

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LANCASTER COUNTY
COURT OF COMMON PLEAS

H. CLAYTON WALKER, JR., SPECIAL REFEREE

RECEIVED

CASE NO. 2015-002243

MAY 09 2017

SC Court of Appeals

BRIEF OF RESPONDENT

Evelyn Lowery, ...Respondent,

v.

Eula M. Daniels, Darrell Waiters, Monique Thompson, Phinessa R. Waiters, Pearl Mahjoub, Tommie Lee James, John William James, William C. Waiters, Mary L. Bailey, James C. Bell, William Bailey, Harold Bascomb, Romona Bascomb, Nakia Williams, Nerisse Williams, Carlton McPhaul, Donnell McPhaul, Idell R. Waiters, Ella R. Waiters, Eddie Waiters, Elizabeth Ann Moore, Donald Waiters, Brenda Wade, Glenda Waiters, Wilric Waiters, Dorothy Johnson, Ruth Jordan, Ronald Sweet, Donald Johnson, David Lee Richardson, Raymond Richardson, Lafayette Richardson, Jr., Robert C. Richardson, Bill Moses, Margaret Jones, Herman Sweet, Jr., Reginald Coleman, Ronald Coleman, Michael Coleman, Sharon Coleman, Tammy Coleman, Bridgette Coleman, Delfreda Coleman, Phillip Hatchet, Iceola Weeks, Charles Burt, Theodore R. Brewer, Leola Waiters, Betty J. Catoe, Carrie Waiters, Ernest L. Waiters, Irene Carr, Janice Dixon, Donald F. Waiters, Rayford J. Waiters, Carolyn McKenny, Larry Waiters, Denise Allen, Kevin Waiters, Ginger Ann Waiters, Harry Waiters, III, Deshone Waiters, Willie W. Addison, Bessie M. Waiters, Linda D. Addison, Angelet Hardin, Irene Sanders, Joseph Coleman, Jr., Wyle Mingo, Joyce Ann Benjamin, Gary W. Coleman, Jr., Lilyan A. Coleman, John C. Waiters, Estate of Anna B. Waiters, Anna E. Perkins, Willie James Hall, Lena Tibbs, Janese R. Allen, Leonard Hall, Jr., Clinton James Hall, Leotis Hall, Christine C. Hall, Alma R. Grant, Pearl Hall, Mary Hall, Mark Hall, Kevin Hall, Doris Hall, Iris Hall, Maggie Hall, Jimmy L. Hall, Jr., Marilyn Hall, Lowarren Hall, Clifton Hall, Dywayne Hall, Novella Hall, Lenonne Addison, Brendetta Hall, NaSheqeca Bekia Hall, Marquavious Tramle Hall, Sabrina McWaters, Renonia Church, Gwen McWaters, Jacqueline McWaters, Renee McWaters, Connie C. Parker, Alice C. Truesdale, Eliza C. Truesdale, Roy Caskey, Randy Caskey, Maggie Caskey, Leon Caskey, III, Sharon Harris, Eliza Furgerson, David Hall, Robert Hall, Joseph Hall, Henrietta Hall, Linda Duncan, M. L. Hall, Alvin Hall, Oscar Hall, Jr., Laura Mae Hall, Stanford Hall, Anna Hall, Patricia H. Bentley, Casey Hall, Janie Hall, Janie Douglas, Mary Bradlee, Elizabeth Hall, Teresa Pope, Devron Wright, Dyron J.

Hall, Romelle Simpson, Estate of Alma Tilman, Ren Tilman, Chris Waiters, if living and if any of the said Defendants are deceased, then their heirs or devisees at law, and all other persons claiming any right, title, interest in or lien upon the real estate described herein, and any unknown infants or persons under disability or persons in the military service hereby designated as a class John Doe and Jane Roe,

Of whom Kevin Waiters is the.....Appellant,

BRIEF OF RESPONDENT

Marion H. (Mark) Grier, Jr.
Attorney for Respondent Evelyn Lowery
PO Box 1809,
Lancaster, South Carolina 29720
(803) 285-5534

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STATUTES

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South Carolina Code of Laws Section 15-9-720

SOUTH CAROLINA COURT RULES

South Carolina Rule of Civil Procedure 59

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STATEMENT OF ISSUES ON APPEAL

