RECEIVED
Mar 05 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Charles M. Watson Jr., Special Referee

Appellate Case No.: 2024-000162

Related Appellate Case No.: 2023-001143

Lower Case No.: 2022-CP-36-00326

Lena Sue Yarborough .....Appellant,

v.

Joel F. Yarborough, III.....Respondent.

INITIAL BRIEF OF APPELLANT

Beth B. Richardson (SC Bar No. 69552)
brichardson@robinsongray.com
Sarah C. Frierson (SC Bar No. 104643)
sfrierson@robinsongray.com
ROBINSON GRAY STEPP & LAFFITTE, LLC
2151 Pickens Street, Suite 500 (29201)
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400 Telephone
(803) 929-0300 Fax

Counsel for Appellant Lena Sue Yarborough

OTHER COUNSEL OF RECORD:

Charles V. Verner, Esquire
1303 Main Street, Suite 304
PO BOX 484
Newberry, South Carolina 29108
(803) 915-9798
cverner@8thcircuitpublicdefender.org

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Secondary Sources

STATEMENT OF THE ISSUES ON APPEAL

I. Did the Special Referee err in finding Appellant did not satisfy her burden that the proposed subdivision would be fair and equitable when she presented uncontroverted expert testimony that the proposed subdivision would result in no pecuniary injury to any party?

II. Did the Special Referee err in failing to shift the burden to Respondent to show the proposed subdivision was not practicable or expedient after Appellant met her burden?

III. Did the Special Referee err in substituting his opinion for that of a qualified expert as to what factors are determinative in making fair market valuations of property, and finding, without citation to any law, that the proposed partition was not equitable based on the differences in topography and the relative ease of access to certain portions of a parcel for timbering purposes, when there was no evidence that those differences affected the fair market value of the proposed parcels?

IV. Did the Special Referee err in failing to consider all the evidence on the topography and the relative ease of access to certain portions of a parcel for timbering purposes on the subdivided parcels, which shows subdivision would be fair and equitable?

V. Did the Special Referee err in ordering allotment to Respondent when Respondent never requested allotment in his pleadings or before or during trial, move to amend his pleadings to conform to the evidence before the close of trial, or present any valuation of the Fairfield Tract to support allotment, and, in the event that subdivision could not fairly and equitably be accomplished, when Appellant requested allotment of the parcel to herself?

STATEMENT OF THE CASE

This appeal arises out of a partition action filed by Appellant Lena Sue Yarborough ("Appellant") against her brother, Respondent Joel F. Yarborough III ("Respondent"), relating to four properties passing to them outside the estate of their mother—Bonnelle G. Yarborough. Only one of those properties is the subject of this appeal: the Fairfield Tract.

On August 19, 2022, Appellant initiated this case in Newberry County, seeking partition of four properties Appellant and Respondent own together in Newberry and Fairfield Counties. (Compl.). Respondent did not answer or otherwise respond in the time allotted under Rule 12 of the South Carolina Rules of Civil Procedure, and the circuit court entered default against Respondent on October 13, 2022. (Order Granting Entry of Default). Later, the circuit court referred the case to a Special Referee, Charles M. Watson Jr. ("Special Referee"), who set aside the default on April 25, 2023, and allowed Respondent to file an Amended Answer. (Order Granting Mot. to Set Aside Default); (Am. Answer).

After Respondent filed his Amended Answer on May 1, 2023, the Special Referee asked about which of the four properties the Parties disputed ownership. The Fairfield Tract was one of them. The Special Referee then ordered the Parties to file motions for summary judgment regarding the Parties' ownership interests. The Parties filed cross-motions for summary judgment on May 22, 2023, in which they agreed the Fairfield Tract is owned by Respondent in a 22/36 (61.1%) interest and Appellant in a 14/36 (38.9%) interest. (Pl.'s Mot. for Summ. J.); (Def.'s Mot. for Summ. J). On May 25, 2023, the Special Referee entered judgment accordingly. (Order Granting Def.'s Mot. for Summ. J.).[1]

[1] Appellant timely appealed a separate issue relating to the Parties' respective ownership interests in a different property subject to this Partition Action, the Newberry Tract. That issue is pending on appeal before this Court under appellate case number: 2023-001143.

The parties proceeded to a bench trial on the partition of three of the properties on September 7, 2023, with closing arguments on September 11, 2023.[2] At the September 7 trial, as to the Fairfield Tract, Appellant presented her own testimony and testimony from a qualified expert in rural real estate appraisals and forestry, Ben Royer, as well as many exhibits and appraisal reports for the Fairfield Tract. (Pl.'s Exs. 17–23; Tr. at 18:17–41:19; 67:1–111:16; 281:1–285:15). Respondent, on the contrary, presented only his own testimony and testimony from his friend, Michael Mannel.

After several months,[3] the Special Referee issued an Order, which he filed on January 9, 2024. As to the Fairfield Tract, the Special Referee found it could not be partitioned in kind and thus ordered it be allotted to Respondent for an accounting to Appellant of the sum of $171,966.67. (Partition Order).

