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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
John K. DuBose, III, Special Referee

Civil Action No. 2011-CP-28-0073
Appellate Case No. 2014-001012

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

v.

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

Of whom

Richard Wesley Hough is.....Appellant,

And

Joel Pitts Hough and Mary Louise Robinson are.....Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in holding that a nonpetitioning party in an action for partition in kind is not afforded the right to purchase the property pursuant to S.C. Code Ann. § 15-61-25?

STATEMENT OF THE CASE

The parties are siblings and co-owners of approximately 1,260 acres of undeveloped real property in Kershaw County. In January 2011, Plaintiffs/Respondents initiated an action seeking partition in kind of the real property. Three years later, on March 21, 2014, Plaintiffs/Respondents filed and served Appellant with a pleading captioned "Second Amended Complaint for Temporary Restraining Order Without Notice; Temporary Injunction (Rule 65, SCRCP); Partition and Damages to Real Property (Waste and Nuisance)" ("Second Amended Complaint"). (Sec. Am. Compl.; R. pp. 8-48.) Appellant filed Defendant Richard Wesley Hough's Answer to Second Amended Complaint and Counterclaims on April 11, 2014. (Richard Hough Answer to Sec. Am. Compl. and Counterclaims; R. pp. 49-66.) On April 23, 2014, Appellant served his Notice of Dismissal Without Prejudice Pursuant to Rules 41(c) and 41(a)(1), SCRCP, of Defendant Richard Wesley Hough's First Counterclaim Against Plaintiffs. (Richard Hough Withdrawal of First Counterclaim; R. pp. 67-69.) Plaintiff/Respondents filed and served Plaintiffs' Reply to Defendant Richard Hough's Amended Answer to Second Amended Complaint, and Counterclaims on April 25, 2014. (Plaintiffs' Reply; pp. 70-73.)

Trial in the partition matter was scheduled to begin on May 12, 2014. (Amended Notice of Trial, R. pp. 131-132.) On May 2, 2014, Appellant Richard Hough filed and served a letter (Notice of Interest to Purchase) informing the trial court of his interest in

purchasing the other parties' interests in the real property. (Notice of Interest to Purchase, dated May 2, 2014; R. p.74.) Appellant Richard Hough filed and served this Notice of Interest to Purchase pursuant to S.C. Code Ann. § 15-61-25.

On May 5, 2014, Plaintiffs/Respondents served a Motion to Disallow or Strike Defendant Richard Hough's Section 15-61-25 Notice of Interest in Purchasing Property, and for Expedited Hearing (Pls.' Motion to Disallow Notice of Interest to Purchase Property). (Motion to Disallow Notice of Interest to Purchase, served May 5, 2014; R. pp. 75-79.) The Plaintiffs/Respondents asserted in their motion that the Notice of Interest to Purchase Property was untimely. *Id.* Plaintiffs/Respondents served Plaintiffs' Supplemental Memorandum of Law in Support of Motion to Disallow or Strike Defendant Richard Hough's § 15-61-25 Notice of Interest in Purchasing Property on May 6, 2014, in which Plaintiffs/Respondents further expounded on their position that Appellant's Notice of Interest to Purchase Property was untimely. (Pls.' Supp. Mem. in Support of Mot. to Disallow Notice of Interest in Purchasing Property; R. pp. 80-87.)

Appellant served a memorandum in opposition to Plaintiffs/Respondents' Motion to Disallow Notice of Interest to Purchase on May 6, 2014. (Defendant Richard Hough's Memorandum in Opposition to Plaintiffs' Motion to Disallow or Strike Defendant Richard Hough's § 15-61-25 Notice of Interest in Purchasing Property; R. pp. 88-110.) The trial court immediately scheduled a hearing and heard Plaintiffs/Respondents' motion on May 6, 2014. (Tr. of Hrg., May 6, 2014; R. pp. 111-130.)

On May 7, 2014, the trial court filed its Order on Plaintiffs' Motion to Strike Defendant Richard Hough's S.C. Code Ann. § 15-61-25 Notice ("Order Striking Notice"). (Order Striking Notice; R. pp. 3-6.) In its Order Striking Notice, the trial court

held that Appellant's Notice of Interest to Purchase Property was timely filed and served. *Id.* This ruling is unappealed. However, the trial court further held, "S.C. Code Ann. § 15-61-25(A) is applicable to actions for partition by sale and not actions for partition in kind." (Order Striking Notice ¶ 2; R. p. 5.) In support of that ruling, the trial court stated:

> 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 partition by sale carries the burden of proof to show that partition in kind is not practicable or expedient. *Smith v. Pearson*, 43 S.E.2d at 482. Defendant Richard Hough admitted in his Answer to Second Amended Complaint that the property is capable of being partitioned in kind.
>
> 4. Richard admitted that partition in kind can be made and has not carried burden of showing that partition in kind is not practical or expedient. Court found that partition in kind can be fairly made without injury to the parties.

Id. ¶¶ 3 and 4; R. p. 5. The consequence of this holding was the trial court's *sua sponte* determination that nonpetitioning parties do not have the right to purchase the property in actions for partition in kind such that Appellant's Notice of Interest to Purchase had "no impact on the present proceedings," and the trial court ordered the matter to trial on May 12, 2014. *Id.* ¶ 5; R. p. 6.

Appellant timely filed this appeal of the trial court's Order Striking Notice.

