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

Lena Sue Yarborough .....Appellant,

v.

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

INITIAL REPLY BRIEF OF APPELLANT

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Respondent's arguments on appeal contain the same fatal errors as the Special Referee's rulings in the partition order and order denying Appellant's motion to reconsider below (together, "Orders"). Both ignore that the preferred remedy in a partition action is partition in kind and that the predominant factor in determining partition in kind is an equitable division of the parties' pecuniary interests in the real property, not an equitable division of the physical characteristics of the real property among the parties. Both ignore that when evidence establishes a proposed division does no pecuniary harm to any party, courts routinely reject arguments that differences in physical attributes of subdivided parcels make partition in kind impracticable or infeasible. And both ignore that Appellant presented uncontroverted expert testimony as to the fair market valuations of the proposed subdivided parcels, establishing partition in kind would not result in any pecuniary injury to either party here. Respondent further asks this Court to disregard the appropriate standard of review and give deference to the Special Referee's flawed rulings.

The Court should reject Respondent's arguments and reverse the Special Referee for the reasons set forth in Appellant's initial brief and for at least four reasons here.

I. The pecuniary interests of the Parties to, not the differing physical characteristics of, a partition in kind, control the Court's determination of what is equitable.

First, Respondent, like the Special Referee, focuses only on the "physical features" of the 143.11-acre Fairfield Tract in attempting to argue partition in kind is "untenable." (Resp't's Br. at 11). For three pages, Respondent discusses the differences in the physical characteristics of Appellant's proposed subdivision of the Tract. (Resp't's Br. at 11–13).[1] It is clear from his brief

[1] At times in his discussion, Respondent misrepresents the facts testified at trial. For instance, Royer did not testify "Tract A on the western side of the property, (slated to go to Respondent) has approximately 15% usable acreage." (Resp't's Br. at 11). Royer's testimony on the soil rating maps was about the rating of soil suitable for a dwelling, not usable and unusable acreage. *See*

that Respondent preferred the physical attributes of one proposed parcel over the other. As thoroughly explained in Appellant's brief, however, the predominant factor as to whether partition in kind can be fairly and equitably accomplished is not personal preference or physical characteristics; it is "the *pecuniary interests* of all of the parties." *Zimmerman v. Marsh*, 365 S.C. 383, 388, 618 S.E.2d 898, 901 (2005) (emphasis added).[2]

Appellant presented unrebutted expert testimony from Ben Royer, a South Carolina licensed rural land appraiser and licensed forester, that established Appellant's proposed subdivision was fair and equitable and would not result in pecuniary injury to either party. *See id.* While Respondent attempts to sweep Royer's testimony under the rug—arguing that certain physical characteristics important to him should control what is equitable—Respondent does not once dispute Royer's expert fair market valuation. Nor does he dispute the fair market valuation created independent, market-conforming parcels in the Parties' proportionate interests and accounted for dozens of appraisal factors that revealed that no pecuniary injury would result from the proposed subdivision. *See, e.g.*, (Appellant's Br. at 9–10 (noting Royer testified important factors for a fair market valuation include, among others, location, land use patterns, public access

(Pl.'s Exs. 20 & 21); *see also* (Tr. at 282:2–19). Royer also did not "concede" "the best land on the tract would go to Appellant" or that Respondent's land would be "inaccessible." *But see* (Resp't's Br. at 15). To the contrary, Royer testified the subdivided parcels would be independent, market-conforming parcels that would provide a greater value to each party in their proportionate share than the Parties could realize in their proportionate share in the undivided whole. *See, e.g.*, (Appellant's Br. at 8–11). Royer also testified that Respondent's proposed tract had skid trails, a timber trail, and a timber road that provided access to all parts of Respondent's proposed parcel. *See, e.g.*, (Appellant's Br. at 18–19).

[2] Essentially, Respondent wants to have his cake and eat it too in that he not only requires his proportionate fair market value but also all his preferred physical characteristics to be part of his subdivided share of the property. This result is not a realistic outcome in partition cases and why South Carolina courts have consistently held that mere differences in the physical characteristics of a property's subdivided parts cannot overcome evidence establishing that no pecuniary harm would result to any party in the proposed subdivision.

and transportation, demographics, school districts, suitable acreage for a homesite, and accessible timber for logging)). Respondent also does not dispute that Appellant's proposed subdivision provides greater value to them in their proportionate shares than in the undivided whole. And although the Special Referee inexplicably refused to discuss this evidence as supporting the predominant factor controlling partition, the Special Referee noted Respondent's lack of testimony on this dispositive issue. *See* (Partition Order at 4 (discussing testimony from Respondent and stating "[n]o evidence of the value of the different components of each tract were presented, as [Appellant's] expert witness had presented.")).