Appellant timely moved to reconsider, alter, or amend the Order pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on January 19, 2024. (Mot. to Recons.). Without any

[2] At the close of evidence on September 7, the Newberry County Courthouse had to close its doors to the public for the day. All agreed to conduct closing arguments in a virtual format as soon as possible after that because the Special Referee had to leave for vacation in the middle of the following week. Despite numerous emails and phone calls to Respondent's counsel on September 8 and 9 setting closing arguments for 9:00 a.m. on Monday, September 9, Respondent and his counsel failed to appear for closing arguments. (Closing Arg. Tr. at 3:7–5:12).

[3] After the hearing, the Special Referee circulated a draft order on October 23, 2023, requesting the Parties comment on the factual findings within three days but refrain from any comment on the legal conclusions. Appellant timely responded and submitted 26 comments, including, among other things, facts overlooked in his analysis on topography and relative ease of access to and ease of timbering on the proposed subdivided parcels. Appellant also raised the issue that Respondent did not request allotment for himself at the trial. (Oct. 26, 2023 Email String with Attachment). Respondent did not participate in the comment period. Then, the Special Referee requested a copy of the transcript of the hearing, and Appellant provided the Special Referee the transcript on October 30. *See* (Ex. C to Pl.'s Mot. to Reconsider).

opposition or additional hearing on the matter, the Special Referee denied the Rule 59(e), SCRCP, motion by Order on February 2, 2024. (Order Den. Mot. to Recons.).

Appellant timely filed and served the notice of appeal on February 5, 2024, seeking review of the Special Referee's Orders relating to the Fairfield Tract. (Notice of Appeal).

STANDARD OF REVIEW

"A partition action is an equitable action, heard by a judge alone and, as such, this court may find facts in accordance with [its] own view of the preponderance of the evidence." *Wilson v. McGuire*, 320 S.C. 137, 140–41, 463 S.E.2d 614, 616 (Ct. App. 1995) (citing *Anderson v. Anderson*, 299 S.C. 110, 382 S.E.2d 897 (1989)); *see also Zimmerman v. Marsh*, 365 S.C. 383, 388, 618 S.E.2d 898, 901 (2005) (same). And the "Court reviews all questions of law de novo." *Thompson v. Swicegood*, 430 S.C. 648, 658, 845 S.E.2d 920, 925 (Ct. App. 2020) (quoting *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009)).

ARGUMENT

Section 15-61-50 of the South Carolina Code provides a Court may order a property be partitioned in kind so long as it can "be fairly and impartially made and without injury to any of the parties in interest." At trial, Appellant presented unrebutted expert testimony of Ben Royer satisfying this burden and establishing the proposed subdivision of the Fairfield Tract would result in independent, market-conforming parcels, with fair market values reflecting the Parties' proportionate ownership interests. Royer also testified that the subdivided parcels *were each of greater economic value* to the Parties than their respective proportionate fair market value of the appraised parcel as a whole.

Yet, despite acknowledging Appellant—through Royer—presented, among other things, "a very granular (and impressively thorough) analysis of the different components of the property which contribute or detract from the values of different portions," "very detailed information" regarding the physical features of the property including its timber, and a "very detailed appraisal," (Partition Order at 2–3), the Special Referee somehow found Appellant "failed to meet her burden of proof that her proposed division is fair and equitable." *Id.* at 3–4. This decision is clear error. South Carolina case law provides the predominant factor in considering whether a proposed partition is fair and equitable depends on whether any party would suffer pecuniary harm. Appellant more than satisfied her burden to show the Fairfield Tract could be fairly and equitably subdivided without pecuniary injury to either party and the Special Referee erred in finding otherwise.

Further, the Special Referee erroneously focused only on the ease of harvesting timber on the property (and an incomplete consideration of that evidence) and the topography of the proposed subdivided parcels in determining whether Appellant satisfied her burden. This is error because

once Appellant met her burden, the burden then shifted to Respondent to show Appellant's proposed subdivision was not practicable or expedient. The relative ease of harvesting timber on one subdivided parcel over the other and the parcels' topography are not considerations making Appellant's proposed subdivision less practical or expedient. Even if they were, the evidence the Special Referee considered as to the relative ease of harvesting timber on one subdivided parcel over the other was incomplete and thus the analysis is flawed.

Finally, in ordering partition by allotment to Respondent, the Special Referee failed to acknowledge Respondent had neither asked for allotment of the Fairfield Tract in his pleadings or at any time after that, including during trial, nor moved to amend his pleadings after trial to conform to the evidence. The Special Referee also ignored Appellant's post-trial answer—in response to his own question—that she would prefer allotment to herself if the Special Referee somehow found she did not meet her burden to support partition in kind. Without Respondent having requested allotment to himself at any time, the Special Referee lacked the authority to unilaterally grant allotment to Respondent, and the decision to do so in Respondent's favor, over Appellant's specific request if subdivision in kind could not be had as a matter of equity, is perplexing.

In viewing the facts in accordance with its own view of the preponderance of the evidence, the Court should reverse the Special Referee, find partition in kind of the Fairfield Tract can be fairly and equitably accomplished without pecuniary injury to either party, and partition the Tract in accordance with Appellant's proposed subdivision created by expert Ben Royer.

