

STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Mikell R. Scarborough – Master-in-Equity

**RECEIVED**

DEC 27 2017

**SC Court of Appeals**

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, EDRIANA  
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

**SUPPLEMENTAL FILING RECORD ON APPEAL**

Willie B. Heyward  
27 Gamecock Ave., Ste. 200  
Charleston, SC 29407  
(843) 225-8754  
Attorney for Appellants

Other Counsels of Record:  
Harold A. Oberman, Esquire  
Oberman & Oberman, LLC  
60 Markfield Drive, Ste 2  
Charleston, SC 29407  
Attorney for Respondents

Barry I. Baker, Esquire  
Attorney at Law  
PO Box 31265  
Charleston, SC 29417-1265  
Attorney for Respondents

Kyle Varner, Esquire  
Attorney at law  
PO Box 31265  
Suite 2  
Charleston, SC 29407  
Attorney for the Respondents

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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, 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.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT  
Case Number: 2006-CP-10-1772

MOTION FOR RECONSIDERATION  
(Rule 59(e), SCRPC)

FILED  
2014 SEP 30 PM 3:48  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY 

TO: BARRY I. BAKER, ESQUIRE, AND HAROLD A. OBERMAN, ESQUIRE, ATTORNEYS  
FOR PLAINTIFFS

NOW COME the Defendants in this case, who, by and through their undersigned  
counsel, pursuant to Rules 59(e), SCRPC, hereby move for reconsideration of the final order  
issued by the Charleston County Master in Equity ; and, as grounds for this Motion, allege and  
say the following:

INTRODUCTION AND BACKGROUND INFORMATION

1. This is a quiet title action regarding property located in Charleston County, South  
Carolina, that involves numerous owners who claim or may claim rights in the subject property.

2. The families of the late John Chisolm and Tracy Chisolm, and their successors, (hereinafter sometimes referred to as "Plaintiffs" as a group ), brought this suit to enforce a Judgment from a prior quiet title and partition action. This prior action also dealt with other property out the Estate of Charles Chisolm in addition to the Subject Property.

3. In the prior action, the then Master In Equity for Charleston County, Judge Louis E. Condon, ordered, on September 28, 1982, that a certain parcel of land, identified as Parcel Five, was to be conveyed to certain individuals as members of the "Family of John Chisolm" and the "Family of Tracy Chisolm" (John Chisolm and Tracy Chisolm were brothers).

4. Parcel Five was never deeded to those family members. The Plaintiffs are heirs of Tracey Chisolm and Leroy Chisolm. Plaintiffs brought this action to obtain an order vesting title to the Subject Property in the heirs of Tracy Chisolm and Leroy Chisolm, in fee simple absolute, barring any of the Defendants from having any rights in the subject property.

5. The Defendants are heirs of Charles Chisholm, Sr., who died on June 15, 1999. Defendants are not the heirs of the above-referenced John Chisolm and Tracy Chisolm mentioned above. The Defendants allege that they acquired title to the Subject Property after having continuously exhibiting all of the incidents of ownership in the Subject property for over a Ten (10) year period after the prior quiet title action was concluded with, and, accordingly, Defendants base their claim on adverse possession.

6. The Estate of Charles Chisholm, Sr., was probated in Charleston County under Case Number 1999-ES-10-0950 and his spouse, Mary Frances S. Chisolm, acted as Personal Representative of his estate. A Deed of Distribution, to all of the heirs of Charles S. Chisolm, Sr. was recorded and listed Parcel Five as being conveyed to the heirs of Charles S. Chisolm, Sr. Defendants do not base their claim to Parcel Five solely upon this Deed of Distribution, which served also to release the Subject Property from any claims that may have been made by parties under the Estate of Charles Chisolm, Sr.

7. The following relevant pleadings raised issues before the Master in Equity, and they are arranged chronologically, more or less, according to their dates of either preparation or filing of record with this Court:

- I. Plaintiffs' Motions Under Rules 60(a) and 60(b), SCRCP, filed on August 4, 2008.
- II. Defendants' Motion to Set Aside Default, filed on December 8, 2008.
- III. Plaintiffs' Motion for Reconsideration filed April 23, 2009.
- IV. Remand from South Carolina Court of Appeals Leon Chisolm, et al, v. Mary Frances S. Chisolm, et al, Unpublished Opinion No. 2011-UP-011 (S.C.Ct.App. filed January 24, 2011).