Further, importantly, neither the Special Referee nor Respondent attempt to wrestle with the applicable precedent, which demonstrates that partition in kind of properties with differing physical characteristics is commonplace.[3] In *Campbell v. Jordan*, this Court affirmed a special referee that partitioned in kind four properties—which included two timber tracts, one "homeplace," and one unoccupied farmland—because it "*was justified on economic grounds, as the pecuniary interests of all parties would be best served by dividing the property*." 382 S.C. 445, 450–51, 675 S.E.2d 801, 804 (Ct. App. 2009) (emphasis added). And in *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 because the difference in physical characteristics did not affect the "feasibility of dividing

[3] Instead, Respondent continuously cites sections of the Clementa C. Pinckney Uniform Partition of Heirs' Property Act, S.C. Code Ann. § 15-61-310 *et seq.*, as purportedly applicable to this case. The Special Referee *did not* consider any factors listed in section 15-61-390(B) and specifically found—after agreement by the Parties—the "Clementa C. Pinckney Uniform Partition of Heirs' Property Act does not apply to this action." (Partition Order at 8). Respondent did not move to reconsider, appeal this ruling, or even argue the Act controls to the Special Referee. Thus, he cannot rely on the Act in this appeal. *See Shirley Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case."); *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court that it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.").

the tract in-kind." 320 S.C. 137, 138–39, 142, 463 S.E.2d 614, 615, 617 (Ct. App. 1995); *see also id.* at 142, 637 S.E.2d at 617 ("Except 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."). These cases show that a difference in physical characteristics or topography cannot override evidence establishing partition in kind would result in no pecuniary injury to either party.

II. Respondent's untimely reference to his alleged "sweat equity" is not timely as raised for the first time on appeal, and it without merit too.

Second, Respondent did not once argue at trial or in any post-trial motion that he should be allotted the Fairfield Tract because he had made improvements to the Tract. *But see* (Resp't's Br. at 14–15 (claiming without citation that the partition order "reflects Respondent's long-term physical presence on the property and improvements to the property made by him")). Nor did Respondent seek to be compensated for his "sweat equity" before the Special Referee. *But see id.* at 15. The Special Referee's Orders on appeal make no mention of these alleged facts. And, to be sure, Respondent already received the benefits of any such improvements from harvesting timber on the property during the Parties' mother's lifetime. (Tr. at 205:15–18; 277:8–11).[4] Thus, the Court should ignore Respondent's untimely references to this equitable principle, which is without merit in any regard.

[4] This situation is nothing like the situation in *Few v. Few*, in which the defendant "[b]y his pleading, . . . alleg[ed] that he had constructed the dwelling with his own funds, except for a small amount contributed by plaintiff, [and] claimed that he is entitled to have it allotted to him because plaintiff is estopped from claiming any interest therein." 242 S.C. 433, 439, 131 S.E.2d 248, 251 (1963). It isn't like *Shumaker v. Shumaker* either. 234 S.C. 421, 425, 108 S.E.2d 682, 685 (1959) (explaining that the plaintiff sought a proportionate reimbursement for his contribution of rebuilding a house on the property partially with his own money). Respondent did not seek allotment at trial at all and definitely not because of his purported improvements.

III. Under the appropriate standard of review, the Court must view the facts in accordance with its own view of the preponderance of the evidence and refuse to defer to the Special Referee's flawed rulings and factual findings.

Third, although Respondent references the appropriate standard of review for this Court in one part of his brief, he then inexplicably asks the Court to give "considerable deference" to the Special Referee who purportedly set forth a "carefully reasoned and detail-oriented order." (Resp't's Br. at 21 & 22). While this Court may defer to a lower court as to *credibility determinations* in this equitable action, the Court can and should view the facts in accordance with its own view of the preponderance of the evidence. *See, e.g.*, *Lollis v. Dutton*, 421 S.C. 467, 479, 807 S.E.2d 723, 729 (Ct. App. 2017). And contrary to Respondent's implication, there is no dispute as to "the inherent probability" of Royer's testimony or his "credibility." *But see* (Resp't's Br. at 19–20). In fact, the Special Referee found Royer to be extremely credible. *See* (Partition Order at 2–3) (stating Royer presented "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").

Appellant established—through Royer and other evidence—that the proposed partition in kind would be fair and equitable because it would not result in any pecuniary injury to either party. As Respondent concedes, partition in kind is the preferred remedy and "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) (emphasis added) (citing *Smith v. Pearson*, 210 S.C. 524, 43 S.E.2d 479 (1947)). Thus, this Court should reject Respondent's request to defer to the Special Referee's view the facts and instead view the facts in accordance with its own view of the preponderance of the evidence—as the standard requires.

