

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

John K. DuBose, III, Special Referee

RECEIVED

MAY 23 2014

SC Court of Appeals

Trial Court Case No. 2011-CP-28-073
Appellate Case No. 2014-001012

Albert H. Hough, individually and as Personal Representative of the Estate
of Harold W. Hough and as Personal Representative of the Estate of
Elizabeth P. Hough; George J. Hough and Angela Hough Respondents,

v.

Richard Wesley Hough, Joel Pitts Hough, and Mary Louise Robinson Defendants,

Of whom Richard Wesley Hough is the Appellant,

And

Joel Pitts Hough and Mary Louise Robinson are Respondents.

Respondents Albert Hough's, George Hough's and Angela Hough's
Memorandum in Support of Appealability of the Trial Court's
Order on Appellant's Attempted Use of S.C. Code Ann. § 15-61-25 (Supp. 2013)

This partition action was filed in January, 2011. It involves five siblings, Albert, George, Richard, Joel and Mary Louise, and Albert's spouse, Angela. Albert, George and Angela are co-Plaintiffs. Joel is incapacitated and is represented by his attorney/guardian ad litem, and Mary Louise is in default. The action involves eight parcels of unimproved land (mostly a combination of timberland and pastureland) totaling approximately 1,289 acres, the respective interests in which were received by the siblings from their parents via gifts and inheritance.

Prior to Richard's § 15-61-25 Notice of Interest in Purchasing Property Notice, served on May 2, 2014, no party had sought a partition by sale, thereby admitting, or admitted by default in the case of Mary Louise, that the land can be fairly partitioned in kind.¹ Trial was set to begin on May 12, 2014. On Friday, May 2, 2014, Richard filed and served a notice, pursuant to S.C. Code Ann. § 15-61-25 (Supp. 2013) that he is interested in purchasing the land that is the subject of the partition action. (Exhibit C.) On May 5, 2014, Respondents herein (Plaintiffs below) filed and served their Motion to Disallow or to Strike Defendant Richard Hough's Section 15-61-25 Notice of Interest in Purchasing Property, and for Expedited Hearing. (Exhibit D.) By consent, the hearing on Respondents' Motion was conducted by conference call on May 6, 2014. By Order dated May, 7, 2014 the trial court held that S.C. Code Ann. § 15-61-25 (Supp. 2013) is not available to a tenant in common when the land can be fairly partitioned in kind and that Richard had not shown to the Court that partition in kind was not practicable or expedient. (Exhibit E.) Richard's Notice of Appeal was filed and served on May 8, 2014.

¹ Second Amended Complaint, p. 2, ¶ 7 at Exhibit A; and Appellant Richard Hough's Answer, p. 3, ¶ 7 at Exhibit B.

South Carolina adheres to the final judgment rule which provides that, with certain exceptions, an appeal lies only from a final judgment. Brunson v. American Koyo Bearings, 367 S.C. 161, 623 S.E.2d 870 (Ct.App. 2005.) The May 7, 2014 Order is obviously interlocutory; however, certain interlocutory orders are immediately appealable as identified in S.C. Code Ann. § 14-3-330 (1976).

Interlocutory orders “involving the merits” may be immediately appealed. S.C. Code Ann. § 14-3-330(1) (1976). Involving the merits has been defined as an order that “must finally determine some substantial matter forming the whole or a part of some cause of action or defense.” Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993.)

Likewise, an interlocutory order that affects “a substantial right” may be immediately appealed. S.C. Code Ann. § 14-3-330(2) (1976). “An order affects a substantial right and is immediately appealable when it '(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial[,] or (c) strikes out an answer or any part thereof or any pleading in any action.’” Watson v. Underwood, Op. No. 5206 (S.C.Ct.App. filed March 19, 2014) (Shearouse Adv.Sh. No. 11 at 48), citing Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005).