I. The Special Referee erred in finding Appellant did not satisfy her burden of establishing her proposed subdivision would be fair and equitable as she presented uncontroverted expert testimony that the proposed subdivision would result in no pecuniary injury to any party.

Section 15-61-50 and the common law interpreting it show the Special Referee erred in finding Appellant did not meet her burden of establishing partition in kind can be "fairly and impartially made and without injury to any of the parties in interest." As to what is fair and impartial, South Carolina courts have stated that, while "equitable considerations such as the length of ownership and sentimental attachment to the property may be considered, *the pecuniary interests of all of the parties is the determining factor*." *Zimmerman*, 365 S.C. at 388, 618 S.E.2d at 901 (emphasis added); *see also Campbell v. Jordan*, 382 S.C. 445, 451, 675 S.E.2d 801, 804 (Ct. App. 2009) (same). And when all parties to a partition action express sentimental attachment to and a desire to retain their respective ownership interests in a property, and partition in kind can be had without pecuniary injury to the other, then partition in kind must be the favored remedy and allotment cannot be afforded to one party over the other, in equity. Our supreme court has consistently "recognized that partition in kind is favored when it can be fairly made without injury to the parties." *Anderson*, 299 S.C. at 114, 382 S.E.2d at 899 (citing *Smith v. Pearson*, 210 S.C. 524, 43 S.E.2d 479 (1947)).

Here, the preponderance of the evidence proves subdivision of the Fairfield Tract is practicably feasible and can be fairly and equitably accomplished without any *monetary or pecuniary* injury to either party. Indeed, Appellant was the only party to present evidence on the monetary and pecuniary values of a proposed subdivision. As the Special Referee correctly noted, Respondent presented "[n]o evidence of the values of the different components of [his proposed subdivision], as the [Appellant's] expert witness had presented." (Partition Order at 4). In fact, Respondent specifically stated he "th[ought] it can be divided." (Tr. at 217:14).

Appellant presented expert testimony from Royer, who was qualified as an expert in rural real estate appraisals and forestry. (Tr. at 69:15–74:5). Respondent stipulated to Royer's expert

qualifications, and, notably, Royer explained that he is a certified general real estate appraiser and a registered forester in South Carolina, with a specialty in appraising rural lands. *Id.*

In determining what would be a fair and equitable subdivision of the Fairfield Tract and resulting in no pecuniary injury to either party, Royer examined the location and land use patterns, public access and transportation, physical and geographic considerations, demographics, school districts, and farmland and timberland real estate markets, in the relevant neighborhood. Royer also examined the history of the property itself, its land management, ownership, taxes, and any encumbrances. (Tr. at 76:15–83:16). To account for the timber on the property, Royer made a detailed inventory of the timber, delineating "management groups, or stands, by species, age, and management history, providing for 73.9 plus acres of merchantable loblolly pine and 35.3 plus acres of natural hardwood locations in streamside management zones around the creek." (Pl.'s Ex. 22; Tr. at 87:5–23). Considering these facts, Royer stated: "it is my opinion that the current highest and best use [of the Fairfield tract] is as an investment in rural land for the production of timber, management of wildlife, recreation, and low-density residential use. This use is legally permitted, physically possible, and financially feasible, and it yields maximum productivity." *See* (Pl.'s Ex. 18, at 000354). Using no less than 12 sales comparisons and finding the sales comparison approach to be of the most meaningful method of valuation, Royer found the Fairfield Tract's fair market value as a *whole* to be $442,200, as of March 2022. Respondent stipulated to Royer's appraised value of the entire property. (Tr. at 96:23–24).

Royer also proposed what he believed, in his expert opinion, to be a fair and equitable subdivision of the Fairfield Tract considering the Parties' proportionate shares. In doing so, Royer stated he "look[ed] at what is the simplest subdivision that results in market conforming parcels that either maintain[s] or increase[s] the value of the property as a whole and are part equitable

based off of what proposed parcel entries we have." (Tr. at 99:3–9). He also looked to the road frontage, timber types and volume, physical characteristics of the land, and acreage. (Tr. at 99:15–110:16).

Ultimately, Royer testified to a proposed subdivision of the Fairfield Tract that provided Respondent seven more acres than his relative ownership share would otherwise afford him in the entirety of the Fairfield Tract. *See* (Pl.'s Ex. 19; Tr. at 109:18–24). Royer testified these subdivided parcels created independent, market conforming tracts, with timber allotted on each subdivided tract in volume and type in each party's relative proportionate share, providing land on which a residential dwelling could be placed for residential and recreational purposes, and afforded each party the fair market value of their respective ownership interests: $178,762.50 for Appellant's 14/36 interest and $280,270.02 for Respondent's 22/36 interest. (Tr. at 110:17–111:13); (Tr. at 111:8–13 ("This subdivision produces two parcels that like I said are not co-mingled, that are separate, that are market-conforming that either maintain or increase the value of property. And each one corresponds to roughly 5.5 to 3.5/9ths. So yes. This is a fair and equitable distribution of the property"). Royer's fair market valuations of the subdivided parcels actually realized a proportionate value *greater than* what would be provided under his fair market valuation of the Fairfield Tract as *one* parcel. That is, Royer's valuation of the Fairfield Tract as subdivided would total $459,032.52, compared to his valuation as a whole totaling $442,200.00 on March 20, 2022. (Tr. at 91:20–24). In all events, Respondent presented no evidence that the values attributed by Royer are incorrect. Thus, Appellant's proposed partition in kind is "justified on economic grounds." *Campbell*, 382 S.C. at 451, 675 S.E.2d at 804.

