STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough – Master-in-Equity

CASE NUMBER 2016-001197

LEON CHISOLM, JAMES ROOSEVELT CHISOLM, DORIS C. FLADGER, ROBERT CHISOLM, FLORENCE CHISOLM, ALICE C. JENKINS, SADIE Y. MCDONALD, MARTHA PRYOR, PATRICIA MILLIAN, MARGARET E. WARREN, ANDREW K. CHISOLM, EDRINA L. WILSON, CARL CHISOLM, LAWRENCE CHISOLM, ROOSEVELT CHISOLM, II, LOUIS CHISOLM, EDDIE CHISOLM, LEROY CHISOLM, AND TOMMY CHISOLM,
.....Respondents

v.

MARY FRANCES S. CHISOLM, WILLIAM CHISOLM, EMILY C. CAMPBELL, DEBRA C. MURPHY, ALLIE C. FRAZIER, CORA C. BROWN, CORDELL CHISOLM, CHARLES CHISOLM, JR., PHILLIP CHISOLM, ANTHONY CHISOLM, DAVID CHISOLM, LEONARD CHISOLM, AND LEVY CHISOLM, ... Appellants

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)
COUNTY OF CHARLESTON)

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Plaintiffs,

vs.

MARY FRANCES S. CHISOLM, WILLIAM CHISOLM, EMILY C. CAMPBELL, DEBRA C. MURPHY, ALICE C. FRAZIER, CORA C. BROWN, CORDELL CHISOLM, CHARLES CHISOLM, JR., PHILLIP CHISOLM, ANTHONY CHISOLM, DAVID CHISOLM, LEONARD CHISOLM, and LEVY CHISOLM,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2006-CP-10-1772

ORDER

HEARING DATE: January 8, 2015
TRIAL JUDGE: Honorable Mikell R. Scarborough
PLAINTIFFS' ATTORNEY: Barry I. Baker, Esquire and Harold A. Oberman, Esquire
DEFENDANTS' ATTORNEY: Willie B. Heyward, Esquire and John J. Pinckney, Esquire
COURT REPORTER: Bernadette A. Cali

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This matter came before me on Defendants' Motion for Reconsideration. I issued a final comprehensive order dated September 17, 2014 which disposed of all issues in this case. I heard arguments for reconsideration on January 8, 2015, and reviewed the submissions of the parties. Though Defendants raise some interesting legal issues concerning the disability of Roosevelt Chisolm and the tolling of adverse possession as to heirs not taking through his lineage, I need not readdress those issues and I reassert the findings of fact in my Order.

I need not readdress those issues because I find that Charles Chisolm, Sr.'s possession of Parcel 5 was permissive. I specifically recall the testimony of Gary Chisolm and based upon my observation of him, I find his testimony very credible. He was a witness called by both sides with no interest in this matter. He was uncomfortable testifying because he was caught between opposing interests in the family, but I strongly believe he told the truth. He testified that "Big John" Chisolm expressly gave permission to Charles Chisolm, Sr. and Eddie (Chansom) Chisolm to farm Parcel 5. "Big John" Chisolm was an owner of Parcel 5 and knew he was an owner of Parcel 5. He was the leader of the family and he did not die until 2004. Because the use was permissive, it was not hostile. Therefore, Defendants have failed to prove adverse possession.

I further find that there was no ouster in this case.

Because of this, and because of the facts and legal reasoning set forth in my Order dated September 17, 2014, I deny Defendants' Motion for Reconsideration.

Honorable Mikell R. Scarborough
Master in Equity for Charleston County

Charleston, South Carolina
January 16, 2015.

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON LEON CHISOLM, JAMES ROOSEVELT CHISOLM, DORIS C. FLADGER, ROBERT CHISOLM, FLORENCE CHISOLM, ALICE C. JENKINS, SADIE Y. MCDONALD, MARTHA PRYOR, PATRICIA MILLIAN, MARGARET E. WARREN, ANDREW K. CHISOLM, EDRINA L. WILSON, CARL CHISOLM, LAWRENCE CHISOLM, ROOSEVELT CHISOLM, II, EDDIE CHISOLM, and LEROY CHISOLM, Plaintiffs, vs. MARY FRANCES S. CHISOLM, WILLIAM CHISOLM, EMILY C. CAMPBELL, DEBRA C. MURPHY, ALICE C. FRAZIER, CORA C. BROWN, CORDELL CHISOLM, CHARLES CHISOLM, JR., PHILLIP CHISOLM, ANTHONY CHISOLM, DAVID CHISOLM LEONARD CHISOLM, and LEVY CHISOLM, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 2006-CP-10-1772 **FINAL ORDER**

FILED
2014 SEP 18 AM 9:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TRIAL DATES:	August 21-22, 2012
TRIAL JUDGE:	Honorable Mikell R. Scarborough
PLAINTIFFS' ATTORNEY:	Barry I. Baker, Esquire and Harold A. Oberman
DEFENDANTS' ATTORNEY:	Willie B. Heyward, Esquire
COURT REPORTER:	Bernadette A. Cali

FACTS

The families of John Chisolm and Tracy Chisolm and their successors (hereinafter referred to as "Plaintiffs") brought a suit to enforce an Order of Judge Condon. Judge Condon,

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in a partition action, ordered a certain parcel of land to be deeded to Plaintiffs. The deed was not issued. Plaintiffs filed a Complaint on May 4, 2006, seeking to have Parcel 5 conveyed as ordered by Judge Condon on September 28, 1982, and seeking to have the Deed of Distribution of April 15, 2000 nullified such that it complied with the Order of Judge Condon. Soon after the Complaint was filed, in June 2006, the branches of the families met with attorneys to see if the claims of the Plaintiffs to the land could be worked out amicably. There was no resolution, so Defendants eventually answered. On October 31, 2011, with consent of the parties, the Plaintiffs filed an amendment to their Summons and Complaint, which added among other things, a quiet title action and a declaration that a certain subdivision be declared null and void. Defendants answered denying the claims of Plaintiffs and asserted the defenses of adverse possession and laches. With the consent of all the parties, the Plaintiffs filed an Amended Reply in which they asserted affirmative defenses and other causes of action in response to Defendants' Answer. These included tolling, judicial estoppel, equity, and fraud.

Underlying Cases

A. Charles Chisolm vs. Edward Chisolm, et al., Case No. 81-CP-10-0739

Charles Chisolm, Sr. as Plaintiff, brought an action to partition numerous tracts of land owned by the heirs of Hamlet Chisolm. On September 28, 1982, the Honorable Louis E. Condon, at that time Master-In-Equity for Charleston County, issued a "Final Order and Decree" that partitioned the lands owned by the Hamlet Chisolm family. Judge Condon ordered Parcel Five deeded jointly to the family of John Chisolm and the family of Tracey Chisolm. Judge Condon never executed a Master's Deed conveying Parcel Five to the families of John Chisolm and Tracey Chisolm (henceforth, the families of John Chisolm and Tracy Chisolm and their

successors will be referred to as "Plaintiffs"). The other deeds outlined in the Order were executed as ordered, including deeds to two other parcels into Charles Chisolm, Sr.

B. Estate of Charles Chisolm, Case Number 99-ES-10-0950

Previous to the partition action, Charles Chisolm, Sr. had deeded out by quit claim deed, Parcel 5 to his attorney, John H. Bennet, Jr. on December 6, 1976. John Bennet reconveyed his interest back to Charles Chisolm, Sr. on January 5, 1977. Charles Chisolm, Sr. died on June 15, 1999. Mary Frances S. Chisolm qualified as his Personal Representative, and she executed a Deed of Distribution conveying Parcel 5 to all of the heirs of Charles Chisolm, Sr. However, Parcel 5 was never listed on the Inventory and Appraisement, and the only mention of Parcel 5 in the estate is in the description on the Deed of Distribution. The recitation on the deed stated that the homestead was to be conveyed, but instead the description conveyed Parcel 5. Plaintiffs are asking the Court to declare this deed null and void, while enforcing its Order of September 28, 1982.

Facts Shown at Trial

The heirs of Hamlet Chisolm own a large tract of land. This type of property is commonly known as "heirs property". Charles Chisolm, Sr., partly driven by the fact that he was carrying what he thought to be an excessive tax burden and because the tax bills were coming to him, brought a partition action such that the family land could be divided up among family members. This was done by the Order of September 28, 1982. In that partition action, Judge Condon ordered Parcel 5 to be deeded to Plaintiffs, however, that deed was not issued.