V. Plaintiffs' Amended Complaint filed October 31, 2011:

VI. Defendants' Answer to Plaintiff's Amended Complaint and Counterclaim dated December 2, 2011 which alleged Adverse Possession and Laches as an affirmative defense.

VII. Plaintiffs' Amended Reply to Counterclaim filed July 6, 2012, which contains various causes of action: Tolling, Judicial Estoppel, Equity, Breach of Contract / Breach of Contract Accompanied by a Fraudulent Act, and Fraud / Constructive Fraud).

8. Plaintiffs Motions of record under Rules 60(a) and 60(b), SCRPC, requested that this Court Correct Clerical Mistakes, Declare as Null and Void a Subdivision of the Subject Property and Void a Deed of Distribution:

a) Correct Clerical Mistakes Under Rule 60(a):

(1) That this Court issue a Master's Deed to Parcel 5 as described in the Plaintiffs' Complaint and bearing Tax Map No. 219-00-00-088, to the heirs of John Chisolm and Tracy Chisolm, in accordance with an Order previously issued by the Honorable Louis E. Condon, at that time Master-in-Equity for Charleston County, dated September 28, 1982;

(2) That this Court declare as null and void the subdivision of Parcel Five into six (6) lots, as shown on a plat prepared by George A.Z. Johnson, Jr., Inc., Land Surveyors, dated August 19, 2003, revised February 18, 2004, recorded Plat Book EG, page 929, RMC Office for Charleston County.

b) Void a Deed of Distribution under Rule 60(b) : Find that the Deed of Distribution executed by Mary Frances S. Chisolm, as Personal representative of the Estate of Charles Chisolm, Sr., dated April 15, 2000, recorded July 26, 2000, in Book W-351, page 020, RMC Office for Charleston County, conveying Parcel Five to the heirs of Charles Chisolm, Sr., is null and void and of no force and effect inasmuch as the Charleston County Probate Court never acquired jurisdiction over the said property.

9. The Master in Equity issued an order dated April 9, 2009, dismissing Plaintiffs' motion under Rule 60(b), SCRPC, as untimely, and denying Plaintiffs' motion under Rule 60(a), SCRPC.

10. Plaintiffs' Motion for Reconsideration filed April 23, 2009, requested that the Master in Equity clarify a number of matters as to my order dated April 9, 2009, and I denied this motion May 5, 2009.

11. On June 1, 2009, Plaintiffs' filed a Notice of Appeal as to my order dated April 9, 2009.

12. Plaintiff-Appellants appeal was dismissed and this case was remanded by the South Carolina Court of Appeals, cited as: *Leon Chisolm, et al, v. Mary Frances S. Chisolm, et al*, Unpublished Opinion No. 2011-UP-011 (S.C.Ct.App. filed January 24, 2011).

13. Following Plaintiffs' appeal and remand from the South Carolina Court of Appeals, the Plaintiffs amended their Complaint asking this Court for additional relief under

various causes of action styled as: Correction of a Clerical Error, Bell v. Knight, *Nunc Pro Tunc* Powers, Reform the Deed of Distribution, Quiet Title, and To Declare the Subdivision Null and Void.

14. Defendants answered Plaintiff's Amended Complaint (subsequently filed out of sequence) and included counter-claims and affirmative defenses therein for Adverse Possession and Laches.

15. Thereafter, Plaintiffs filed a Reply to Counterclaim on December 7, 2011, and an Amended Reply to Counterclaim on July 6, 2012.

16. Judge Condon's Order was that Parcel Five (5) be partitioned in kind and that Master's Deeds issue accordingly as set for the below and as shown on pages #16 and #17 of said Order:

"... ORDERED, ADJUDGED AND DECREED that real property at issue be partitioned as follows and that the Master issue deeds accordingly"):

\* \* \*

B) Family of John Chisolm

To: John L. Chisolm and Alice Chisolm, as tenants in common, an undivided one-half interest in Parcel Five.

\* \* \*

F) Family of Tracy Chisolm

To: A tenants in common in the fraction given as undivided interests one-half (1/2) interest in Parcel Five:

|                       |     |
|-----------------------|-----|
| Roosevelt Chisolm     | 1/3 |
| Roosevelt Chisolm, II | 1/9 |
| Louis Chisolm         | 1/9 |
| Eddie Chisolm         | 1/9 |
| Tommy Chisolm         | 1/3 |

17. No Master's Deeds were issued to reflect Judge Condon's partition in kind.

18. Under the above Family of John Chisolm, John L. Chisolm and Alice Chisolm, who were ordered to receive an undivided one-half interest in Parcel Five, are both deceased: John L. Chisolm died in 2004 and Alice Chisolm died in 1986.