STANDARD OF REVIEW

The only issue for resolution in this appeal is whether Section 15-61-25 of the South Carolina Code affords a nonpetitioning party the right to purchase the property in an action for partition in kind. This is a matter of statutory interpretation. "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662

S.E.2d 40, 41 (2008) (citing *Catawba Indian Tribe v. State,* 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)).

ARGUMENT

The question presented in the case—whether the trial court erred in holding that the Appellant did not have a right of first refusal pursuant to Section 15-61-25 of the South Carolina Code to purchase the property that is the subject of an action for partition in kind—is a matter of first impression in South Carolina. Appellant asserts that as a nonpetitioning party in an action for partition in kind he is afforded the same statutory right of first refusal as would be afforded a nonpetitioning party in an action for partition by sale. This is because Section 15-61-25 by its plain language does not limit the right of first refusal only to those nonpetitioning parties involved in an action for partition by sale, and to read such a limitation on a partition party's rights into the statute would be improper.

Because this is a matter of first impression, it was necessary for the trial court to look to a case considering a different issue for guidance in this matter. In particular, the trial court based its decision upon *Smith v. Pearson*, 210 S.C. 524, 43 S.E.2d 479 (1947). In *Smith*, the Supreme Court held:

> 'The court favors partition in kind when it can be fairly so made without injury to any other parties in interest.' *Rivers v. Atlantic Coast Lumber Corporation*, 81 S.C. 492, 62 S.E. 855, 856. The burden was upon appellants to prove that partition in kind would not be practicable or expedient. As stated in 47 C.J., page 457: 'Although not universal the general rule is that, until the contrary is made to appear, the presumption prevails that partition in kind is feasible and should be made, and that the burden is on those who ask a sale of the premises in lieu of a partition in kind to show the existence of a statutory ground for a sale.'

Id., at 532, 43 S.E.2d at 482. Although it is not a public sale that Appellant seeks, he does, in substance, seek a form of private sale of the property that is statutorily permitted.

Section 15-61-25(A) of the South Carolina Code provides the authority for such a form of private sale and specifically provides as follows for a nonpetitioning party to purchase the other interests in the property:

> For the purposes of this section, "joint tenants and tenants in common" include heirs or devisees. Upon the filing of a petition for partition of real property owned by joint tenants or tenants in common, the court shall provide for the nonpetitioning joint tenants or tenants in common who are interested in purchasing the property to notify the court of that interest no later than ten days prior to the date set for the trial of the case. The nonpetitioning joint tenants or tenants in common shall be allowed to purchase the interests in the property as provided in this section whether default has been entered against them or not.

S.C. Code Ann. § 15-61-25(A).

In order to determine whether Section 15-61-25(A) affords Appellant the right to purchase the other parties' interests, this Court should look first to the plain language of the statute. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). In *Hodges*, the Supreme Court held:

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n,* 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

Id. at 85, 533 S.E.2d at 581. In *Hodges*, the question was whether the Governor had authority to remove a member of the Santee Cooper board of directors by issuance of an

executive order pursuant to S.C. Code Ann. § 1–3–240(B) (Supp.1998). *Id.* At the time of that decision, Section 1-3-240(B) provided that the Governor could remove most of his appointees to state boards at his discretion. *Id.* However, that power was limited in several specific circumstances enumerated in Section 1-3-240(C). *Id.* The Supreme Court held that because the members of the board of directors of Santee Cooper were not among the enumerated positions in regards to which the Governor's power was limited, the Governor could remove Santee Cooper board members upon the issuance of an executive order. *Id.* The Supreme Court refused to read such a further limitation on the Governor's power into the statute. *Id.*

As in *Hodges*, this Court should look first to the plain language of the statute. Nowhere in Section 15-61-25 is there any express or implied limitation on a right of first refusal to actions solely for partition by sale. Had the legislature intended to limit the right of first refusal to only nonpetitioning parties in actions for partition by sale, it would have included such limitation in the express language of the statute. Thus, the statute's language is plain and unambiguous, and "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* Accordingly, it would be improper for this Court to read the limitation propounded by the trial court into the statute.

As set forth above, the only limitation in Section 15-61-25 is that the right is afforded only to a nonpetitioning party. Appellant meets this requirement. In his Answer to Second Amended Complaint and Counterclaims, Appellant counterclaimed for partition of a separate but contiguous 5.8 acre parcel. (Richard Hough Answer to Sec. Am. Compl. and Counterclaims ¶¶ 43-66; R. pp. 55-58.) However, Appellant timely

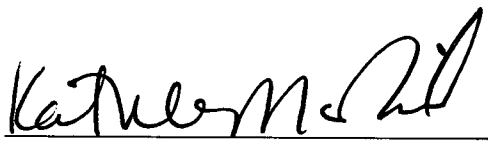
withdrew this counterclaim, and no party asserted before the trial court that Appellant was a petitioning party rather than a nonpetitioning party. (Richard Hough Withdrawal of First Counterclaim; R. pp. 67-69.) Thus, Appellant is a nonpetitioning party.

Second, the trial court found that the Appellant's Notice of Interest to Purchase was timely submitted. (Order Striking Notice; R. pp. 3-6.) This was unappealed. Thus, Appellant complied with the procedural requirements necessary to exercise his right of first refusal, and the trial court erred in refusing to permit him to do so.

CONCLUSION

Based upon the foregoing, Appellant requests that this Court reverse the trial court and determine that Appellant, as a nonpetitioning party to an action for partition in kind, has a right of first refusal to purchase the property under Section 15-61-25(A) of the South Carolina Code.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

I hereby certify that the Final Brief of the Appellant filed and served on April 15, 2015 complies with Rule 211(b), SCACR.

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