Parcel 5 was described as follows:

All that lot, piece, parcel of land located on Wadmalaw Island, County of Charleston, State of South Carolina, consisting of approximately ten (10) acres.

Bordering to the North on Church Creek, on the South on lands of the late Hamlet Chisolm, on the East by lands of Eddie Chisolm and on the West by Bears Bluff and lands of Charles L. Paul, III.

TMS 219-00-00-089

Leon Chisolm testified this description had the wrong TMS number. He testified the hand-writing on the Order in evidence correcting this was his hand-writing.

After the Order, Charles Chisolm, Sr. and Eddie (Chansom) Chisolm continued to farm Parcel 5. Gary Chisolm (Gary), a witness with no interest in the outcome of this litigation who was called by both Plaintiffs and Defendants, testified that "Big John" Chisolm, who got an interest in Parcel 5 under the Order, gave permission to Charles Chisolm, Sr. to use Parcel 5. Gary stated that "Big John" Chisolm knew that the property was his and his immediate family and that Big John expressly gave permission to both Charles Chisolm and his dad, Eddie (Chansom) Chisolm, to farm his property. This testimony was not contradicted and I find it credible. It is the only competent evidence proffered on this issue. "Big John" Chisolm was the leader of the family and they did not question his authority. Family members understood that Big John Chisolm was protecting their interests. He did this until he died in February, 2004.

After the death of Charles Chisolm, Sr., on June 15, 1999, the Personal Representative of the Estate of Charles Chisolm, Sr., intended to execute a deed to the homestead. Instead, Parcel 5 was deeded to Charles Chisolm, Sr.'s heirs and not to Plaintiffs.

Roosevelt Chisolm was a child of Tracey Chisolm and entitled to receive an interest in Parcel 5 at the time of the 1982 decree. Roosevelt Chisolm was incompetent well before 1982

when the Master's Order was issued. He hit his head as a child and was thereafter never right. Roosevelt Chisolm's family consistently questioned his competency as he traveled to various parts of the country. Family members were often uncertain about his whereabouts. He was incompetent at the time he and the Plaintiffs' predecessors gained legal title to Parcel 5. Roosevelt Chisolm remained incompetent until he died in December, 1996. This fact was clearly established by the testimony of the Plaintiffs, their witnesses, and testimony presented before the Master at the 1982 hearing.

Idell Chisolm was the wife of Roosevelt Chisolm. She became incompetent before her death in 2005. By 2001, she had full-fledged Alzheimer's disease and could not be by herself. Leon Chisolm testified that Idell Chisolm was in the early stages of Alzheimer's disease when Roosevelt died. Dr. Harold Nicollette, her personal family physician, first saw her on May 6, 2003. He testified in his deposition, *de benne esse,* that Dr. Tracy had retired and he took over his patients at that time. He testified to a reasonable degree of medical certainty that she was incompetent in May, 2003, and from his review of Dr. Tracy's records, her incompetency began in 2001, but may have existed before that.

Throughout the years, Defendant and their predecessors made no effort to oust the Plaintiffs and their predecessors from the property.

LAW

I. Judge Condon's Failure to Issue a Deed Pursuant to His Order was a Clerical Mistake Correctable at Any Time by the Court.

A. The Failure to Issue a Deed as Ordered Was a Correctable Clerical Omission Under Rule 60(a), SCRCP

Plaintiffs concede that they are not within the one year time limitation of Rule 60(b)(1), SCRCP, and hence they rely on Rule 60(a). Rule 60(a), SCRCP, provides in pertinent part:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Generally, a clerical error is defined as a mistake in writing or copying. *See Black's Law Dictionary* 252 (6th ed. 1990). As applied to judgments and decrees, it is a mistake or omission by a clerk, counsel, judge or printer which is not the result of exercise of judicial function. Id; Dion v. Ravenel, Eiserhardt Assoc., 316 S.C. 226, 449 S.E.2d. 251 (Ct. App. 1994).

Here, we have an error of omission. Judge Condon ordered a deed be issued. That deed was not issued. This error of omission is not the result of judicial function. In Bell v. Knight, 376 S.C. 380, 656 S.E.2d. 393 (Ct. App. 2008), the S.C. Court of Appeals held that a court order divested a party's interest in real property, notwithstanding the failure to issue and record the anticipated deed divesting that interest and granting the other party their interest. Since a deed is not necessary to give judicial effect to the order, the failure to record a deed is not a mistake or omission which is the result of judicial function, but rather a mistake of a lawyer, judge, or clerk that is a clerical error. It is an error of oversight or omission.

The Bell case stands for the proposition that the judicial power and the judicial function was exercised in the order itself. The subsequent act of issuing the deed required by the order is ministerial. The decision to grant a motion for relief from judgment or order based on mistake.... is within the sound discretion of the trial judge; an "abuse of discretion" occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support. Ware v. Ware, 404 S.C. 1, 743 S.E.2d 817 (S.C. 2013). Whether to grant or deny a motion for relief from a judgment lies within the sound

discretion of the trial court, and the standard of review on appeal is limited to determining whether there was an abuse of discretion. Southeastern Housing Foundation v. Smith, 380 S.C. 621, 670 S.E.2d 680 (S.C. App. 2008).

Initially, Judge Condon apparently intended Parcel 5 to be deeded to Plaintiffs. "The factor most strongly suggesting a 'clerical mistake' or 'error' of oversight of the type contemplated for correction is an apparent right to have had what is now sought to be reflected in the judgment, order, or other part of the record reflected in it initially." 46 Am.Jur.2d, Judgments § 177. The order of Judge Condon, on its face, deeded Parcel 5 to Plaintiffs (R. pp. 17 - 18). The Plaintiffs seek to have Judge Condon's omitted order corrected according to the original terms.

The TMS number under the description of Parcel 5 was a typographical error in Judge Condon's order and can be concluded that there was a clerical mistake. A clerk could have easily assumed that the deed to this parcel was already issued, and then mistakenly omitted to issue the ordered deed.

B. Nunc Pro Tunc Powers May be used to Issue the Deed as Previously Ordered.

The court's *nunc pro tunc* powers are used to place in the record some previous action of the court that is not adequately reflected. Ex Parte Strom, 343 S.C. 257, 264, 539 S.E.2d. 699, 703 (S.C. 2000). The court can correct only what was done, not what should have been done, through a *nunc pro tunc* order. Id.

It is apparent the from the 1982 Final Order and Decree that Parcel 5 was to go to Plaintiffs, but the deed failed to be recorded. The court has the inherent power to correct this mistake.

C. The Deed of Distribution to be Rescinded.

The Order of Judge Condon divested Charles Chisolm, Sr. of his interest in Parcel 5. Bell v. Knight, 376 S.C. 380; 656 S.E.2d. 393 (Ct. App. 2008). Charles Chisolm, Sr. was the Plaintiff in the partition action. Therefore, the Deed of Distribution has no effect as to that parcel, and I order it should be rescinded such that it reflects Plaintiffs' ownership of Parcel 5.

D. Plaintiffs' Suit Was Timely.

Rule 60(a), SCRCP provides, "[c]lerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." Thus a court may correct clerical errors at any time.

Errors, omissions, and mistakes in the field of real estate, by their very nature, may take years or decades to discover or to surface. People hold on to parcels of land for long periods of time and problems sometimes only arise once that land is to be conveyed. Here, the testimony shows that the heirs of Tracy Chisolm would get his interest under the 1982 Order. (R. pp. 37-41). Once the clerical error of not recording the deed surfaced, Leon Chisolm, Jr. immediately sought legal counsel.

II. Legal Title

I find that legal title to parcel 5 passed to Plaintiffs at the time of Judge Condon's Order. In Bell v. Knight, 376 S.C. 380, 656 S.E.2d. 393 (Ct. App. 2008), the S.C. Court of Appeals held that a court order divested a party's interest in real property, notwithstanding the failure to issue and record the anticipated deed divesting that interest and granting the other party their interest. The 1982 order was sufficient, not only to divest Defendants and the parties to the partition action of their title, but to vest title to the Plaintiffs' predecessors in this action.

III. Defenses/Adverse Possession

Though I have found legal title vested in the Plaintiffs at the time of the 1982 Order, Defendants put forth the affirmative defense of adverse possession.

