In her Amended Complaint, the Respondent sought partition of the subject property in-kind pursuant to a survey she had completed which was entered into evidence. The standard of review for a partition action heard by the Master in Equity is an equitable action and, as such, this Court may find facts in accordance with its view of the preponderance of the evidence. Zimmerman v. Marsh, 365 S.C. 383, 386, 618 S.E.2d 898, 900 (2005). The partition procedure must be fair and equitable to all parties of the action. Pruitt v. Pruitt, 298 S.C. 411, 414, 380 S.E.2d 862, 864 (Ct.App.1989). This Court has previously stated that partition 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). Furthermore, "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" § 15-61-50. Campbell v. Jordan, 675 S.E.2d 801, 382 S.C. 445 (S.C. App. 2009). In addition, "The special referee had jurisdiction to partition the property pursuant to Section 15-61-50 and incidentally to allot certain portions of the property to the respective parties in the action." Campbell v. Jordan, 675 S.E.2d 801, 382 S.C. 445 (S.C. App. 2009). In this case, the Court allowed the Appellants an opportunity, if agreement was reached, to purchase Respondent's interest in the subject property. The parties were unable to do so, and by their own letter post trial letter, Appellants stated that the Court would have to decide the issue presented.

Furthermore, issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the appellate court with a platform for meaningful review. Wilder Corp. v. Wilke, 330 SC 71, 497 S.E.2d 731 (1998). It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Honea v. Honea, 292 SC 456, 357 S.E.2d 191 (Ct. App. 1987). This case does not involve heir's property as defined in S.C. Code § 15-61-320. At no point prior to trial or during trial did the Appellants allege that the subject property was heir's property.

At no point did the Appellants contest the Respondent's request for partition in kind. This was not done by their answer/pleading or any argument at the trial of the case. No argument was ever made that the property was heirs property by the Respondent or the Appellants at the trial level; the property is not heirs property.

4. THE APPELLATE COURT DID NOT ERR IN AFFIRMING THE MASTER'S RULING TO AWARD ATTORNEYS FEES TO THE RESPONDENT

Pursuant to S.C. Code § 61-11-110, the Court of Common Pleas may fix attorney fees in all partition proceedings as may be equitable, assess such fees against any or all of the parties or interests. The parties testified that they split all costs associated with the subject property, including the property taxes. Respondent wrote the parties prior to commencement of the underlying action inquiring about Appellants desire to partition the property as the trial court found. They were not interested in doing so at that time so this action followed. An Affidavit of Attorney's fees/costs was entered into evidence at the trial of this matter and found to be reasonable by the trial court. This issue was within the jurisdiction of the trial court based on statute. No objection to the presentation of an affidavit and request for fees was objected to by the Appellants

at trial. This issue was within the discretion of the trial court and no showing of abuse has been made to date that would lead to a finding of error by the trial court or appellate court on this issue.

CONCLUSION

The Appellate Court order shall stand affirming the Order of the trial court and the costs allowable shall be assessed against the Appellants.

Respectfully submitted,

s/ Scott F. Talley

Scott F. Talley, Esquire
TALLEY LAW FIRM, P.A.

291 S. Pine St.

Spartanburg, South Carolina 29302

Attorney for Respondent

November 7, 2023

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CERTIFICATE OF SERVICE

S.C. SUPREME COURT

I hereby certify that a true and correct copy of the Return to Petition for a Writ of Certiorari of Respondent Yvonne J. Robinson has been served via U.S. Mail this 7th day of November, 2023 upon: **Donray Curtis Jones, 125 Hudnut Dr., Pacolet, SC 29372, Cynthia Denise Jones, 125 Hudnut Dr., Pacolet, SC 29372, Emma Kelly Washington, 118 Hudnut Dr., Pacolet, SC 29372, and Troy Eliazer Washington, 118 Hudnut Dr., Pacolet, SC 29372.**

/s/ Hannah Offhaus
Hannah Offhaus, Paralegal