- 1. Did the Court err in declaring deeds void and that title had not been acquired through adverse possession from the Estate of Can Waiters?**
- 2. Did the Court err in setting off land with improvements to the party who made the improvement based on their percentage of ownership in the heir property?**
- 3. Did the Court include a statement allegedly written by Darryl Waiters in the record and if so did the Court err in doing so?**
- 4. Did the Court err in concluding that the Appellant's family cut approximately \$8,189.00 worth of timber from the property during the pendency of this action?**
- 5. Did the Court err in failing to allow Appellant and remaining Co-Defendants the opportunity to purchase the property or a share of the property prior to a trial pursuant to SC Code of Laws, Section 15-61-75?**
- 6. Did the Court err in valuing the property at \$1,200.00 per acre?**
- 7. Did the Court err in proceeding with trial once the Court became aware of the possibility of heirs whose existence was disclosed by the Appellant and Defendant Donald Frank Waiters during the course of the trial?**

STATEMENT OF THE CASE

Evelyn M. Lowery filed a Complaint August 23, 2005 and an Amended Complaint and Lis Pendens on November 23, 2005 requesting that the Court determine all interests and claims to property that had been purchased by her grandfather Can Waiters in 1905, void certain improper deeds filed on the public record, partition the property in kind and or conduct a private sale to descendants of Can Waiters, and require accounting of proceeds from the sale of timber off the property. Plaintiff also filed a Petition for injunctive relief to halt ongoing timber harvesting on the property. A hearing was held before Judge Garrison Hill on November 28, 2005 and he issued an Order enjoining the harvesting of timber until such time as relief from the injunction was sought by an interested party.

Pro se responses were filed by the Appellant and other interested parties in January 2006 objecting to the injunction and to the "selling of the land." John Waiters filed an Answer in November 2009 seeking injunctive relief to halt timber harvesting from the property which had resumed as well as other relief.

A Special Referee was appointed in February 2010. The injunction remained in full force and effect with the cutting of trees, timber or logs expressly forbidden. (Order by Special Referee on April 8, 2010.) A hearing was held March 16, 2012 on Respondent's Motion to Amend the Amended Complaint. An Order was issued by the Special Referee dated March 23, 2012 allowing a portion of the property situated on the south side of Hoke Road to be released from the action and appointing John Christopher

Mills as Guardian ad Litem. Affidavit of Service by Publication was filed August 20, 2013.

A trial was held October 3, 2013, however, the Special Referee was suspended from the practice of law before issuing an Order. Thereafter, H. Clayton Walker, Jr. was appointed Special Referee by Order filed April 28, 2014.

The case was tried *de novo* on June 20, 2014. Counsel for Appellant was not present for the trial. Appellant's Statement of the Case contains a number of statements neither made at trial nor part of the transcript of record. Counsel states on page 20 of Appellant's brief that Kevaofan (Kevan) Waiters testified that he and his mother assumed ownership of certain property and did not consider is to be a part of or owned by the Waiters estate is not supported by the record. Counsel also states that Kevaofan Waiters testified that "an attorney had advised he and his mother that so long as the[y] separate their purchased tract of land from the 140 acres, she had free reign to cut timber and maintain the property" is also incorrect. Mr. Waiters testified that he was told that "as long as we didn't cut the land out that she had free reign to cut timber and maintain the property." (R. p.144, lines 21-24). Further, Counsel's statement on page 21 of the Appellant Brief that Mr. Waiters testimony supports the heirs position that they owned the land in a manner hostile to the Waiter's estate ... is not supported by the transcript.

The Special Referee issued an Interim Order filed November 24, 2014 approving the sale of timber on the Property, authorizing the Defendant John Waiters to execute the contract, and directing the proceeds of sale be placed in trust with Walker & Reinhold, LLC until a trustee is appointed. The Special Referee issued a final Order filed

September 16, 2015. The Court made the following findings of fact and conclusions of law:

- 1) Service was properly made upon all unknown persons by the proper publication in The Lancaster News and proof of that publication was filed with the clerk of court on August 20, 2013.
- 2) The real property which is the subject of this action is located in Lancaster County, South Carolina, being all of that property conveyed to Can Waitis (sic) by deed of J.P. Williams filed in the Office of the Clerk of Court for Lancaster County, South Carolina on December 7, 1905 in Deed Book 0-2 at Page 330, and being further described as follows:

All of that certain piece, parcel or tract of land lying, situate and being in Cedar Creek Township, County of Lancaster, State of South Carolina, containing Two Hundred (200) acres, more or less, and being bounded on the East by Stewart Place Road and by lands now or formerly of A.D. Tillman and P.H. McDow; and being bounded on the South by lands now or formerly of C.O. Witts and P.A. McDow; and being bounded on the West by lands now or formerly of Mrs. Annie Wilson.