> When it is asserted by the defendant, adverse possession is an affirmative defense. Miller v. Leaird, 307 S.C. 56, 62; 413 S.E.2d 841, 844 (1992). The party asserting adverse possession must show continuous, hostile, open, actual, notorious, and exclusive possession for a certain period of time. Mullis v. Winchester, 237 S.C. 487, 491; 118 S.E.2d 61, 63 (1961). In South Carolina, adverse possession may be established if the elements of the claim are shown to exist for at least ten years. S.C. Code Ann. § 15-67-210 (Supp.2008). To meet this burden of proof, the party asserting the claim must show by "clear and convincing" evidence he has met the requirements for adverse possession. Davis v. Monteith, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (S.C. 1986).

Jones v. Leagan, 384 S.C. 1, 681 S.E.2d 6 (Ct.App. 2009)

> In addition to the 10-year statute of limitation for adverse possession, South Carolina common law recognizes the 20-year presumption of a grant. Terwilliger v. Daniels, 222 S.C. 191; 72 S.E.2d 167 (S.C. 1952). See S.C. Juris. Adverse Possession § 4 n. 4 (1991) (there are several methods for acquiring property through the passage of time, and the acquisition of land under the common law period is more accurately labeled the 20-year presumption of a grant). Under the presumption of a grant, the time of possession may be tacked not only by ancestors and heirs, but also between parties in privity in order to establish the 20-year period. White, 222 S.C. 176, 72 S.E.2d 169.

Getsinger v. Midlands Orthopaedic, 327 S.C. 424, 489 SE.2d 223 (Ct. App. 1997)

I find that Defendants have not proven adverse possession by clear and convincing evidence.

A. Permissive

I find possession by Charles Chisolm Sr. was not adverse because it was permissive. Gary Chisolm, a witness who was called by both Plaintiffs and Defendants, testified that Big John Chisolm gave permission to Charles Chisolm, Sr. to use Parcel 5. Gary stated Big John

Chisolm knew that the property was his, and expressly gave permission to both Charles Chisolm and Gary's dad, Eddie (Chansom) Chisolm, to farm his property. This is the only competent testimony in this regard and it was not contradicted. Big John Chisolm frequently visited the property until his death in February 2004. As stated in McDaniel v. Kendrick 386 S.C. 437, 688 S.E.2d 852 (Ct. App. 2009):

> [T]his case is more analogous to those wherein a party entered land with permission of the owner and then claimed adverse possession at a later point. See Davis v. Monteith, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986) (finding occupation of property with owner's tacit permission was not hostile although such possession may have become hostile when claimant remained on property after being told to vacate); Frady v. Ivester, 118 S.C. 195, 205, 110 S.E. 135, 138 (1921) ("The defendant's entry into possession was permissive, and, as she had a duty to perform, she could not hold adversely to the rights of the mortgagors until she either surrendered the possession or gave notice of an adverse possession."); Young v. Nix, 286 S.C. 134, 136, 332 S.E.2d 773, 774 (Ct.App.1985) (holding claimant who had farmed tract of land for more than forty years with permission of property owner's widower did not establish claim of adverse possession without a "clear and positive disclaimer of the title under which entry was made"). While a party cannot adversely possess property used with permission, a party may begin to satisfy the requirement of hostility upon a clear disclaimer of the owner's title. All Saints Parish, Waccamaw, 358 S.C. at 233, 595 S.E.2d at 266-67.

McDaniel v. Kendrick 386 S.C. 437, 688 S.E.2d 852 (Ct. App. 2009).

Defendants' possession became hostile, if at all, at the earliest in 2000, when they received a deed from the Estate of Charles Chisolm, Sr. Up until that point, they were still permissive users as they had made no clear and positive disclaimer of the title under which entry was made. They were there with permission, did not oust others from the property, and did not openly reject Plaintiffs' title. Therefore, the Defendants' occupation of the property was not hostile for 10 years before this suit was brought. Though the tax bills may have come to

Charles Chisolm, Sr., there is no proof that he paid these taxes alone and, and if he did, this was not under the arrangement with Big John Chisolm.

B. Tolling

In South Carolina, adverse possession may be established under a 10-year statute of limitations. See S.C.Code § 15-3-340 (Supp.1996); S.C. Code § 15-67-210 (1976); S.C.Code § 15-67-220 (1976). However, S.C. Code Sec. 15-3- 370 specifically provides that:

> If a person entitled to commence any action for the recovery of real property, or make an entry or defense founded on the title to real property or to rents or services out of the same is, at the time the title shall first descent or accrue, either: (1) within the age of eighteen years; or (2) insane; the time during which the disability shall continue not be considered any portion of the time in this article limited for the commencement of the action or the making of the entry or defense, but the action may be commenced or entry or defense made after the period of ten years and within ten years after the disability shall cease or after the death of the person entitled who shall die under the disability. But the action shall not be commenced or entry or defense made after that period.

"If some disability prevents adverse possession against one co-tenant, then it will also prevent acquisition of title as against the other co-tenants." Curtis v. DesChamps, 290 S.C. 315, 324; 350 S.E.2d 201, 207 (Ct. App. 1986). "The possession of one cotenant is the possession of all, and the disability of one cotenant will protect the title of the others against the running of the statute of limitations." Effect of Disability of Landowner With Respect to the Acquisition of Adverse Rights by Another by Statute of Limitations, Presumption of Grant, and Prescriptive Rights in South Carolina, 10 S.C. LQ 292, 301, citing Adams v. Adams, 220 S.C. 131 (1951); Haley v. White, 216 S.C. 360, 58 S.E. 2d 88 (1950).

Roosevelt Chisolm was incompetent when the Master's Order was issued in 1982. He was incompetent at the time he and the Plaintiffs' predecessors gained legal title to Parcel 5.

Roosevelt Chisolm remained incompetent until he died in December, 1996. This fact was clearly established by the testimony of the Plaintiffs, their witnesses, and testimony before the Master at the 1982 hearing. The Plaintiffs brought suit in May, 2006 within 10 years after Roosevelt's death.

Therefore, the statute was tolled. This tolling applies not only to Roosevelt Chisolm, but also to all the Plaintiffs. Since Roosevelt's successors sued within ten years after his death, the ten year adverse possession period is tolled. Similarly, Plaintiffs are protected from the 20 year presumption of grant. Roosevelt was totally unaware of the status of his proprietary affairs and thus did not act on them.

C. Committee

The only evidence of a committee appointed for Roosevelt are the statements in court that indicates that one was appointed in Pennsylvania. There is no evidence besides that, no evidence of what the committee was charged with or what the committee or court did. There is certainly no evidence of a South Carolina committee or guardian, and there was no local committee or guardian.

Though a committee may have been appointed for Roosevelt in Pennsylvania, this does not remove the disability that tolls the statute of limitations. S.C. Code Ann. § 15-3-370 (2006) speaks only of the existence of a disability and does not envision a committee or representative removing the disability. *See* cases collected at Section 6, Effect of Appointment of Legal Representatives for Persons Under Mental Disability on Running of State Statute of Limitations Against Such Person, 111 A.L.R. 5th 159, Section 6.

Rule 17(c), SCRCP merely provides a method for a disabled person to bring suit or defend a suit and does not remove the disability. Therefore the tolled statute is not triggered.

111 A.L.R. 5th 159 at section 4 and cases collected therein. Additionally, Rule 17(d)(1) provides that only in-state judges can appoint a GAL pertaining to suits here, therefore there is some question as to whether an out of state committee could have brought suit concerning property here. Rule 17(d)(7), SCRCP, provides additional protections for out of state persons under a disability.

Since this is a case where Roosevelt had the inability to understand that people were adversely possessing his land, and since the committee was in Pennsylvania and could not perceive this on their own without the input of Roosevelt, the statute should not be triggered. A majority of states and cases have found that the appointment of a legal representative for a person who is under a disability for purposes of a state tolling statute does not trigger the running of the otherwise tolled statute of limitations. 111 A.L.R. 5th 159, Section 3. Courts have found the right of action is in the incompetent. Id. Others have ruled the appointment does not remove the disability to which the tolling statute refers. Id. at Section 4. Some courts have done so summarily, Id. at Section 7, and others have said the appointment of a legal representative is irrelevant as to whether the applicable limitations period was tolled. Id. at 8. Even in some cases where the tolling ceased because of an appointment, the Defendants were required to show that the legal representative acted reasonably and diligently. Id. at Section 10. The Defendants have offered no proof of that here.