If left as is, the Special Referee's Order would result in pecuniary harm to both Parties by denying them the right to realize the greater value to each of them in their proportionate share in

the subdivided whole. The Special Referee thus erred as a matter of law in substituting his peculiar judgment of fair and equitable in the place of the uncontroverted, certified rural real estate appraiser and forester expert's fair market valuations of the subdivided properties. Inexplicably, the Special Referee's Order does not reference or discuss the evidence presented by Royer as to fair market value and pecuniary interest to the Parties in the subdivided parcels—the predominant factor in determining what is fair and equitable—at all.

The Court should therefore reverse the Special Referee's Order and find Appellant's unrebutted expert opinion that partition in kind of the Fairfield Tract can be had without pecuniary harm to either party and satisfied her burden by the preponderance of the evidence that the proposed subdivision could be fairly and equitably done. The Fairfield Tract can and should be divided in accordance with Appellant's proposal, providing two independent, market-conforming parcels with fair market values reflecting the Parties' proportionate ownership interests, and in fact providing greater value to them in their proportionate share than in the undivided whole.

II. The Special Referee erred in failing to shift the burden to Respondent to show the proposed subdivision was not practicable or expedient after Appellant met her burden above.

Once a party has shown by the preponderance of the evidence that partition in kind can be made in equity without pecuniary injury to either party, the party opposing partition in kind "has the burden of proving that partition in kind is not practicable or expedient." *Brown v. Brown*, 402 S.C. 202, 208, 740 S.E.2d 507, 510 (Ct. App. 2013) (citing *Anderson*, 299 S.C. at 114, 382 S.E.2d at 899). Thus, here, when Appellant satisfied her burden of showing subdivision of the Fairfield Tract is fair and equitable and would not result in pecuniary injury to either party, the burden was then supposed to shift to Respondent to show the proposed subdivision was not practicable or expedient. The Special Referee erred in failing to recognize Appellant met her burden, *see supra* Section I, and then in failing to shift the burden to Respondent.

As shown above, Appellant clearly established the predominant factor in determining whether partition in kind is fair and equitable by showing by a preponderance of the evidence, including the unrebutted expert testimony of Royer, that the proposed partition would not result in pecuniary injury to either party. *See supra* Section I. Thus, Respondent then had the burden to rebut that evidence and show partition in kind is not practicable or expedient. According to Black's Law Dictionary, "practicable" is something that is "reasonably capable of being accomplished" or "feasible in a particular situation." *Practicable*, BLACK'S LAW DICTIONARY (10th ed. 2014). And "expedient" is something that is advantageous or suitable for the particular purpose. *See Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 650 n.5, 557 S.E.2d 670, 674 n.5 (2001) ("Webster's New World College Dictionary 500 (Michael Agnes, ed., 4th ed., Macmillian 1999), provides the following definitions of 'expedient': '1 useful for effecting a desired result; suited to the circumstances or the occasion; advantageous; convenient[.] 2 based on or offering what is of use or advantage rather than what is right or just; guided by self-interest; politic.'"). Respondent failed to meet his burden of establishing—or really present any evidence showing—that subdividing the Fairfield Tract as proposed by Royer cannot in fact be accomplished or cannot suit its particular purpose. The particular purpose of a partition in kind must be to afford each party an independently marketable parcel, designed for the property's highest and best use, that will provide the fair market value of each party's respective ownership interests.

But the Special Referee never reached this question because he failed to shift the burden to Respondent after Appellant established partition in kind was fair and equitable with no pecuniary injury to the Parties. This was error. The Court should therefore reverse the Special Referee, and find that after Appellant satisfied her burden, the Special Referee should have shifted the burden

to Respondent to show that the proposed subdivision was not practical or expedient. The Court should further find that, based on the preponderance of the evidence, Respondent failed to meet this burden, and order partition in kind of the Fairfield Tract.

III. The Special Referee erred in finding that the proposed partition was not equitable based on the differences in topography and the relative ease of access to certain portions of a parcel for timbering purposes, when there was no evidence that those differences affected the fair market value of the proposed parcels.

The Special Referee erroneously focused on the subdivided parcels' differences in topography and relative ease of access to certain portions for timbering purposes to conclude that partition in kind was not fair and equitable. And when Appellant moved to reconsider on this point, the Special Referee doubled down on the differences in topography as his determinative consideration. This Court should reverse.