And including the following tracts of real property derived from said tract:

All of that real property conveyed to William C. Waiters, John C. Waiters, et. al. by deed recorded in Registry of Deeds for Lancaster County, SC in

Deed Book D-6 at Page 6067, consisting of 109 acres, more or less, and being further that parcel identified as Tax Map #130-00-28.00; and

ALSO: All of that real property conveyed to William C. Waiters, et. al. by deed recorded in the Registry of Deeds for Lancaster County, SC in Deed Book W-6 at Page 167, Deed Book Z-9 at Page 51, Deed Book 0-9 at Page 125 and Deed Book 51 at Page 329, consisting of 30 acres, more or less, and being further that parcel identified as Tax Map # 130-00-28.01; and

ALSO: All of that real property conveyed to Mary L. Bailey, Eula N. Daniel, James C. Bell, Monique Thompson, Darrell Waiters, Phinessa R. Waiters, Dervin Bailey and William G. Bailey by deed recorded in the Registry of Deeds for Lancaster County, SC in Book 139 at Page 82, consisting of 2 acres, more or less, and being further that parcel identified as Tax Map # 146-00-22.01; and

ALSO: All of that real property conveyed to Chris Waiters by deed recorded in the Registry of Deeds for Lancaster County, SC in Deed Book 198 at Page 214, consisting of 2 acres, more or less, and being further that parcel identified as Tax Map # 146-00-23.01.

HOWEVER, LESS AND EXCLUDING PURSUANT TO THE ORDER OF SPECIAL REFEREE DATED MARCH 23, 2012 All of that property derived from the aforesaid conveyance from J.P. Williams to Cam

Waiters, and being all of said lands lying and being south of Hoke Road, and being all of that piece, parcel and tract of land, being that fifty (50) acres, more or less, conveyed by Rena Stewart to Emanuel and Eliza Bell by deed recorded in the Register of Deeds for Lancaster County in Deed Book A at Page 285. Said property having been partitioned and divided between the heirs of Emanuel and Eliza Bell by Decree of William Catoe, Special Referee in the Court of Common Pleas Case No. 1976-CP-29-629, and said lands are therefore not subject to this action.

- 3) That undivided interests in the Property are vested in the persons named on Exhibit 1 attached to the Order, and the percentage interest each person holds in the Property is set forth in the final column on the right-hand side of that exhibit.
- 4) That none of the deeds identified in the legal description in the Order were properly executed by all persons with an interest in that portion of the Property at the time the deeds were executed.
- 5) The property and improvements bearing Tax Map No. 146-00-23.01 should be quieted as a result of a judicial foreclosure proceeding
- 6) The remaining deeds of portions of the Property are void. No showing has been made by any heir to support a claim of adverse possession. The elements being well established under South Carolina law and no person made an effort to defend any title purportedly conveyed by any other deeds.

- 7) The elements of an adverse possession claim are well-established under South Carolina law, and no one made an effort to defend any title purportedly conveyed by any of the other deeds.
- 8) Over 100 persons have an interest in the property and the court does not see a reasonable way to get each of these persons an individual parcel.
- 9) The court does not want to enrich one owner at the expense of another and that if the court can set off land with improvements for the party who made the improvements without material injury to others, that part should be set off to the improving landowner. Eight parties have residences located on the Property as identified in the sketch attached to the Order identified as Exhibit 2. The unrefuted testimony was that the parties did not wish to force any person living on the property to leave it and that after considering the proof the portion of property surrounding the eight homes as shown in Exhibit 2 shall be subdivided in kind, with each parcel having access to a public road sufficient to comply with Lancaster County subdivision regulations, with each parcel divided based on the percentage of the eight owners as set forth in Exhibit 1.
- 10) The remainder of the property shall be subdivided as shown on the sketch attached to this order is Exhibit 2. which provides for lots of various sizes to be purchased by family members. Persons wanting larger properties may purchase larger parcels and may purchase multiple adjacent parcels and combine them, the intent of the court being to create a variety of opportunities for family members who wish to own part of the Property to have that opportunity.