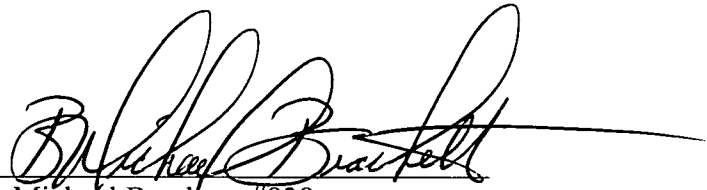
These Respondents submit that the May 7, 2014 Order correctly decided the Motion to Disallow or to Strike the S.C. Code Ann. § 15-61-25 (Supp. 2013) notice and should be affirmed. However, in the interest of judicial economy and because the Order involves the merits and affects a substantial right, Respondents assert that the May 7, 2014 Order is immediately appealable and that Appellant’s appeal should be considered now. Because the issue on appeal involves a question of law, the undersigned intends to move that the South Carolina Supreme Court certify the matter for

review by that Court.

The Order determines a part of the Respondents' action for partition, and has the effect of striking a defense of the Appellant. These Respondents incorporate by reference the argument of the Appellant in his Memorandum.

Conclusion

For the aforementioned reasons, the May 7, 2014 Order should be found to be immediately appealable.

A handwritten signature in black ink, appearing to read "B. Michael Brackett", written over a horizontal line.

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Attorneys for Respondents Albert
Hough, George Hough and Angela
Hough

May 23, 2014

For a First Cause of Action - All Defendants

(Partition of Real Property)

6. The Plaintiffs re-allege all of the allegations set out hereinabove.
7. The Plaintiffs are informed and believe that all of the real property in which the parties have undivided interests, being those described on Exhibit A, are divisible in kind and should be apportioned among the parties entitled thereto according to their severable rights, as provided for in Rule 71 SCRPC and §15-61-10 et seq. of the South Carolina Code of Laws.
8. That the Plaintiffs are further informed and believe that they are entitled to reasonable attorney's fees and costs in connection with this action and as provided by law.

For a Second Cause of Action Against Defendant Richard Hough

(Waste)

9. The Plaintiffs re-allege all of the allegations set out hereinabove.
10. That heretofore, on or about July 12, 2010, the Defendant Richard Wesley Hough, a tenant-in-common to the real properties at issue herein, began a course of conduct designed to demand that the real property be re-conveyed into three equal shares. (Exhibit B)
11. That on or about October 19, 2010, the Defendant Richard Wesley Hough demanded that the Plaintiff Albert Hough further divide his one-half interest with himself and his brother George Hough. (Exhibit C)



Paragraph 2 of the Second Amended Complaint. Answering further, not all parties are tenants in common of each of the real properties that are the subject of this action.

4. Richard Hough admits the allegations of Paragraphs 3 and 4 of the Second Amended Complaint.

5. As to Paragraph 5 of the Second Amended Complaint, Richard Hough admits that venue is proper in Kershaw County, South Carolina. Answering further, however, the proper authority for such venue is S.C. Code Ann. § 15-7-10(2).

FOR A SECOND DEFENSE

6. Richard Hough realleges and incorporates by reference hereto Paragraphs 1 and 5 in response to Paragraph 6 of the Second Amended Complaint.

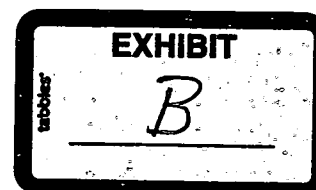
7. Richard Hough admits the allegations of Paragraph 7 of the Second Amended Complaint to the extent they allege that certain of the parties own undivided interests in certain of the real properties that are the subject of this action and that those interests are divisible in kind as provided for by the South Carolina Rules of Civil Procedure and the South Carolina Code of Laws. Richard Hough denies the remaining allegations of Paragraph 7 of the Second Amended Complaint. Answering further, Richard Hough will refer herein after to the real properties described in Exhibit A of the Second Amended Complaint as "the subject real properties."

8. Richard Hough denies the allegations of Paragraph 8 of the Second Amended Complaint.


FOR A THIRD DEFENSE

9. Richard Hough realleges and incorporates by reference hereto Paragraphs 1 through 8 in response to Paragraph 9 of the Second Amended Complaint.