South Carolina case law establishes that physical features alone cannot overcome a fair and equitable proposed subdivision that does not cause any pecuniary injury to either party but provides each person an independently, marketable parcel worth more than the fair market value of their proportionate share. For instance, in *Campbell*, this Court considered four parcels of land of differing topographies and uses and owned in various percentages by five people. 382 S.C. at 448, 675 S.E.2d at 803. The special referee there partitioned in kind the four properties, which included two timber tracts, one "homeplace," and one unoccupied farmland. *Id.* at 450, 675 S.E.2d at 804. This Court described those properties as:

> Three of the four parcels are unoccupied farmland. The Darlington County parcel consists of thirty-three acres and contains merchantable timber worth approximately $ 2,000-3,000. One of the Florence County parcels consists of approximately forty-two acres and contains merchantable timber worth approximately $ 6,500-7,500. The two remaining adjoining Florence County parcels total seventy-five acres and are divided by Lamar Highway. The fifty-acre parcel lying west of Lamar Highway is unoccupied farmland, while the twenty-five acre parcel lying east of Lamar

> Highway (hereinafter referred to as "the Homeplace") is occupied by the parties or members of the parties' families.

Id. at 449, 675 S.E.2d at 803. This Court affirmed the special referee on appeal: "The special referee properly partitioned the property in a manner that was fair and equitable to all the parties," which "*was justified on economic grounds, as the pecuniary interests of all parties would be best served by dividing the property in this manner*." *Id.* at 451, 675 S.E.2d at 804 (emphasis added).

In another case, *Wilson v. McGuire*, this Court reversed a trial court's order of partition by sale on a 135-acre tract of land owned by eleven people. 320 S.C. 137, 138–39, 463 S.E.2d 614, 615 (Ct. App. 1995). After the trial court ordered a writ of partition to five commissioners under Rule 71(f), SCRCP, the commissioners responded with a majority report and a minority report. *Id.* at 139, 463 S.E.2d at 615–16. Going against the majority report finding the land could be partitioned in kind, the trial court ordered partition by sale because "partition in-kind was not feasible because it could not be done fairly." *Id.* at 141, 463 S.E.2d at 616. This Court noted the trial court "criticized" the majority report because

> (1) the three parcels designated for appellants had road frontage whereas other tracts did not; (2) the three parcels allocated to appellants were closer to available water and sewer service than other parcels; (3) respondent [] was allotted two parcels on opposite ends of the 135 acre tract; (4) the two parcels allocated to [some] heirs were oddly shaped; and (5) there was no notation of any flood plain or any consideration given to how it would affect the value of the property.

Id. at 141, 463 S.E.2d at 616–17. But this Court found the concerns raised by the trial court did not affect the "*feasibility of dividing the tract in-kind*." *Id.* at 142, 637 S.E.2d at 617 (emphasis added). Reversing the trial court and ordering it to accept the majority report subdividing the properties, the Court stated, "[e]xcept for the fact the trial court does not like the configuration of

the tracts allocated to [some] heirs and [respondent], nowhere in the record is there competent evidence that these tracts are less valuable than the tracts allocated to the other heirs." *Id.*

Here, the Special Referee erred in disregarding these cases—and any legal authority[4]—and improperly focused on the wrong considerations in determining whether partition in kind is fair and equitable and may be accomplished without any pecuniary injury to either party. In his view, all that mattered was the topography and the relative ease of access for timber harvesting. While the Fairfield Tract is unique in that all property is unique, it is not so out of the ordinary to render it incapable of being fairly and equitably partitioned in kind because of its physical characteristics.[5] The Fairfield Tract is 143.11 acres located in a rural area, consists of recreational timberland, and is best suited for use in timber and wildlife management, agricultural production, recreation, and low-density residential housing. Even Respondent stated on the record that he thought the Fairfield Tract could be subdivided. (Tr. at 217:14). That one parcel may have physical features that the other parcel does not simply goes to "*the value of the allocated parcels, not the feasibility of dividing the tract in-kind*." *Wilson*, 320 S.C. at 142, 463 S.E.2d at 617 (emphasis added). And where neither party has produced genuine evidence that one proposed tract is less valuable than the other, *id.*, or, in this case, that Royer's expert fair market valuations of the subdivided parcels are incorrect, physical topography differences do not constitute pecuniary injury to either party.

[4] Despite presenting governing case law for partitions of property in kind, both in a post-trial brief and a motion to reconsider, the Special Referee disregarded all case law and failed to include a single citation to support his decision in either Order.

[5] To be sure, it would create dangerous precedent for the Court to find a timberland property like the Fairfield Tract could not be partitioned in kind simply because one parcel may have different topography or logging access than another. Courts have considered much more difficult subdivisions of properties, like in *Campbell* and *Wilson*, and determined partition in kind can be fairly and equitably accomplished because there is no monetary injury to either party.

Indeed, the only evidence in this record relating to values of the proposed subdivided parcels is that both Appellant and Respondent would realize *more value* with subdivided parcels than they would if the parcels were left whole. *See supra* Section I.