D. Exclusive

To constitute adverse possession, which results in obtaining title to the disputed property, the possession must be continuous, hostile, open, actual, notorious, and exclusive for the requisite period. Mullis v. Winchester, 237 S.C. 487; 118 S.E.2d 61. *The claimant's possession must be hostile to not only the true owner, but also to the rest of the world so as to*

indicate his exclusive ownership of the property. Getsinger v. Midlands Orthopedic, 327 S.C. 424, 489 S.E.2d 223 (Ct. App. 1997) (emphasis added).

Eddie (Chansom) Chisolm, who is from a separate branch of the family from those claiming adverse possession and those claiming legal title, farmed Parcel 5 with Charles Chisolm, Sr. The heirs of Charles Chisolm Sr. readily admit this. The Defendants all testified that Eddie shared Parcel 5 with Charles Sr. to some degree. Some of the Defendants testified that Eddie and Charles, Sr. sometimes interchanged the tracts on Parcel 5 they farmed when the other became sick. Others testified that Eddie used parcel 5 as a pasture up to a certain fence marked in red on the subdivision plat. I find that Eddie (Chansom) Chisolm used that parcel with Charles Chisolm, Sr. up until at least 1992. Therefore, Charles Chisolm, Sr.'s possession was not exclusive for 10 years as he died in 1999, and tacked with that of his heirs, was not exclusive for 20.

E. Open, Notorious, and Continuous

The nature and location of the land, and the appropriate uses for which it is suited should be considered in determining whether adverse possession has been established. Getsinger v. Midlands Orthopaedic, 327 S.C. 424, 431; 489 S.E.2d 223 (Ct. App. 1997). While the legal owner need not have actual knowledge the claimant is claiming property adversely, the hostile possession should be so notorious that the legal owner by ordinary diligence should have known of it. Jones v. Leagan, 384 S.C. 1, 681; S.E.2d 6, 13 (Ct. App. 2009).

Defendants testified that Charles Chisolm Sr. had an extensive farming operation where various products would be taken to market. Though he farmed other parts of the Hamlet Chisolm tract, on Parcel 5 he farmed only lot 6 and a part of lot 5. The testimony of Defendants show that, only after Eddie Chisolm died in the early 1990s, did Charles Sr. farm

lots 1-4, and he only did that for 4-5 years. He ceased these farming operations before his death. However, once he died, his children testified that they planted Parcel 5 in a limited manner such that they could have crops to attract deer for hunting activities off the property. The land surveyor, A.H. Schwacke, testified that the property was not being used for a farming operation and was overgrown with trees. The aerial photographs taken in 2001 and 2009 shows that lots 1, 2, 3, and 4 were overgrown with trees, along with a good portion of lot 5. He could determine it was not being used as a farm then. Furthermore, the property was only timbered once and was neither hunted nor fished.

The property went from a large scale farming operation to a minimal one at best, where goods were not being produced for sale. Plaintiffs viewing the property would have seen no real cultivation, no farm operation, and a parcel of property that was largely overgrown on large portions after the death of Charles Chisolm, Sr.

F. Color of Title

I find that the Defendants did not adversely possess the land under color of title for 10 years. The deed of distribution in 2000 marked the first instance where the parcel of land was clearly defined. The tax bills alone are inconclusive in this regard. In Johnson v. Pritchard, 302 S.C. 437; 395 S.E.2d 191 (Ct. App. 1990), the Court of Appeals found that tax records alone were "not as important," Id. at 445, but had to be "substantiated" by other documents. In this case, the other document did not come into existence until too late, the year 2000, such that there has not been adverse possession under color of title for ten (10) years. Without timely substantiation, the tax records do not adequately outline Parcel 5.

Furthermore, Charles Chisolm, Sr. farmed only a portion of Parcel 5 and Eddie Chisolm farmed and used the other parts of Parcel 5. Not only does this show that Charles Sr. did not

exclusively possess the parcel as discussed above, it shows that he did not do so under the color of title. At best, he was only in possession of the portion of the property up to the fence line. Charles Sr. cannot claim possession of the whole tract by way of tax bills when others were on large portions of the property.

Thus, even if I were to find that Defendants adversely possessed the property, it would only be the portion of Parcel 5 that was farmed. This was limited to, on the subdivision plat, lot 6 and a portion of lot 5. The testimony, gleaned from the testimony of Defendants, was that Charles Chisolm, Sr. only farmed on lots 5 and 6 and that Eddie had a pasture on lots 2, 3, and 4.

IV. Laches

The equitable doctrine of laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1998). The party seeking to establish laches must show (1) delay, (2) that was unreasonable under the circumstances, and (3) prejudice. Kelley v. Kelley, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct.App. 2006). To establish laches as a defense, the defendant must show the complaining party unreasonably delayed its assertion of a right, thereby prejudicing the defendant. Id.; Jones v. Leagan, 384 S.C. 1, 681 S.E.2d 6 (Ct. App. 2009).

Plaintiffs' delay in bring this suit was not unreasonable. The guidelines as to Rule 60(a), SCRCP, and the law as to adverse possession, dictate what the legislature and the courts deem to be reasonable and unreasonable. The facts set forth above show that Plaintiffs' delay was not unreasonable. Roosevelt was incompetent and he died in 1996. Idell was incompetent and died in 2006. The testimony established the fact that as soon as Leon Chisolm,

Jr. discovered certain papers of his mother and became aware of the situation, he took immediate action, consulted a lawyer, and brought suit.

Annie and Leroy Chisolm, Jr. were in the military and lived abroad for many years. After the death of Big John Chisolm in 2004, they searched the property records for property in his name but could not find any. Leroy Chisolm, Jr. did not have a legal right to the property until 2004, when he inherited it upon the death of Big John Chisolm. He acted quickly after this date. Thus, his delay was not unreasonable.

V. Subdivision

As legal title vested in Plaintiffs and as Defendants do not have a valid claim to this property by adverse possession, I order the subdivision made by Defendants in April, 2004 recorded at Plat Book EH, page 46, RMC office of Charleston County voided.

VI. Quiet Title

The Plaintiffs have also brought an action to quiet title into the heirs of John Chisolm and the heirs of Tracey Chisolm. Based upon the prior order and the uncontradicted testimony of the Plaintiffs, I find as set forth in the following paragraphs.

A. JOHN CHISOLM FAMILY – 50% Interests

John Chisolm is now deceased and his only remaining heir is Leroy Chisolm, Jr. Therefore, Leroy Chisolm, Jr. has a 50% interest in Parcel 5. This is because John Chisolm, Sr. died prior to the 1981 lawsuit. He left a wife, Alice Chisolm, who died prior to the 1981 lawsuit and three children: a daughter, Alice Chisolm, and two (2) sons, John L. Chisolm and Leroy Chisolm, Sr. Alice Chisolm died approximately in 1986, leaving no spouse or children. John L. Chisolm died on February 14, 2004 leaving no spouse or children. Leroy Chisolm, Sr. died before the 1981 lawsuit was concluded. The 1982 Decree shows the only surviving heirs of

Leroy Chisolm Sr. as Alice Chisolm and John L. Chisolm. Leroy Chisolm, Sr. was the natural father of Leroy Chisolm Jr. a/k/a Leroy Chisolm. Mable Fuller, a daughter of Alice Chisolm (the elder), adopted Leroy Chisolm Jr. and he was thus not named as an heir in the 1981 lawsuit. Therefore, the only heir of John Chisolm is Leroy Chisolm, Jr.

B. TRACEY CHISOLM FAMILY – 50% Interest

The family of Tracey Chisolm were, under the 1982 order, to divide their undivided 50% interest in Parcel Five as follows, to wit:

1. Children of Benjamin (Jesse) Chisolm

1.	Roosevelt Chisolm	16.67% interest
2.	Roosevelt Ben Chisolm II	5.67% interest
3.	Louis Chisolm	5.67% interest
4.	Eddie Chisolm	5.67% interest
5.	Tommy Chisolm (only child of Eulle Chisolm Williams)	16.67% interest

Roosevelt Chisolm is now deceased and left 8 children. His wife, Idell Chisolm is also deceased and she left 6 children that were not born of the union between Roosevelt Chisolm and Idell Chisolm. Roosevelt Ben Chisolm a/k/a Roosevelt Chisolm II is still alive. Louis Chisolm is deceased but he has children. Eddie Chisolm is still alive and owns an interest in the subject property. Tommy Chisolm is deceased and no known heirs exist.