10. Richard Hough denies the allegations of Paragraph 10 of the Second Amended Complaint.



Kathleen McDaniel – Attorney
803-404-690
kathleenmcdaniel@callisontighe.com

CALLISON  TIGHE

May 2, 2014

(Via Hand-Delivery)

The Honorable Joyce McDonald
Kershaw County Clerk of Court
Post Office Box 1557
Camden, SC 29021-1557

**RE: Albert H. Hough, individually, and as the Personal Representative of the Estate of Harold W. Hough and as the Personal Representative of Elizabeth P. Hough, George J. Hough and Angela Hough v. Richard Wesley Hough, Joel Pitts Hough and Mary Louise Robinson
Case Number: 2011-CP-2800073
Our Case Number: 11127.003**

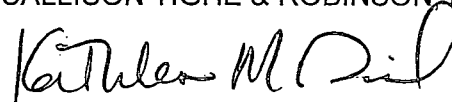
Dear Ms. McDonald:

I am writing on behalf of Richard Wesley Hough, a non-petitioning defendant in the above partition action, to inform the Court that, pursuant to Section 15-61-25 of the South Carolina Code of Laws, Richard Hough is "interested in purchasing the property" that is the subject of this partition action. Please let this letter serve as Richard Hough's notice of such interest in purchasing the property. A trial in this matter is set to begin on May 12, 2014.

I am by copy of this letter serving all parties with a copy of this letter as well as providing a copy to Special Referee John DuBose.

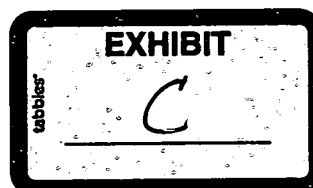
With kind regards, I am

CALLISON TIGHE & ROBINSON, LLC



Kathleen McDaniel

cc: Special Referee John DuBose
B. Michael Brackett, Esquire
M. Scott Rankin, Esquire
Mary Louise Robinson



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF KERSHAW

2011-CP-28-073

Albert H. Hough, individually and as Personal Representative of the Estate of Harold W. Hough and as Personal Representative of the Estate of Elizabeth P. Hough; George J. Hough and Angela Hough,

Plaintiffs,

v.

Richard Wesley Hough, Joel Pitts Hough, and Mary Louise Robinson,

Defendants.

Plaintiffs' Motion to Disallow or to Strike Defendant Richard Hough's § 15-61-25 Notice of Interest in Purchasing Property

And, For Expedited Hearing

FILED FOR RECORD
2014 MAY -6 AM 11:49
JOYCE MODONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

Plaintiffs oppose the S.C. Code Ann. § 15-61-25(A) notice filed and served by Defendant Richard Hough and move the Court to expeditiously strike or disallow it as being untimely.

The trial in this partition case has been set for Monday, May 12, 2014. On the afternoon of Friday, May 2, 2014, Defendant Richard Hough filed with the Court and delivered to the Judge and to the other parties and attorneys the attached letter, dated May 2, 2014, notifying the Court and the parties of Richard Hough's interest in purchasing the properties that are the subject of this partition action. (Exhibit A.) The notice was emailed to the Judge at essentially the same time. (Exhibit B.)

The notice was given pursuant to S.C. Code Ann. § 15-61-25(A). Defendant Richard Hough had not previously expressed an interest in buying the property, and in his Answer to Second Amended Complaint, dated April 10, 2014, he admitted that the properties are divisible in kind. (Richard Hough Answer to Second Amended Complaint, ¶ 7). It is also worthy of note that



Defendant Richard Hough's eleventh-hour motion for continuance was denied by Order dated May 1, 2014.