To be sure, Royer noted, *without contradiction*, that he inventoried and accounted fairly for the type of timber apportioned to each proposed parcel. (Pl.'s Ex. 22; Tr. at 87: 5–23). And he considered and accounted for differences in topography, such as soil conditions and ephemeral or permanent streams, on each parcel, presenting into evidence topography maps representing the same, and ultimately providing Respondent seven more acres than his relative ownership share would otherwise afford him in the entirety of the Fairfield Tract to be sure the subdivision would not result pecuniary harm to either party. *See, e.g.*, (Pl.'s Exs. 18–23). Royer also explained that timber harvesting is only one factor going into a fair market valuation of the highest and best use of tracts of this type of land in Fairfield County. (Tr. at 283:13–284:12); *see also id.*; (Tr. at 76:11–78:17). When proposing independent, market-conforming parcels in proportionate fair market value to the parties' respective ownership interests, many factors are important to weigh and balance. (Tr. at 283:13–284:12). Other factors, such as the inclusion of enough suitable acreage on each parcel to place one or more homesites, are important, for which Royer accounted in the proposed subdivision. *Id.*

But the Special Referee ignored this expert opinion on the fair market value and the multiple factors that weigh in such determination—all pointing to the inevitable conclusion that partition in kind would not result in any pecuniary injury to either party—and erred in considering only the differences in the proposed subdivided parcels' topographies and the relative ease of access for timber harvesting. In finding these differences determinative, the Special Referee substituted his judgment for that of an expert: "Royer took the topography of the land into account,

along with other factors, into making his recommendations. He did not consider the topographies to be very significant at all. However, after giving the matter a great deal of thought, and considering other evidence regarding differences in topography, I chose to give the comparative topographies greater weight."[6] (Order Den. Mot. to Recons. at 2). Not only did the Special Referee err in substituting his opinion for that of an expert as to what factors are significant in making fair market valuations, which are clearly the province of an expert, but he also erred in failing to identify what "other evidence regarding differences in topography" he considered more weighty or, perhaps credible, than Royer's testimony on the issue. The Special Referee admitted Royer as certified general real estate appraiser and a registered forester in South Carolina, with a specialty in appraising rural lands, and noted himself that Royer provided "a very granular (and impressively thorough) analysis of the different components of the property which contribute or detract from the values of different portions," "very detailed information" regarding the physical features of the property including its timber, and a "very detailed appraisal." (Partition Order at 2–3).

In any event, under governing case law, differences in the physical characteristics of the proposed subdivided parcels such that harvesting timber on one parcel may prove tougher than on the other or that one proposed parcel may have more attractive topography than the other, *but see infra* Section IV, do not matter if no pecuniary harm results from them. Royer testified that he accounted for these differences in determining the fair market value of the proposed subdivided parcels, and the proposed subdivided parcels result in a pecuniary *gain* for the Parties. Respondent failed to present any evidence on fair market value, or that the differences affect Appellant's expert

[6] In fact, the Special Referee's Order omits any reference to the facts and expert opinion presented by Royer on the fair market valuation of Appellant's proposed subdivision of the Fairfield Tract. The Order also fails to even mention evidence establishing the pecuniary injury or harm to either party.

testimony that the fair market valuations of the proposed subdivided tracts would not result in any pecuniary injury to either party. In any event, these differences do not establish the proposed subdivision is not practical or expedient. *See supra* Sections I & II.

The Court should reverse the Special Referee and find partition in kind is fair and equitable and will not result in any pecuniary injury to either party.

IV. The Special Referee's conclusions on the relative ease of harvesting timber on the subdivided parcels are factually flawed and ignore important facts to the contrary.

Putting aside that topography and the relative ease of harvesting timber *are not* determinative factors in considering the equity of partition in kind when no pecuniary harm to either party has been established, *see supra* Sections I & III, in considering the relative ease of harvesting timber on the subdivided tracts, the Special Referee also erred by ignoring testimony contrary to his finding that "[w]ithout the primary access road, getting to the stands of timber on the Defendant's portion would be impaired by the gullies and creeks that would have to be crossed." (Partition Order at 4).

Royer testified there were timber roads already cut through the land, as well as markings along the stream beds where logs had been dragged over. (Tr. at 162:5–8). Both Respondent and Mannel admitted, as Royer also observed, that both proposed parcels had been logged before and had existing roads over which trucks could maneuver for logging purposes. They also admitted they logged below the creek before too. Respondent testified that he and Mannel "ma[d]e places to go across the creeks" on the property. (Tr. at 204:18). And Mannel testified that "when [they] logged that [portion they] actually put steel bridges in the creek[,] across the creek and continued the road to the power line." (Tr. at 254:9–10).

Royer also noted there is an existing woods road—Sleepy Hollow Road—that meets the south-western side of the property below the creek that could be used for logging too. (Tr. at

148:15–23; 285:11–13). In fact, Appellant called Royer in rebuttal to address the access to the property through Sleepy Hollow Road. Appellant's counsel presented Royer with the original recorded plat of the property—which he had used in evaluating the property and proposing subdivision of the same—and Royer stated the plat referenced Sleepy Hollow Road as "existing woods road to be used for access." (Tr. at 284:13–285:7). In any event, Royer stated it would not be difficult to construct a new main access point to Respondent's proposed portion of the property, especially considering the trails already existing on the western edge of the property and road frontage available. (Tr. at 107:3–16; 132:1–6; 132:25–133:11). Also, logging companies could and would likely cut their own roads when harvesting timber. (Tr. at 132:1–6).