2. Children of Roosevelt Chisolm

1. Leon Chisolm
2. James Roosevelt Chisolm
3. Doris Fladger
4. Robert Chisolm
5. Florence Chisolm
6. Alice Jenkins
7. Sadie W. McDonald
8. Martha Pryor

3. Children of Idell Chisolm ONLY

1. Patricia Millian
2. Margaret E. Warren
3. Andrew Chisolm
4. Edrina L. Wilson
5. Carl A. Chisolm
6. Lawrence Chisolm

C. RECAP

I, therefore, find that the following persons have an interest in the property in the following percentages:

1.	LEROY CHISOLM	50% Interest
2.	Children of ROOSEVELT & IDELL CHISOLM	25% Interest (together)
3.	Roosevelt Chisolm II	25% Interest (together)
	Heirs of Louis Chisolm	
	Eddie Chisolm	

CONCLUSION

The failure to issue a Master's Deed pursuant to the Final Order of September 28, 1982 was a clerical error. It was not an error involving the exercise of judicial function because the 1982 Order shows on its face that the judicial decision had been rendered and Parcel 5 was to go to Plaintiffs. I correct this error using both Rule 60(a), SCRCP, and the *nunc pro tunc* powers of the court. The court may correct these clerical errors at any time. Further, under the Bell case, the order had the same effect as a deed with the parties involved in this lawsuit. Therefore, I find legal title vested in Plaintiffs or their successors at the time of the order. As Defendants have not proved their affirmative defense of adverse possession by clear and convincing evidence, and as they have not proved their defense of laches, I will issue a deed to

Parcel 5 as set forth above and I reform the deed of distribution to reflect no ownership in Defendants. I further order the subdivision void.

AND IT IS SO ORDERED.

Mikell R. Scarborough
Master-In-Equity for Charleston County

Charleston, South Carolina

May 9/17, 2014.

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	)
COUNTY OF CHARLESTON	) FOR THE NINTH JUDICIAL CIRCUIT
	)
	) CASE NO.: 2006-CP-10-1772
LEON CHISOLM, JAMES ROOSEVELT CHISOLM, DORIS C. FLADGER, ROBERT CHISOLM, FLORENCE CHISOLM, ALICE C. JENKINS, SADIE Y. MCDONALD, MARTHA PRYOR, PATRICIA MILLIAN MARGARET E. WARREN, ANDREW K. CHISOLM, EDRINA L. WILSON, CARL CHISOLM, LAWRENCE CHISOLM, ROOSEVELT CHISOLM, II, LOUIS CHISOLM, EDDIE CHISOLM, LEROY CHISOLM, AND TOMMY CHISOLM Plaintiff (s) vs. MARY FRANCES S. CHISOLM, WILLIAM CHISOLM, EMILY C. CAMPBELL, DEBRA C. MURPHY, ALLIE C. FRAZIER CORA C. BROWN, CORDELL CHISOLM, CHARLES CHISOLM, JR., PHILLIP CHISOLM, ANTHONY CHISOLM, DAVID CHISOLM, LEONARD CHISOLM, AND LEVY CHISOLM, Defendant(s)	**DEFENDANT'S MOTION FOR RECUSAL and SET-ASIDE ORDER**

TO: BARRY R. BAKER and HAROLD OBERMAN, JR., ATTORNEYS FOR PLAINTIFF.

NOW COME Defendants **MARY FRANCES S. CHISOLM, WILLIAM CHISOLM, EMILY C. CAMPBELL, DEBRA C. MURPHY, ALLIE C. FRAZIER, CORA C. BROWN, CORDELL CHISOLM, CHARLES CHISOLM, JR. PHILLIP CHISOLM, DAVID CHISOLM, LEONARD CHISOLM AND LEVY CHISOLM** in this case, who, by and through their undersigned counsel, pursuant to Rule 60 (b) of the SCRCP, hereby move for

recusal of the Charleston County Master In Equity, the Hon. Mikell R. Scarborough, from the present action and say the following:

RECUSAL

That the motion to set-aside the Final Order pursuant to Rule 60 (b), is being filed concurrent with this Motion for Recusal and Defendants ask that this motion be heard prior to a hearing on the motion to set-aside the order denying reconsideration. Counsel for Plaintiffs in this matter are Barry I. Baker and Harold A. Oberman, Jr . The Order of the court, dated January 20, 2015, by the Hon. Mikell Scarborough, denying the Defendant's Motion for Reconsideration, declared that title to the real property that was the subject of that quiet title action designated as Parcel 5, was confirmed in _____and that his decision was based on the fact that the use of the property by the Defendant's father was permissive, therefore the Dependant's claim of adverse possession and ouster failed.

After a full adjudication of this matter since it was filed in 2009, including an appeal to the South Carolina Court of Appeals on certain issues, the final decision in this case rests on the precept that the testimony of a witness, one Gary Chisolm, is determinative of the intent of the deceased John "Big John" Chisolm as to his garnting the Defendant's father Charles Chisolm, consent to use the real property at issue therefore nullifying the "hostile" element in the Defendant's claim for adverse possession and ouster. The issues presented by his testimony are are crucial to the determination of the Defendant's claim of adverse possession.

An admission by Judge Scarborough at the January 8, 2015 hearing that John "Big John" Chisolm was a prior client of his law firm gives the Defendants pause as to his ability to fairly render a decision given the perception of a conflict of interest.

SET-ASIDE ORDER

The South Carolina Rules of Civil Procedure, Rule 71(Foreclosure and Partition) requires in Section 71(4) (e) that in all actions where title is at issue a transcript of record is required. In pertinent part the rules mandate the proper procedure as follows:

> "When Title Is at Issue. In foreclosure or partition actions when title to real property is at issue the court or master to whom the action is referred shall take testimony and receive evidence as to the title and interest in the premises of the several parties. In all such actions the judge or master shall ascertain the rights and interests of the several parties and set forth in the report or order of judgment the conveyances or probate estates, if any, through which the rights or interests were acquired. In all such actions a transcript of record shall be made and preserved in the case file in the office of the clerk of court.

The South Carolina Appellate Court case of *Linda Mc Company, Inc. v. Shore*, 653 S.E.2d 279, 375 S.C. 432 (Ct. App. 2007), in addressing the language in SCRCP Section 15-35-360, requiring an affidavit setting forth the exact amount due in a money judgment, as being permissive or mandatory. The Sloan Court interpreted the Rule as being permissive because of the use of the term "may". The Court opined in *Linda Mc Company, Inc. v. Shore*, 653 S.E.2d 279, 375 S.C. 432 (Ct. App. 2007):

The language in 71(4) (e) states that the transcript requirement is mandatory in its use of the word "shall" rather than "may" indicating a requirement that a transcript of record must be taken of the proceedings in partition actions. The absence of the required transcript deprives

the movant of the ability to demonstrate not only the exact testimony presented at trial but also the tenor of the proceedings, which in the Plaintiff's view, was not predicated on fairness to all parties.

For the foregoing reasons and in the interest of justice, I request be continued for a reasonable time so as to allow this matter to be heard by a different trier of the fact so as to avoid any appearance of impropriety. Further Defendants ask the order denying reconsideration in this matter be set-aside due to the lack of a transcript of the testimony of Gary Chisolm that would be the best reflection of his prior testimony.

Dated this 4th day of January 2015, at Charleston, South Carolina.

WILLIE B. HEYWARD
Heirs Property Law Firm, LLC
27 Gamecock Ave, Suite 200
Charleston, SC 29407
(843) 225-8754
ATTORNEY FOR DEFENDANTS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO. 2006-CP-10-1772

IN THE MATTER OF:

Leon Chisolm, James Roosevelt Chisolm, Doris C. Fladger, Robert Chisolm, Florence Chisolm, Alice C. Jenkins, Sadie Y. McDonald, Martha Pryor, Patricia Millian, Margaret E. Warren, Andrew K. Chisolm, Edrina L. Wilson, Carl Chisolm, Lawrence Chisolm, Roosevelt Chisolm, II, Louis Chisolm, Eddie Chisolm, Leroy Chisolm, and Tommy Chisolm,

Plaintiffs,

vs.