By the terms of the statute, Defendant Richard Hough's notice was untimely given. The statute requires that the Court be notified of a party's interest in purchasing the property "no later than ten days prior to the date set for the trial of the case."¹ South Carolina law provides that the word "day" means a civil day of twenty-four hours, beginning and ending at midnight. . . and that fractions of days are not recognized in our laws." Town of Summerville v. City of North Charleston, 662 S.E.2d 40 (S.C. 2008.) Where the time requirement in a statute does not speak in terms of specific hour periods, the courts will not interpret a day to mean anything other than a calendar day. Id. In the case *sub judice*, the calculation of the ten-day period is made in reverse because of the period is expressed as being "no later than ten days prior . . ."

Courts differ on the time computation for a ten-day period expressed as "no [or not] later than." The general rule is that either of the terminal days may be included and the other excluded. 86 C.J.S. Time § 16. The general rule is to exclude the first day and include the last day. Id. South Carolina law follows this rule.

Rule 6(a), SCRCP, provides:

TIME (a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by **any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included**, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

¹ The statute describes the notice period in terms of days and not hours or other fractional parts of days.

The relevant period at issue herein is ten days with the notice period being completed or fully run by midnight May 11. Counting in reverse, the day of the event (trial) after which [prior to] the period begins to run, is May 12. May 12 is the excluded day per Rule 6(A), SCRPC. The tenth day, the “included” terminal day in the period, is Friday, May 2. In other words, May 2 is one of the ten days of the notice period that must follow the giving of notice. In order to satisfy the statute’s requirement of ten days notice prior to the date set for trial (ten 24-hour days running from midnight to midnight without counting fractions of days), the latest that notice could have been timely given was midnight on May 1, 2014. By giving notice on May 2, 2014, and late in the day at that, Defendant Richard Hough gave only nine days notice prior to the date of trial.

Because of the impending trial date, Plaintiffs move the court to hear and decide this motion on a super-expedited basis, as permitted by Rule 6(d), SCRPC, which gives the Court discretion to hear motions on less than ten-days notice. The undersigned certifies that prior consultation with opposing counsel could not be had in this instance, and that such consultation, if held, would serve no useful purpose.



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Attorneys for Plaintiffs

May 5, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

C/A No. 2011-CP-28-073

Albert H. Hough, individually and)
as Personal Representative of the Estate)
of Harold W. Hough and as Personal)
Representative of the Estate of Elizabeth)
P. Hough; George J. Hough and)
Angela Hough,)

Plaintiffs,)

vs.)

Richard Wesley Hough, Joel Pitts)
Hough, and Mary Louise Robinson,)
)
Defendants.)

ORDER ON PLAINTIFFS' MOTION
TO STRIKE DEFENDANT RICHARD
HOUGH'S S.C. CODE ANN. §15-61-25
NOTICE

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SC Court of Appeals

FILED FOR RECORD
2014 MAY - 7 AM 11:28
JOYCE MC DONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

Under a common reading of the matter of time computation, and application of statutory and case law referenced in memoranda and arguments by both counsel for Plaintiffs and counsel for Defendant Richard Hough, I find that Defendant Richard Hough's notice pursuant to S.C. Code Ann. §15-61-25(A) was timely.

1. Despite finding that notice pursuant to S.C. Code Ann. §15-61-25(A) was timely, I find that the notice has no impact on the present proceedings.

2. S.C. Code Ann. §15-61-25(A) is applicable to actions for partition by sale and not actions for partition in kind.

3. Partition in kind is favored when it can be fairly made without injury to the parties. Smith v. Pearson, 210 S.C. 524, 43 S.E.2d 479 (1947). The party seeking a partition by sale carries the burden of proof to show that partition in kind is not practicable or expedient.



ATTEST True, Correct & Certified
Copy of Original on File in this
Court

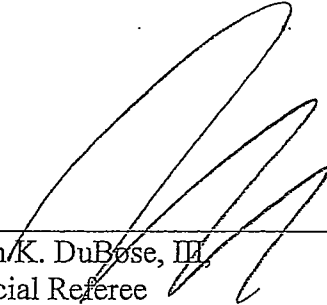
Oliver B. ...
Clerk of Court Kershaw County

Smith v. Pearson, 43 S.E.2d at 482. Defendant Richard Hough admitted in his Answer to Second Amended Compliant that the property is capable of being partitioned in kind.