- 11) The value of the property without improvements and without timber which has been previously removed from the property is \$1200 per acre.
- 12) The parties requested that the Property be sold at a private auction, limited to the persons identify on Exhibit 1 and their children by blood or marriage, shall be conducted under the supervision of the trustee.
- 13) Proceeds of the auction will be placed into a common fund under the supervision of the trustee and used to pay the reasonable expenses associated with the duties of the trustee and the sale of the property.
- 14) After paying all of these costs, all remaining funds will be distributed to the persons identified on Exhibit 1 who did not receive a distribution in kind.in the proportionate shares shown on that document. Any property not sold at the private auction will be sold as a public auction
- 15) Frank Waiters and Carrie Waiters caused timber to be removed from the property in violation of the injunction prior to the hearing. Witnesses established the value of the timber wrongfully removed to be approximately \$8189. Carrie Waiters and Frank Waiters shall be required to disgorge \$8189, which is the value of the timber removed from the property at the direction of and for the benefit of themselves.
- 16) The fees and disbursements of counsel in this action shall be paid from a common fund.

No post-trial Motions were filed pursuant to either Rule 52 or 59 of the South Carolina Rules of Civil Procedure.

Notice of Appeal was filed October 28, 2015.

ARGUMENT

1. The Special Referee properly declared deeds void.

The Special Referee declared the deeds conveying title to the following described parcels of the Property to be void:

All of that real property conveyed to William C. Waiters, et. al. by deed recorded in the Registry of Deeds for Lancaster County, SC in Deed Book W-6 at Page 167, Deed Book Z-9 at Page 51, Deed Book 0-9 at Page 125 and Deed Book 51 at Page 329, consisting of 30 acres, more or less, and being further that parcel identified as Tax Map # 130-00- 28.01; and

All of that real property conveyed to Mary L. Bailey, Eula N. Daniel, James C. Bell, Monique Thompson, Darrell Waiters, Phinessa R. Waiters, Dervin Bailey and William G. Bailey by deed recorded in the Registry of Deeds for Lancaster County, SC in Book 139 at Page 82, consisting of 2 acres, more or less, and being further that parcel identified as Tax Map # 146-00-22.01; and

A title summary for TM#130-00-28.01 was admitted into evidence and marked as Plaintiff's Exhibit 1C and TM# 146-00-22.01 was admitted as Plaintiff's Exhibit 1B (R. pp. 217-221) with copies of the relevant deeds attached.

Defendant John Waiters testified that he had lived on the Property for eighty years, was familiar with the history and all of the family associated with the property. (R. p. 77, line 13 - p. 78, line 8) Waiters identified Plaintiff's Exhibit 1C (R. pp. 222 - 240) as the parcel TM# 130-00-28.01 consisting of 31 acres, said property being part of the heir property but listed with a separate tax map number. He further testified that the deeds were not executed by the appropriate persons and that two acres had been cut off of the original 33 acre tract and improved, but nothing had ever been done to improve the remaining 31 acres. (R. p. 96, line 5 - p. 98, line 6) John Waiters also testified that deeds for the parcel TM# 146-0022.01 (Plaintiff's Exhibit 1B, (R. pp. 217 - 221)) were not properly executed by the appropriate parties. (R. p. 99, line 10 - p. 100, line 17)

It was apparent at trial that the parties viewed the entirety of the Property as commonly owned. Appellant Kevin Waiters testified that it was the family's understanding that they could go anywhere on the Property and cut trees because it was their property, "we were part of that their property" and with regard to his family "that we hold a child's portion of the property". (R. 154, line 17 - p. 155, line 5) Defendant Donald Frank Waiters also spoke of a child's portion, "I am talking about the part we have, the child's portion that we have....I'm not talking about a specific place." (R. p. 167, line 24 - p. 168, line 5) Defendants John Waiters, Kevin Waiters and Donald Frank Waiters all testified about the taxes on all the Property being paid through a common account funded by cutting timber off the Property prior to the filing of this action. (R. p. 111, lines 10 - 13; p. 144, lines 25 - p. 145, line 4; p. 165, lines 8 - 18)

Appellant asserts a claim on appeal that title should have been awarded through adverse possession, a claim that was not asserted at trial. Adverse possession is an action at law. Frazier v. Smallseed, 384 S.C. 56, 61, 682 S.E.2d 8, 11 (Ct.App.2009) In actions at law tried by a judge without a jury, the findings of fact of the judge will not be disturbed on appeal unless found to be without evidence which reasonably supports them. *Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