Mary Frances S. Chisolm, William Chisolm, Emily C. Campbell, Debra C. Murphy, Allie C. Frazier, Cora C. Brown, Cordell Chisolm, Charles Chisolm, Jr., Phillip Chisolm, Anthony Chisolm, David Chisolm, Leonard Chisolm, and Levy Chisolm,

Defendants.

ORDER DENYING DEFENDANT'S 60(b) MOTION FOR RECUSAL AND TO SET ASIDE ORDER DATED SEPTEMBER 17, 2014

This matter came before me on March 10, 2016 upon the Motion for Recusal and to Set Aside Order filed by Defendants pursuant to Rule 60(b), SCRCP on January 6, 2016. Willie Heyward, Esquire appeared on behalf of the Defendants and Barry I. Baker, Esquire and Kyle T. Varner, Esquire appeared on behalf of the Plaintiffs.

BACKGROUND

This case is very complex and has a tortured history. The record shows that the Plaintiffs filed suit on May 4, 2006 to enforce an Order issued by the late Louis E. Condon, Master-in-Equity for Charleston County dated September 28,1982. I held a hearing on August 21, 2012 and August 22, 2012. The issues in this case have been very difficult and I took a great deal of time to deliberate before issuing my Final Order of September 17, 2014.

After issuing my Final Order, the Defendants filed a Rule 59(e), SCRCP Motion that I heard on January 8, 2015. I issued an Order dated January 20, 2015 denying the Motion for Reconsideration.

Thereafter, Defendant, Cora Chisolm Brown, filed *a pro se* Notice of Appeal to the South Carolina Court of Appeals, which the attorneys stipulated was never perfected.

RECUSAL

The Defendants base their Rule 60(b) Motion for Recusal upon the fact that I represented the Charleston County Election Commission and that the late John Chisolm, who at one time had an interest in the subject property, was a member of said commission. I want the record to be perfectly clear and I find that John Chisolm was not a party to the within action and did not appear at the trial as a witness. As a matter of fact, John Chisolm died in 2004, two years before the within action was even filed. Furthermore, John Chisolm had been deceased for approximately ten (10) years at the time I issued my Final Order in September 2014.

Gary Chisolm was the pivotal witness in this case. Mr. Chisolm was a very reluctant witness and he was called by both Plaintiffs' and Defendants' counsel.

I want the record to further reflect that Rule 501, Canon 3E of the SC Appellate Rules governing judicial conduct provides that a judge shall voluntarily recuse himself or be subject to recusal if any one or more of the following is true:

a) the Judge has a personal bias or prejudice against a party or a party's counsel or has personal knowledge of disputed evidentiary facts;

b) the Judge or one of his former law partners served as counsel in the matter in controversy or the Judge was a material witness concerning the matter;

c) the Judge or his family have an economic interest in the matter;

d) the Judge or his family is either a party to the proceeding, acting as counsel in the proceeding, has an economic interest that is more than de minmis or are material witnesses in the proceeding; or

e) the Judge's impartiality might reasonably be questioned.

I find that none of the above grounds for recusal as set forth in Rule 501, Canon E are present in the instant case. Further, I did not have any bias or prejudice about this case before, during the trial, or at the present time, nor is it reasonable to question my impartiality. There is

no evidence of prejudice or bias as required by case law. *See Christensen v. Mikell*, 324 S.C. 70, S.E.2d 692 (1996).

I further find that the appellate courts have made it abundantly clear that the failure to timely file a Rule 59(e), SCRCP Motion serves as an absolute bar in attempts to later raise this issue on appeal or otherwise. *Ness v. Eckerd Corp.*, 350 S.C. 399, 566 S.E.2d 193 (S.C. App. 2002).

I therefore find that there is no basis for me to recuse myself from the within case and furthermore the issue of recusal was not even timely brought before the Court.

SET ASIDE ORDER

The Defendants also moved pursuant to Rule 71(4)(e) that my Decree should be reversed upon the fact that there is no transcript of record as required by said Rule. The parties all agree that a court reporter was present during the entire proceedings and that a transcript of the hearing has been preserved. Further, the testimony of Gary Chisolm has been transcribed and the transcript has been filed with the Clerk of Court; therefore it is

CONCLUSIONS OF LAW

ORDERED, ADJUDGED, and DECREED that Defendants' 60(b) Motion for Recusal is denied; it is further

ORDERED, ADJUDGED and DECREED that Defendant's Motion to Set Aside the Order pursuant to Rule 71(4)(e) is denied; it is further

ORDERED, ADJUDGED, and DECREED that Defendant, Cora Chisolm Brown's *pro se* appeal to the South Carolina Court of Appeals is no longer pending as it was not timely perfected;

AND IT IS SO ORDERED!

THE HONORABLE MIKELL R. SCARBOROUGH
MASTER-IN-EQUITY FOR CHARLESTON COUNTY

April 18, 2016
Charleston, SC

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON FOR THE NINTH JUDICIAL CIRCUIT

CHISOLM,)

Plaintiff,)

VS.) CASE NO.:2006-CP-10-1772

CHISOLM,)

Defendant.)

Testimony of Gary Chisolm heard before the Honorable Mikell R. Scarborough, reported by Bernadette A. Cali, CSR and Notary Public, at 10:00 a.m. on August 21, 2012 at 100 Broad Street, Charleston, South Carolina.

A P P E A R A N C E S

For the Plaintiff: Harold Oberman, Esq.

Barry I. Baker, Esq.

For the Defendant: Willie Heyward, Esq.

Heirs Property Law Center, LLC

Bernadette A. Cali, CSR

Notary Public

THE COURT: Very good. Thank you, sir. All right Mr. Baker, you may proceed however you wish. You want to call your first witness?

MR. BAKER: Yes, sir.

(Gary Chisolm, 1545 Truck Farm Road, Wadmalaw Island, S.C. 29487, duly sworn, testifies as follows:)

DIRECT EXAMINATION BY MR. BAKER:

Q Good morning, Mr. Chisolm?

A Good morning.

Q Your Honor, I believe Mr. Chisolm is -- we can call him a witness to both parties. I asked you to come testify; is that correct?

A That is correct.

Q You also received a call, I think, from Mrs. Cora Brown?

A That is correct.

Q Who is on the other side, who also wants you to testify?

A That is correct.

Q Very good.

Now, you are a cousin to all the parties in this action?

A Actually, that is an uncle, my natural uncle. Leon is my natural uncle.

Q All right. You are the -- I think that your natural mother was Doris?

A That is correct.

Q Flagler(phonetic)?

A Doris Flagler.

Q And who was the sister of Leon Chisolm?

A That is correct.

Q Roosevelt Chisolm would have been your grandfather?

A That's right.

Q But you were adopted by --

A Eddie and Thelma Chisolm.

Q All right. So if we go -- all right. So Leon and your uncle by natural, but everybody else are your cousins?

A That's right.

Q Okay. You are familiar with the property that is involved that's the subject of this lawsuit today?

A Yes, I am.

Q All right, sir. And I'm going to show you -- I know that seeing something on the ground and on a plat is two different things. I'm going to show you what has been marked as Plaintiff's Exhibit -- let's just use 18. I only have one copy

of Exhibit 18. Can I borrow that, Your Honor. Big plat.

THE COURT: Is that it?

MR. BAKER: Yup.

Q I'm going to show you what's been marked as Plaintiff's Exhibit Number 18. This shows new Truck Farm Road and it shows tract 1, property of Eddie Chisolm. Now that was your daddy?

A That is correct.

Q Who was also known as Chansom?

A That is correct.

Q So we are involved with all this property on, I guess it would be to the north of your property shown as lots 1, 2, 3, 4, 5, 6 on this plat?

A Yes.

Q You are familiar with this property, obviously?

A Yes, I am.

Q Okay, sir.

You don't have any interest in this property?

A None at all.

Q This property used to contain, I think, ten acres of land. I think it's now been reduced to

seven. I believe this property and several other tracts of property were owned by your great grandfather Hamlet Chisolm?

A That is correct.

Q In 1981 Charles Chisolm brought a lawsuit to ask the court to divide the property up among all of the heirs of Hamlet Chisolm; is that correct?