IV. The Special Referee erred in failing to give Appellant's request for allotment, in the event partition in kind could not be equitably ordered, the same consideration as he gave Respondent's belated request.

Fourth, Respondent claims no less than five times in his brief that he requested allotment of the Fairfield Tract to himself at trial. (Resp't's Br. at 9, 14, 15, 18, & 21). Respondent provides no citation to support this proposition though and because Respondent never requested allotment at trial. The Special Referee ruled that Respondent requested allotment to himself in his Amended Answer. *See* (Resp't's Br. at 18). But pleading that the properties "should be equitably partitioned, in kind, where possible," (Am. Answer at ¶ 10), cannot be construed as seeking allotment,[5] especially when Respondent specifically sought partition in kind for himself leading up to and during trial. At trial, Respondent specifically stated that he "th[ought] it can be divided." (Tr. at 217:14). Respondent sought allotment only after trial, when submitting a post-trial brief to the Special Referee, and without moving to conform the pleadings to the evidence presented at trial. Appellant was never on notice that Respondent planned to seek allotment to himself before or during trial and thus had no opportunity to present a case at trial that contemplated allotment of the Fairfield Tract to either party.

Further, contrary to Respondent's representation, Appellant did not stipulate to the fair market value of the Fairfield Tract for purposes of allotment. Neither Appellant nor Royer would attest what the fair market valuation of the Fairfield Tract was on September 7, 2023, the day of

[5] And it is Respondent, not Appellant, that "eschews" the holding in *Zimmerman*. The court in *Zimmerman* did not note it "could waive the requirement for strict technical compliance with this section when equity is served." (Resp't's Br. at 18). It is unclear to what "section" Respondent is referring. Even so, the majority of the court in *Zimmerman* simply stated in a footnote in response to the dissent that the rules provide that a court may dispense with a writ of partition yet still order allotment. 365 S.C. at 388 n.2, 618 S.E.2d at 901 n.2. That statement, however, has nothing to do with this case. The point Appellant made in citing *Zimmerman* on this issue is that a party's preferred relief must still be requested in his pleading. *See* (Appellant's Br. at 22).

trail. Royer's appraisal of the Fairfield Tract for purposes of the proposed subdivision in kind had been performed a year and a half earlier. (Tr. at 95:25–96:4); *see also* (Tr. at 158:24–159:9). Thus, Appellant certainly did not accept Royer's March 2022 appraisal of the Fairfield Tract for allotment purposes at trial.

Even if Respondent's Amended Answer or post-trial request for allotment of the Fairfield Tract to himself could be construed in the way the Special Referee afforded to him, then the Special Referee should have also construed Appellant's Complaint that way too and given more consideration to Appellant's post-trial affirmative answer to the Special Referee's inquiry as to whether she would accept allotment to herself. (Ex. C to Pl.'s Mot. to Reconsider). The Special Referee's conclusion that Appellant's post-trial request was untimely and "not properly before [him]," (Order Den. Mot. to Recons. at 2), is belied by the facts that Appellant's Complaint could have been liberally construed like Respondent's Amended Answer and that Respondent did not pursue allotment to himself of the Fairfield Tract until post-trial either.

CONCLUSION

For these and the many reasons argued in Appellant's initial brief, the Court should reverse the Special Referee's Orders, find partition in kind of the 143.11-acre Fairfield Tract can be fairly and equitably accomplished without pecuniary injury to either party, and order partition in kind of the Fairfield Tract in accordance with the proposed subdivision of Appellant's expert. The Special Referee erred in finding Appellant did not meet her burden when she presented unrebutted expert testimony that 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. In fact, the proposed subdivided parcels increased the fair market value of the Parties' proportionate share than that afforded to the Parties

in the undivided whole. Rather than recognizing the predominant factor is whether any party would suffer pecuniary harm, both Respondent and the Special Referee erroneously focus only on their preference for certain physical characteristics in the proposed subdivision. And they fail to reconcile that there was no evidence presented at trial demonstrating that these physical differences affected the fair market value of the proposed parcels in any way. The Special Referee's conclusions are also factually flawed and ignore important facts to the contrary. Finally—although the Court need not address this issue on appeal, because the preponderance of the evidence shows Appellant's proposed partition in kind is equitable—in ordering allotment to Respondent, the Special Referee erroneously disregarded that Respondent had neither asked for allotment of the Fairfield Tract in his pleadings or during trial.

Because the preponderance of the evidence establishes Appellant's proposed subdivision of the Fairfield Tract is practical and feasible and would not result in any pecuniary injury to either party, the Court should reverse the Special Referee, find partition in kind of the Tract is equitable, and partition the Fairfield Tract in accordance with the proposed subdivision of Appellant's expert.

Respectfully submitted,

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