Adverse possession is an affirmative defense; Weston v. Morgan, 162 S.C. 177, 160 S.E. 436 (1931). The burden of proof of adverse possession is on the one relying thereon. 162 S.C. at 192, 160 S.E. 436. To constitute adverse possession, the possession must be actual, open, notorious, hostile, continuous, and exclusive for the entire statutory period. Mullis v. Winchester, 237 S.C. 487, 118 S.E.2d 61 (1961). No party presented evidence at

trial that title to any parcel of the estate was acquired through possession that was actual, open, notorious, hostile, continuous, and exclusive for the requisite period, in fact, the preponderance of evidence suggested a relatively harmonious co-tenancy by a number of persons living on and using the property cooperatively. The occupancy of the common property by....co-tenants is entirely consistent with the existence of the co-tenancy and a recognition of the rights of the other cotenants to share the possession. Weston v. Morgan, 162 S.C. 177, 160 S.E. 436 (1931)

2. The Court did not err in not determining value of the properties with improvements on the subject Property.

Eight parties have residences located on the Property. They are all heirs and have an interest in the proper. The Court ordered a 19.924 acre tract, identified as Exhibit 2 attached to the Order, containing all the improvements subdivided in kind to accommodate the unchallenged evidence presented that the parties did not wish to force any person living on the property to leave it. The parcel was Ordered divided among the eight persons based on the percentages of each owner set forth in exhibit 1.

The Courts' reasoning was well articulated complete with authorities as follows:

"Partition is an equitable action, and the procedure must be fair and equitable to all parties. Partition in kind is favored when it can be fairly made. The court is allowed to use equitable considerations such as length of ownership and sentimental attachment to property to guide it. The court may also consider the parties living situations, including whether a party has made significant improvements. The general rule is that a joint tenant who has placed permanent improvements on land is entitled in partition to compensation

for those improvements -- the court does not want to enrich one owner at the expense of another. If the court can set off land with improvements for the party who made the improvements without material injury to others, that part should be set off to the improving landowner. See *Campbell v. Jordan*, 382 S.C. 445 (Ct. App. 2009); *Tedder v. Tedder*, 109 S.C. 451 (1918); *Shumaker v. Shumaker*, 234 S.C. 421 (1959).”

The Court found the value of the Property without improvements or timber to be \$1,200.00 per acre (R. p. 7, lines 15 - 23) and granted the heirs who made improvements their respective interests in the Property. All heirs were treated fairly and valuation of the improvements would have been a wasteful, meaningless exercise under the circumstances where the Court found the most equitable method for partitioning the property was partially in kind and partially by sale. A Court of Equity may allocate a portion of the property under partition to one or more heirs while disposing of the remainder by sale (*Bennett v. Floyd*, 237 S.C. 64, 115 W.E.2nd 659 (1960)) provided that it can be done without manifest injury to all co-tenants. *Few V. Few*, 242 S.C. 433, 131 S.E.2nd 248. There was no showing of manifest injury by the Appellant in the Courts method of partitioning the Property.

- 3. No statement allegedly written by Darryl Waiters was admitted in the record and if it was the admission was not objected to and was cumulative to other evidence showing timber had been cut from the Property.**

Respondent does not find a statement allegedly written by Darryl Waiters to be in the record. However, if said statement was admitted no objection was made to the admission of the statement (“...objections to the admission of evidence must be made

when evidence is presented at trial to preserve the error for appeal." *Parr v. Gaines*, 309 S.C. 477, 481, 424 S.E.2d 515, 518 (Ct.App.1992)), and the statement would be merely cumulative to other evidence showing that timber had been cut from the property. Any error in admission of evidence cumulative to other un-objected to evidence is harmless. *State v. Schumpert*, 312 S.C. 502, 507, 435 S.E.2d 859, 862.

4. The Court was justified in concluding that the Defendants Donald Frank Waiters and Carrie Waiters caused approximately \$8,189.00 worth of timber to be cut from the property during the pendency of this action.