A As far as I know, yes.

Q Okay, sir.

I believe you said that being the son --

THE COURT: If you-all turn that off. If it happens I'm going to take it away from you. Thank you.

(Interruption)

Q You said that you were the biological son of Doris Flagler and her father was known as Roosevelt Chisolm?

A Yes.

Q Did you know Mr. Roosevelt Chisolm?

A Yes, I did.

Q When was the first time that you ever met him?

A It had to have probably been, oh, the early 80's perhaps.

Q And how old were you at that time?
A I don't -- I would have been, what? Thirty-one, 32.
Q Thirty-one, 32? That's the first time you ever met him?
A Right. Yes.
Q Do you recall as to where you were when you met him?
A Yes. I was at my house on Truck Farm Road.
Q Can you tell the Court what observations, if any, did you make about your grandfather as to his mental capability and his mental status?
A You can tell he was not cohesive. He pretty much would walk around talking to somebody that was in the air. Everybody was having conversations, he didn't -- he did not join into the natural conversation.
Q He kind of looked up at the sky talking to imaginary people that just weren't there?
A Yes.
Q He was talking to himself?
A Right.
Q Do you recall him being -- staying at the Sea Island Nursing Home at one time?

A Yes, he did.
Q There was a problem. He had to leave?
A Because he caused a fire.
Q He put the place on fire?
A Yes.
Q Then after that he was moved to a nursing home West Ashley?
A I believe somewhere on Highway 61. I'm not sure exactly. On Magnolia Road, I think.
Q Magnolia and Sycamore that's where he died.

Judge that's the nursing home that's been closed a long time. If you leave of the Post Office and go down Sycamore towards Magnolia, there is a big brick building on the right. I think it used to be a school. It's been closed for a long time?

THE COURT: I know where that is. Okay.
Q All right, sir. So --
(Discussion off the record.)
Q But it was in the early 80's when you first met your grandfather?
A Yes.
Q Did you see him on any other occasions after that first meeting?

A I mean, not in passing I used to see him sitting at the bus stop on Magnolia.

Q As far as you know did his mental capacity ever get any better?

A I don't know. As far as I know.

Q Fair enough.

All right. Now, let me ask this question. Your father was Chansom Chisolm?

A Yes.

Q Also called Eddie Chisolm?

A Yes.

Q As I understand it, you correct me if I'm wrong, but your daddy and Charles Chisolm were like grandsons of Hamlet Chisolm?

A Yes.

Q Mr. Hamlet Chisolm acquired tracts of land in different locations on Wadmalaw Island?

A Yes.

Q They said at one time he probably owned as much as 50 acres; is that correct?

A That is correct. If not more.

Q Okay. And I believe that your father did farming and Charles did farming; is that correct?

A Yes.

Q Now, the property that we're concerned

with in this lawsuit, which I'll call Parcel 5, it's also shown on Exhibit 18 as lots 1 through 6. I believe that property was originally first planted mostly by your father; is that correct?

A In the early 60's, yes.

Q And I'm going to show you what's been marked as Plaintiffs exhibits numbers 1 and 2. I want you to take a look at these exhibits.

(pause)

Q All right. Are you familiar with these exhibits 1 and 2?

A I remember hearing about that, yes.

Q So Exhibit 1 was when a person named John Bennett -- well, Exhibit 1 was when Charles Chisolm executed what was known as a deed to Mr. John Bennet, Jr. giving him an interest in this parcel of land; correct?

A Yes.

Q Then that was in 19 -- that was on December 21, 1976 and then on March the 31st, 1977 Mr. Bennet gave this property back -- his interest back to Charles Chisolm; is that correct?

A That is what I'm reading, yes.

Q Is that your understanding?

A I only knew of the quit claim. I didn't

know what happened after that, because I wasn't here.

Q Did the family eventually learn about the quit claim?

A Yes.

Q Tell me, what was the reaction in the family once they found out about it?

A Well, as far as I know, I remember everybody was kind of upset that that had actually happened because Phoebe Chisolm had more than one son. Of course, they were all upset that that had happened.

Q When you say Phoebe Chisolm, Phoebe Chisolm was married to Hamlet Chisolm?

A That is correct.

Q That quit claim deed, Mr. Charles Chisolm who is the father of these folks represented by Mr. Heyward, he put in that deed he was the sole heir of Hamlet Chisolm?

A I can't answer that -- according to what you just showed me, yes.

Q But he was not the sole heir. Mr. Hamlet Chisolm has many grandchildren and children?

A Yes.

Q That caused friction?

A Yes.

Q In the family? And then did you later learn that Mr. Charles Chisolm brought a lawsuit in 1981 against all the family members asking the Court to determine the heirs of Hamlet Chisolm and to order a partition or a division of his property?

A Yes, sir.

Q You attended -- well, did you attend any of the 1982 --

A Not the later ones. Just the one in 1970.

Q And was there any question in the mind of the family which branch of the family was supposed to get this Parcel 5 known as lots 1 through 6?

A John -- the heirs of Tracy Chisolm and Jesse.

Q The heirs of Tracy Chisolm and Jesse, okay. All right. How about Big John Chisolm?

A And John; yes, sir.

Q Supposed to go to the heirs of John Chisolm and Tracy Chisolm?

A Yes.

Q Which would have been Big John Chisolm?

A Right.

Q And Jesse would have been a son of Tracy?

A And Roosevelt.

Q All right. And Roosevelt was the son, and then there was another son -- or there was a grandson, I think, like Tommy. I don't know if --

A That is correct. He was in McKey's Port, Pennsylvania.

Q There is no question that all the family understood Parcel 5 was to go to these folks over here?

A As far as I know, yes.

Q Now, you were raised on the Island, on Wadmalaw Island?

A I was, yes.

Q When you got older did you ever leave Wadmalaw?

A Yes, I did.

Q When did you leave?

A In 1974.

Q When did you come back?

A I came back for the trial in 1977, then I left -- well, that was just a visit. I came back in 1979, and I stayed until '82, and I left went to Georgia.

Q You came back again when?

A In '85.

Q In '85. All right. Now, let me try to

orient you, if you can. When you came back -- all right. Now what's shown as lots 5 or 6, what we refer to as the cornfields?

A Yes.

Q Okay? And then lot 1, that's where your grandmother, Phoebe Chisolm, had a house; is that correct? If you know?

A Yes, that is correct.

Q Then we got lots 1, 2, 3 and 4?

A Yes.

Q Correct? Okay.

Now, when you came back in 1985 tell me if you could describe for me lots 1, 2, 3 and 4. Was it open area? Was it wooded area? What was it?

A This is lot 1?

Q No. Lot 1 is over here.

MR. HEYWARD: May I approach, Your Honor?

THE COURT: Surely.

Q Lot 1 is -- in other words, this is the cornfield right here, lots 5 and 6. Okay?

A Yes.

Q Everything beyond the cornfield is other property.

A Lot 1 was being farmed. Lot 6 was being farmed and Lot 5 was being farmed, and part of this

area right here.

Q Part of 3, 4, 5?

A Yes, by Charles.

Q The rest of it was all wooded area?

A Yes, pine trees had grown.

Q Pine trees had grown up. Okay.

A Yes.

Q Okay. Now, let me ask this question. We mentioned that one of the people that was supposed to get an interest in this Parcel 5 was a guy we call Big John Chisolm?

A That is correct.

Q He would have been your cousin?

A Cousin.

Q He died in 2004?

A I believe so.

Q Were you close to Big John Chisolm?

A My father was.

Q But you knew Big John?

A Yes, I did.

Q How would you describe --

A John Chisolm was a big character, pretty much bigger-than-life kind of character. I mean, everybody respected him. He was well known, I think, even here in the legal district he was well

known. I know he was well known in Charleston so everybody knew him. Everybody respected him.

Q Was a ward leader, political leader? He was a real big fellow; wasn't he?

A Tall and big, yes.

Q Right imposing fellow?

A Yes.

Q When he talked --

A Everybody listened.

Q Did people respect him?

A Yes.

Q Question his authority?

A Not easily.

Q Okay. And tell me, when I was talking you told me of an incident where Big John diffused a potential explosive situation between Charles Chisolm and your father?

A Yes. It was on a Saturday.

Q How about tell the Judge about that?