Therefore, not only is it improper to consider only the physical characteristics and topography as they relate to timber harvesting in deciding not to partition the property in kind, but it is also inaccurate and a misinterpretation of the evidence to find "gullies and creeks" were not workable or that Respondent lacked any suitable ingress or egress to his subdivided tract. Appellant's expert, and even Respondent and his own lay witness, testified that the land below the creek had been logged before and access could be had on the western edge of the property as well as through Sleepy Hollow Road below the creek. Thus, there were not "gullies [or] creeks" or issues with access to the property that would prevent Respondent from using or logging his parcel, and Appellant stipulated before closing arguments to granting an easement to Respondent during his lifetime to ingress and egress to his property from the already existing primary access road. (Ex. A to Pl.'s Mot. to Recons.). The Special Referee did not consider these facts, including expert opinion, in discussing the relative ease of timbering between the proposed subdivided tracts. Thus, to the extent it is relevant to the Court's consideration of whether partition in kind is feasible or impracticable, the Special Referee erred in discounting some of the evidence presented to him

related to the topography and the relative ease of harvesting timber on the subdivided parcels. The Court should reverse.

V. The Special Referee lacked the authority to order and any appropriate evidence on which to base allotment to Respondent, as Respondent did not request allotment in his pleadings or before or during trial, move to amend his pleadings to conform with the evidence before the close of trial, or present any valuation of the Fairfield Tract to support allotment.

In the "Findings of Fact," the Special Referee stated that "Defendant offered to purchase Plaintiff's interest for 14/36 of the [fair market value determined by Royer as to the Fairfield Tract as a whole], but Plaintiff rejected that offer because she wanted to keep [her interest in] the property for long-term investment and for sentimental reasons." (Partition Order at 3). Nowhere in the entire trial transcript, however, is there any testimony from Respondent "offer[ing] to purchase Plaintiff's interest for 14/36 of the [fair market value determined by Royer as to the Fairfield Tract as a whole]." From where the Special Referee drew this conclusion is unknown, and thus that finding of fact is erroneous.

Before the September 7 trial, moreover, Respondent requested only partition in kind of the Fairfield Tract, presenting a hand-drawn proposed subdivision piggybacking on the maps provided by Appellant's expert. (Ex. B to Pl.'s Mot. to Recons.). As to his proposed subdivision though, Respondent provided no valuation and, ultimately, withdrew the proposal at trial. Despite withdrawing his proposed subdivision at trial, Respondent still testified that he thought the property could be subdivided, (Tr. at 217:14), and failed to rebut Appellant's evidence establishing that partition in kind could be had without pecuniary injury to either party or bear his burden to show that partition in kind was not practicable or expedient. *See Brown*, 402 S.C. at 208, 740 S.E.2d at 510 (stating the defendant opposing partition in kind "has the burden of proving that partition in kind is not practicable or expedient").

Respondent also did not request allotment to himself of the Fairfield Tract in the pleadings, or before the close of evidence at trial. Nor did he present any evidence about the value of the Fairfield Tract for allotment purposes. What is more, although the Parties agreed the fair market value of the Fairfield Tract was $442,200.00, as of March 22, 2022, neither Appellant nor her expert Royer would attest what the fair market valuation was on September 7, 2023, a year and a half later. In fact, the Special Referee asked Royer whether he believed the value as a whole would be the same on September 7, and Royer stated, "I have not reviewed sales since [March 2022]. There definitely have been land sales in this area." (Tr. at 95:25–96:4); *see also* (Tr. at 158:24–159:9). Appellant, moreover, did not accept Royer's March 2022 appraisal of the Fairfield Tract for allotment purposes. And, of course, Respondent presented no valuation. Thus, no evidence supports the Special Referee's allotment of the Fairfield Tract to Respondent based on Royer's March 2022 valuation made for purposes of a subdivision. Considering Appellant was not given the opportunity to present evidence on allotment valuation—as her expert testimony valuation was intended only for use in subdividing the property—the Special Referee was without evidence valuing the Fairfield Tract for allotment purposes.

The South Carolina Rules of Civil Procedure and common law provide that "parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992); *see also, e.g.*, *Gary v. Lowcountry Med. Transp., Inc.*, 424 S.C. 18, 23–24, 817 S.E.2d 291, 294 (Ct. App. 2018) (noting a party may receive relief only if it has been specifically pled or if the party seeks amendment of the pleadings before the close of evidence in any trial, as the doctrine of binding a party to its pleadings seeks to protect the integrity of the court process).

To be sure, in resolving partition actions, courts have noted that the party sought the specific type of partition in their pleading. *See Zimmerman*, 365 S.C. at 385, 618 S.E.2d at 900 (noting the defendant responded to the complaint that sought partition by sale by answering and seeking partition by allotment)[7]; *Anderson*, 299 S.C. at 112, 382 S.E.2d at 898 (noting the plaintiffs sought partition by sale and the defendant answered, requesting partition by allotment); *Brown*, 402 S.C. at 205, 740 S.E.2d at 509 (noting the plaintiff's complaint sought partition in kind or by sale). These references follow the South Carolina Rules of Civil Procedure and common law referenced above, holding that "parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." *Postal*, 308 S.C. at 387, 418 S.E.2d at 323; *see also Gary*, 424 S.C. at 23–24, 817 S.E.2d at 294.