4. The Court finds that partition in kind can be fairly made without injury to the parties.

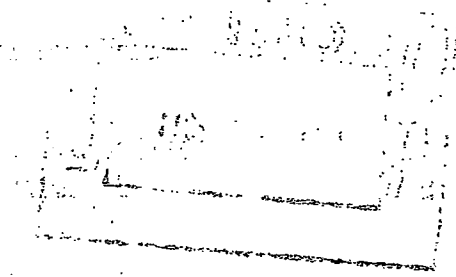
5. Trial of the case will proceed on May 12, 2014 as currently noticed.

IT IS SO ORDERED.



John K. DuBose, III,
Special Referee

Camden, South Carolina
May 7, 2014



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF KERSHAW

2011-CP-28-073

Albert H. Hough, individually and
as Personal Representative of the Estate
of Harold W. Hough and as Personal
Representative of the Estate of Elizabeth
P. Hough; George J. Hough and
Angela Hough,

Plaintiffs,

CERTIFICATE OF SERVICE

v.

Richard Wesley Hough, Joel Pitts
Hough, and Mary Louise Robinson,

Defendants.

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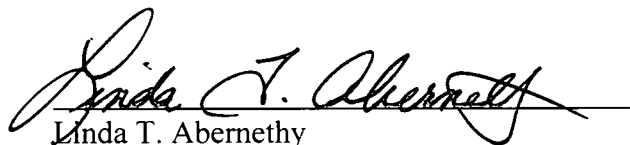
SC Court of Appeals

I, Linda T. Abernethy, Legal Assistant to B. Michael Brackett, Esquire, attorney for the Plaintiffs in the above-captioned matter, do hereby certify that I have served counsel for the Defendant Joel P. Hough and the other Defendants, Richard Hough, pro se and Mary Louise Robinson, pro se with a copy of **Respondents Albert Hough's, George Hough's and Angela Hough's Memorandum in Support of Appealability of the Trial Court's May 7 2014 Order** by United States Mail, postage prepaid and return address clearly indicated on said envelope, on this 23rd day of May, 2014 at the following addresses:

Kathleen M. McDaniel, Esquire
P.O. Box 1390
Columbia, SC 29202
Attorney for Defendant Richard W. Hough

Mary Louise Robinson
1100 Gunter Circle
West Columbia, SC 29169
pro se

M. Scott Rankin, Esquire
P.O. Box 1445
Camden, SC 29021
Attorney for Defendant Joel P. Hough


Linda T. Abernethy

MOSES & BRACKETT, PC

ATTORNEYS AND COUNSELORS AT LAW

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May 23, 2014

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

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MAY 23 2014

SC Court of Appeals

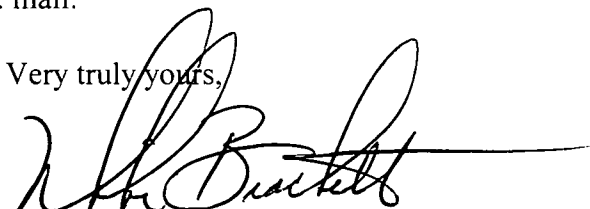
Re: Hough, et. al. v. Hough, et. al.
2011-CP-28-073
Appellate Case No: 2014-001012
MB file no.: 12518.2

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of Respondents Albert Hough's, George Hough's and Angela Hough's Memorandum in Support of Appealability of the Trial Court's May 7 2014 Order.

By copy of this letter, copies of the enclosed Memorandum are being served on the other parties and attorneys of record by email and by U. S. mail.

Very truly yours,



B. Michael Brackett

BMB/Ita
Enclosures

cc. Albert H. Hough
George J. Hough
Angela Hough
Kathleen M. McDaniel, Esquire
M. Scott Rankin, Esquire
Mary Louise Robinson

RECEIVED

MAY 23 2014

SC Court of Appeals