A It was on a Saturday and pretty much my father had come home from the market. He was a little inebriated, a little tight. And his truck got bogged in the road leading to the house, in the ditch. So Charles come over to ask him to move the truck. Daddy, well, you know he was, like I say, he

was tight. Said I'm not doing anything right now, I'll do it later. Well, John and his sisters were at the house, an argument ensued between daddy and Charles and John basically told them, look, you be family, and you're not going to argue, you're not going to do this.

Q But let me ask you one question. Were any guns involved?

A Yes.

Q Tell the Court about the guns.

A Charles had gone home and got his gun and come back back and then they were arguing some more and John said, well, Charles you're going to take your gun back. My father went in the house to try to get a gun. And they were able to keep him in the house and John was able to tell Charles to go back home.

Q That was the end of the situation?

A That was the end of the situation.

Q So that was -- so there was friction between your father and Charles?

A They were estranged. It was a bitter sweet thing. They were friends when they needed to be friends and, well --

Q Okay. I understand.

Now, after this 1982 lawsuit you are aware of the fact that the judge at that time, Judge Condon, issued an order and ordered the property to be divided among all the family members?

A Yes.

Q You are aware of that?

A Yes.

Q As we stated, I know it's the fifth time I've asked you, but this property right here that we're in court for is supposed to go to Big John Chisolm his sister Alice, and a part was supposed to go to Mr. Roosevelt Chisolm, Leon's daddy, to Mr. Roosevelt Ben Chisolm in the back and his two brothers and to his cousin Tommy?

A Yes.

Q Heirs of the original John Chisolm and of Tracy Chisolm?

A Yes.

Q Did Big John Chisolm, the fellow who you described as larger than life, after 1982 do you know, of your own knowledge, whether or not he would visit this area?

A He came out to Truck Farm Road. He came out to our house, went to Charles' house.

Q Went to Charles' house, too?

A Yes.
Q And he and Charles were good friends?
A Yes.
Q And he and your daddy were real close?
A Yes.
Q And I understand you weren't as close to him as your daddy was, but you-all were friends?
A Well, I mean, I was a child.
Q You were a child?
A Younger than, you know --
Q Young, okay.
A Yes.
Q But I'm talking about the 80's. You already in your 30's?
A Even at that, you know, even though I was an adult I was much younger than them, and it's a part of our lifestyle that you just don't mix with the older folks. So I knew them but -- I respected them and they were my elders.
Q Okay. But would it be a fair statement that Big John Chisolm, after the '82 order was issued, the '82 suit was finished, he would visit this property on a regular basis until he became ill in the early 2000's and until he died in 2004? Is that a fair statement?

A I don't know when he stopped. He did come out.

Q And the portion of the property of Parcel 5 that was being farmed by John -- by Charles, John Chisolm, was he aware of what Charles was doing?

A Yes.

Q What was his position about the farm?

A As far as his portion was concerned he wanted it just to remain cleared. We were all family members and so his thing was farm the property, keep it up; keep it going. Keep it zoned as agricultural.

Q So he wanted Charles to do it?

A As far as I know, yes.

Q And he and Charles never argued about Parcel 5?

A Not that I know of.

Q As far as you know?

A Yes.

Q Okay. And I believe John at one time had hopes of even building a house out there on Parcel --

A He talked about it.

Q Okay. Did you ever hear Charles or John argue about -- Charles Chisolm, Big John argue about

who -- about Parcel 5?

A No.

Q In your conversation with Big John, did he always consider that he had his interest in Parcel 5?

A I wouldn't have had any conversation with him like that. I didn't have any conversation with him. He was just -- when he came out he came to talk to my father or Charles.

Q But did he think he still had an interest in Parcel 5 or do you know?

A As far as I know, I mean, I couldn't answer that question.

Q That's fair enough.

(Discussion off the record.)

Q Did Charles Chisolm farm that property with the permission of Big John, would that be an accurate statement?

A I think so.

Q Yes. Okay.

A Yes.

Q Okay.

MR. BAKER: That's it, Your Honor.

THE COURT: All right. Mr. Heyward, I'm sure you've got some questions.

MR. HEYWARD: Yes, Your Honor. Thank you.

THE COURT: All right Mr. Chisolm Mr. Heyward is going to ask you a few questions.

CROSS EXAMINATION BY MR. HEYWARD:

Q Morning, Mr. Chisolm. How are you?

A Fine and you?

Q Fine.

Now, Mr. Chisolm, you made certain statements concerning the relationship between your father and John Chisolm?

A Yes.

Q And Charles Chisolm?

A Yes.

Q And how old were you then, again?

A Well, I've known all these people all my life. And when I was able to recognize the dynamics of the three of them I was an adult.

Q And you said that they were at sometimes hostile, your father and Charles Chisolm?

A I wouldn't -- well, hostile. I don't know if that's a good word. I guess they were estranged. Sometimes they would argue. Sometimes they would get along.

Q Did they consider themselves family?

A Yes, most definitely.

Q Did they consider themselves close family?
A Yes.
Q What did your father do for a living?
A He farmed.
Q And where exactly did he farm?
A He farmed on the property adjacent to the same property we're talking about here, and he also rented several tracts of land nearby.
Q And the property that's adjacent to the property that's the subject of this action, what did your father farm on that property?
A He planted collard greens, string beans, potatoes, any a variety of vegetables.
Q What did he do with that produce?
A He would take it to the market downtown.
Q So it was something he sold?
A Yes.
Q Did he derive his income from that farm?
A Sole income.
Q The parcel of property that's the subject of this action today, the so-called Parcel 5?
A Yes.
Q Who farmed Parcel 5?
A My father -- Eddie Chisolm farmed it up until like the middle to late 60's, then Charles

farmed it from then up to the point where he could no longer farm it and his children was farming after they be.

Q So after your father stopped in the late 60's Charles Chisolm, Sr. farmed Parcel 5?

A Yes.

Q Do you know what Charles Chisolm farmed on Parcel 5?

A He did the same thing; collard greens, he did string beans. Same thing they normally did on Wadmalaw.

Q Do you know what he did with his produce?

A He sold his produce at the market as well.

Q Did Charles Chisolm derive his income from the sale of that produce?

A Yes.

Q You mentioned a number of lawsuits involving the property of your great grandfather Hamlet --

A Yes.

Q -- Chisolm.

You mentioned a lawsuit in the -- were there two lawsuits or just one lawsuit?

A There were two lawsuits. I was living in Washington DC, and when the first lawsuit in the

70's was filed I came to be with my father during that one. And then in the 80's I wasn't here. I was in Georgia.

Q Do you know who were parties to that first lawsuit?

A In the first lawsuit I remember that Charles was the main party against the other part of the family.

Q That lawsuit was to clear title or divide the property? Do you know what the subject of that lawsuit was?

A I remember that lawsuit was the fact that there was a quit claim deed that was produced, and the subject of the lawsuit, as I remember it, was to clear that particular action up.

Q So to clarify the quit claim deed?

A Yes.

Q Now, during the time of the 70's lawsuit and before did your father still consider Charles Chisolm to be a close family member?

A Yes.

Q Now, during the time that your father ceased farming and Charles Chisolm was farming Parcel 5, to your knowledge was there anyone else who made any claims to Parcel 5?

Q The relationship between your father and Charles Chisolm, was it one of being close family member?

A Still family members.

Q Both farmers?

A Both farmers.

Q Now, this incident that we were discussing about the guns being present, was that an isolated incident or a common occurrence?

A That was an isolated incident.

Q Charles Chisolm in that incident acted as mediator?

A Yes.

Q Was he respected -- also respected among your family members?

A Yes, he was.

Q Once again, to your knowledge -- well, I think you answered that question and I won't ask it again. You said you didn't know whether he made any claims to Parcel 5?

A I wasn't here. I don't know.

Q Do you know if he farmed Parcel 5?

A John Chisolm? Never farmed.

Q Thank you, sir.

MR. HEYWARD: No further questions. I will

call -- I reserve the right to call him as my witness Your Honor?

THE COURT: All right.

MR. BAKER: Judge, I don't have any further questions.

(Testimony of Gary Chisolm concluded.)

STATE OF SOUTH CAROLINA)

C E R T I F I C A T E

COUNTY OF CHARLESTON)

I, Bernadette Cali Leland, Notary Public, do hereby certify that the within hearing was taken and transcribed by me; and that the foregoing pages are

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

September 18, 2017

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