Sections 15-61-50 and 15-61-100 should be read in harmony with the existing South Carolina Rules of Civil Procedure and common law. A party is bound by its pleadings, including the request for relief under those statutory sections. On one hand, here, Appellant sought and presented evidence only regarding partition in kind as to the Fairfield Tract before and at trial.[8] On the other hand, Respondent did not request allotment of the Fairfield Tract to himself in his pleading or move to amend the pleadings to conform to the evidence—to the extent there was any evidence to support such claim—before the close of evidence.

[7] And, as the dissent noted, there was "no contention that a partition in kind can be made, there being one house located on one lot." *Id.* at 389, 618 S.E.2d at 902 (Pleicones, J., dissenting).

[8] While Appellant sought partition by allotment of a 2.3 acre homesite subject to the action, she never sought partition by allotment of the Fairfield Tract until after trial, when the Special Referee inquired as to whether she would accept allotment to herself if necessary, to which she responded she would desire this result for herself only if partition in kind resulted in pecuniary harm or was otherwise infeasible and could not be ordered in equity. *See infra* at 23–24.

Accordingly, the Special Referee lacked the authority to award allotment of the Fairfield Tract to Respondent.

In ordering allotment to Respondent under these circumstances, the Special Referee deprived Appellant, post-trial, of the opportunity to prepare for a trial that would contemplate including a claim by Respondent for allotment. He also deprived Appellant of the opportunity to cross-examine Respondent and his witness on such position or to present other direct or rebuttal testimony from Appellant or other witnesses as to the equity of allotment. This ruling—despite Respondent's pleading, pre-trial, and trial position—is manifestly prejudicial to Appellant.

For these reasons, it is an error of law to allot the Fairfield Tract to Respondent. The Special Referee's decision is especially perplexing when Respondent submitted *no* evidence to show the value of the Fairfield Tract for purposes of allotment, and Appellant did not agree to the value of the Fairfield Tract for purposes of allotment. And when the Special Referee asked post-trial if Appellant would like the property allotted to her because he did not "think it [was] fair . . . to make that allotment [to Respondent] until [he knew] her wishes," Appellant responded, "[i]f there was sufficient evidence presented at the hearing to establish that the Fairfield Tract . . . could not be practically or feasibly subdivided (which there is not), then [Appellant] would request allotment of those parcels to herself." (Ex. C to Pl.'s Mot. to Reconsider). The Special Referee did not refer to Appellant's response in his Order or explain why he set aside such request in favor of Respondent. In the order on the motion to reconsider, the Special Referee said, "her request was not made until long after the hearing was over and then only in response to a question from me" and then "[t]hat issue is not properly before [him]." (Order Den. Mot. to Recons. at 2). This conclusion is puzzling at best. If the Special Referee was not going to consider allotment to Appellant, then why did he seek her opinion on allotment to her at all? And if Respondent's

Amended Answer "admit[ting] the allegations of those Paragraphs and join[ing] in the prayer for relief [of Appellant's Complaint requesting allotment as a general matter]," was sufficient to consider allotment of the Fairfield Tract to Respondent appropriate here, then certainly Appellant's Complaint should be afforded the same liberal construction without need for consideration of Appellant's allegedly belated post-trial opinion solicited by the Special Referee. *See* (Order Den. Mot. to Recons. at 2); *see generally* (Pl.'s Compl. (first cause of action and prayer for relief)).

In any event, the Special Referee lacked the authority to unilaterally grant allotment to Respondent when Respondent had not properly or timely sought specific relief in the form of allotment of the Fairfield Tract to himself in his pleadings, pre-trial, or before the close of evidence, and when no evidence supports allotment. The Court should thus reverse the Special Referee and order the Fairfield Tract can and must be partitioned in kind in accordance with Appellant's proposed subdivision.

CONCLUSION

The Special Referee erred in finding Appellant did not meet her burden when her unrebutted expert testimony established the proposed subdivision of the Fairfield Tract would result in independent, market-conforming parcels, with fair market values reflecting the Parties' proportionate ownership interests *without* any pecuniary injury to either party. Rather than recognizing the predominant factor is whether any party would suffer pecuniary harm, the Special Referee erroneously focused only on the ease of harvesting timber on the property (and an incomplete consideration of that evidence) and the topography of the proposed subdivided parcels. And in ordering allotment to Respondent, the Special Referee failed to acknowledge Respondent had neither asked for allotment of the Fairfield Tract in his pleadings or at any time after that, including during trial, nor moved to amend his pleadings after trial to conform to the evidence.

In viewing the facts in accordance with its own view of the preponderance of the evidence, the Court should reverse the Special Referee, find partition in kind of the Fairfield Tract can be fairly and equitably accomplished without pecuniary injury to either party, and partition the Tract in accordance with Appellant's proposed subdivision created by expert Ben Royer.

Respectfully submitted,

s/*Beth B. Richardson*

Beth B. Richardson (SC Bar No. 69552)
brichardson@robinsongray.com
Sarah C. Frierson (SC Bar No. 104643)
sfrierson@robinsongray.com
ROBINSON GRAY STEPP & LAFFITTE, LLC
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400 Telephone
(803) 929-0300 Fax

Counsel for Appellant Lena Sue Yarborough

Columbia, South Carolina
March 5, 2024