Defendant John Waiters testified about Defendants Donald Frank Waiters and Appellant causing timber to be harvested during the pendency of this case. He testified that Petition for injunction was filed to stop the timber cutting in 2005 (R. p. 105, line 18 - p. 107, line 17) and that despite the 2005 injunction, again in 2009. (R. p. 109, line 13 - p. 110, line 20) He also testified that there was a family account and that monies from the cutting of timber during pendency of this action were not placed in the family account. (R. p. 111, line 10 - p. 119, line 8)

Appellant testified that his family believed they could ignore the injunction based on legal advice they received. (R. p. 154, line 23 - p. 156, line 10) Defendant Donald Frank Waiters testified that Defendant Carrie was in possession of the records from the bank accounts from the cutting of the timber during the pendency of the trial that had been subpoenaed but never produced. (R. p. 171, line 1 - p. 172, line 14)

Forester Danny McKittrick testified about the value of standing timber and timber removed from the Property. He estimated the value of timber removed to be worth

about \$10,000.00, “conservatively”. The Court found the value of the timber removed to be \$8,189.00.

An action to quiet title to property is an action in equity. *Jones v. Leagan*, 384 S.C. 1, 10, 681 S.E.2d 6, 11 (Ct.App.2009). “In an equitable action tried without a jury, the appellate court can correct errors of law and may find facts in accordance with its own view of the preponderance of the evidence.” *Church v. McGee*, 391 S.C. 334, 342, 705 S.E.2d 481, 485 (Ct.App.2011). “Our equitable standard of review does not require this court to ignore the findings of the trial judge who heard the witnesses.” *Id.* at 343, 705 S.E.2d at 485. “Decisions relative to the veracity and credibility of witnesses can best be made by the trial judge who heard the witnesses and observed their demeanor.” *Id.* at 343, 705 S.E.2d at 485–86. According, having determined the veracity and credibility of the witnesses, the Court was justified in reaching findings of fact holding Defendants Donald Frank Waiters and Carrie Waiters accountable for monies withheld from the common funds of the Waiter funds.

5. This action is not subject to South Carolina Code of Laws, Section 15-61-75.

South Carolina Code of Laws Section 15-61-75(A) states that “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 non-petitioning 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 non-petitioning 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.”

The Legislative History of South Carolina Code of laws, Section 15-61-75 states “...effective May 25, 2006, applicable to all petitions for partition filed after that date.” This action was filed August 23, 2005 and is not subject to South Carolina Code of laws, Section 15-61-75. However, if the statute is found applicable to this action Respondent would argue that the Statute merely grants joint tenants and tenants in common who are interested in purchasing the property the opportunity to “to notify the court of that interest no later than ten days prior to the date set for the trial of the case.” If the action had been filed after May 26, 2006 and the statute were applicable, and if interested parties had notified the Court of that interest in a timely manner, then the other provisions of the statute would have applied. The Appellant makes no assertion that any non-petitioning joint tenant or tenant in common notified the Court of an interest in purchasing the Property prior to trial.

6. The Court acted within its discretion in valuing the property at \$1,200.00 per acre.

The Court found Andy Harper qualified to give an opinion regarding the value of rural unimproved real estate in Lancaster County. Harper identified comparable parcels similar to the Property by respect to location, use and character. (R. p. 7, lines 15-19; p. 44, line 2 – p. 49, line 25) Value of real property may be shown by evidence of the price realized from voluntary sales of similar property in the vicinity when not too remote in point of time. See *South Carolina State Highway Department v. Estate of R. M. League*, 251 S.C. 368 (1968) Harper opined that the property without improvements or timber would be valued in the range of \$ 1,200.00 to \$1,400.00. (R. p. 47, lines 1 – 5) The Court

determined the value of the Property to be \$1,200.00 (R. p. 7, lines 15 - 23) based on the testimony of Harper which was within his discretion based upon the evidence presented.

7. The Court properly continued with the trial after the Appellant and Defendant Donald Frank Waiters alleged they were aware of a formerly unknown heir or heirs during the course of the trial.

The Appellant and Donald Frank Waiters raised the issue during trial that they were aware of persons professing to be offspring of Beaudry Waiters, one of the children of Can Waiters. The Court was made aware of this assertion by the Appellant and Donald Frank Waiters. (R. p. 102, line 7 - p. 103, line 8) No names, addresses or contact information were disclosed by Appellant or Donald Frank Waiters at the trial nor is any of this information alleged to be known in the Appellant's Brief.

All unknown heirs were properly served by publication and a Guardian ad Litem was appointed to represent their interests. The Appellant and Donald Frank Waiters alleged knowledge of heirs of Beaudry Waiters at the trial, however, there is no evidence of confirmation of the existence of heirs of Beaudry Waiters. The Special Referee properly continued the trial of the case to conclusion subject to protection of the interests of potential children of Beaudry Waiters.

CONCLUSION

The Special Referee listened to and considered evidence presented by the parties and was very mindful and respectful of their opinions. There were over 100 named parties to the action. He sought to issue an Order that would fair and equitable to all parties, one

that would conclude this proceeding spanning over ten (10) years. From the evidence presented it was clear that all parties considered the subject Property to be Heir Property.

The argument presented by Appellant against partitioning in essence was that he wanted to preserve the status quo. He stated that "by not selling the property, as long as a Waiters was living in South Carolina, he had a place to stay." (R. p 149, lines 2-10). Appellant acknowledged that his family was part of the heir property line, did not own specific property, that they had acquired a child's portion of the property (child's percentage interest). (R. p. 167, line 23 - p. 168, line 5) He also argued that the partitioning of the Property would cause the property taxes to increase. (R. p. 152, lines 6-10) Appellant also did not object to an auction where Waiters were able to acquire the property (R. p. 163, lines 4-7). Donald Frank Waiters testified that the reason that he was doing what he was doing was because it was heir property (R. p. 167, lines 3-11). He argued that by partitioning the property "everybody's going lose." (R p. 167, lines 12-16).

The Special Referee did not err in his finding that certain deeds not properly executed by all persons holding an interest in the portion of the Property when the deeds were executed. For the deeds to be effective they would have to have been signed by all co-owners of the property.

Appellant also seems to argue with regards to this first issue presented that no title search was performed in connection with this action. That is not the case. Persons found to have an ownership interest were made a party to the action. Appellant argues that "there was testimony from all parties involved that the various family members had lived

on the land for many decades, showing continuous, hostile, open, actual, notorious and exclusive use and ownership of the land" is contrary to testimony given at trial. Appellant allegations that family members have assumed active, open, and hostile possession of the property for more than a century, granting certain possessory rights through adverse possession" is also not supported by the testimony at trial.

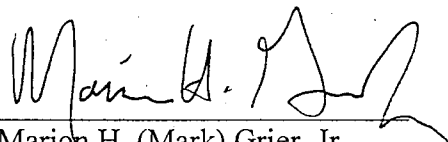
The Special Referee through his Order protected the interest of all heirs. His Order provides a way for heirs that improved the property by placing a home on it to retained by the improving heir. It provides a way for those residing on the property to have a home-site. The Order also provides a way for heirs not living on the property to acquire fee simple title to their ancestral property and/or to receive funds from the sale of property and sale of the remaining timber on the property. He called for the partitioning and sale of property in a manner that was fair and equitable. Further, his Order protected the many heirs by requiring the parties who caused trees to be cut and removed from the property (a common asset of the heirs) in violation of the injunction to provide reimbursement based on the value of the timber removed. The heirs were entitled to recover a reasonable amount for waste committed to the property, which the Special Referee found to be \$8,189.00. He heard and considered the testimony from experts who testified and he saw and observed the witnesses and their demeanor and was in the best position to evaluate their veracity and credibility.

At trial, the Appellant did not challenge the valuation placed on the property or challenge the assignment of homes to those parties residing on the property, nor did Appellant file any Motion for New Trial or to Amend the Judgment pursuant to Rule 59 of

the South Carolina Rules of Civil Procedure. The South Carolina Rules of Civil Procedure provide for post judgment motions. Appellant did not file a motion to ask the court to reconsider matters properly encompassed in the decision on the merits. No Rule 52 (b) motion was filed for seeking to have the court amend its findings or amend the judgment or seeking a new trial. Further, Appellant failed to raise this issue to the judge in a Rule 59(e) motion. Issues on which the trial judge never ruled and which were not raised in a post-trial motion are not preserved for appeal. *Goddard v. Fairways Dev. Gen. Partnership*, 310 S.C. 408, 426 S.E.2d 828 (1993). "An issue must be both raised to and ruled on by the trial court before it can be considered on appeal). *Anthony v. Padmar, Inc.*, 320 S.C. 436, 465 S.E.2d 745 (1995)

The Special Referee crafted an Order responsive to the best interests of the Waiters family based on all the evidence presented at trial. Therefore, Respondent requests that the Order of Special Referee H. Clayton Walker, Jr. be affirmed by the Court.

Respectfully submitted,



Marion H. (Mark) Grier, Jr.
Attorney for Respondent Evelyn Lowery
PO Box 1809,
Lancaster, South Carolina 29720
(803) 285-5534

This 4th day of May, 2017