19. Of the above Family of Tracy Chisolm, three are deceased (Roosevelt Chisolm, Louis Chisolm, and Tommy Chisolm) and two are living (Roosevelt Chisolm II, a/k/a "Ben" Chisolm, and Eddie Chisolm).

20. The Master's Deed to be issued under Judge Condon's Order was to be a deed granting legal title to Subject Property to those certain named individuals (as shown above in paragraph 14(A) and 14(B)) who Judge Condon's had already decreed were owners thereof and to whom the Subject Property had already been partitioned in kind. A Master's Deed was never ordered by Judge Condon to be issued to the Plaintiffs named in this case or to heirs of John Chisolm and Tracy Chisolm some thirty (30) years after Judge Condon has already partitioned Lot 5 partition in kind in 1982).

#### MOTION FOR RECONSIDERATION

This motion for reconsideration requests that the master reconsider the following issues and rule with specificity and, in addition, this motion preserves these same issues for purposes of any appeal:

21. Did the Master consider Defendants' Actual Possession? – consistent with the possible uses of the Subject Property, the same being vacant farm land, Defendants continuously exercised their acts of ownership by farming the Subject Property and selling the crops derived therefrom. Evidence of Defendants actual possession was before the Master in Equity in the form of credible witnesses giving testimony on behalf of the Defendants.

22. Did the Master consider Defendants' Open, Notorious and Hostile Possession? - Defendants' continuous use of the Subject Property as their farm land for over a ten (10) year period, beginning when they took actual possession as stated above, was at once open, notorious and hostile as against the Plaintiffs:

- a. Defendants openly used the Subject Property as their farm land.
- b. Plaintiffs, as legal owners of the Subject Property in 1982 by virtue of Judge Condon's Order, would have, by ordinary diligence, known of Defendants farming operations as such was notoriously conducted without consent of the Plaintiffs.
- c. Even without Defendants placing permanent structures or residing on the farm land, their activities were sufficiently open and notorious as to put the Plaintiffs on notice that their land was being adversely possessed.

23. Did the Master consider Defendants' Continuous Possession? - Defendants' possession of the Subject Property described above was continuous as they farmed the land year to year for over ten (10) years without interruption by the Plaintiffs or any other person or entity. Defendants first act of possession stated above continued without any abandonment of possession by the Defendants as they continuously farmed the Subject Property which was a use of the land consistent with the nature and location thereof. Although Defendants may not have rested their feet upon the soil, their farming operations were a continuous possession under the circumstances and evidence before me. As to lots of

the Subject Property situated at the water's edge, Defendants testified before me that they actively harvested oysters next to the Subject Property and allowed trees on these lots to serve as a natural buffer against chemicals and other aspects of their farming operations.

24. Did the Master consider Defendants' Exclusive Possession? – Testimony was clear and convincing that the Defendants were the only persons or entities in actual possession of the Subject Property. Plaintiffs did not enter upon the land for more than ten (10) years while the Defendants continuously maintained their farming operations and performed other acts of exclusive ownership. After Defendants above possession of the Subject Property, it was subdivided by Defendants into six (6) lots in April, 2004, by a plat recorded at Plat Book EH, page 46, RMC Office of Charleston County and approved by the Charleston County Planning Board. After Defendants above possession of the Subject Property, the Estate of Charles Chisholm, Sr., was probated in Charleston County under Case Number 1999-ES-10-0950 and his spouse, Mary Frances S. Chisolm, acted as Personal Representative of the estate. A Deed of Distribution to all of the heirs of Charles S. Chisolm, Sr., as to any interests Parcel Five, was recorded July 26, 2000, in Book W-351, page 020, RMC Office for Charleston County.

25. Did the Master Address the fact that a Lack of a Master's Deed did not Change Title as previously Ordered? The fact is, as of September 28, 1982, title to the Subject Property passed to family members of the Plaintiff and in the above fractional amounts, as undivided interests, by virtue of Judge Condon's Order of record some twenty (20) ago. Issuing a Master's Deed from the Court, as requested by the Plaintiffs, would require that the said deed be styled as *nunc pro tunc* with reference to Judge Condon's 1982 Order such that the same would not change any current ownership interests in the Subject Property due to the manner in which Defendants' obtained title as set forth herein. Issuing such a deed would necessarily contain deceased grantees and the same would not assist the Plaintiffs in their request for a current title given the present and exclusive title interests of the Defendants. Such a deed would be redundant under law of South Carolina. See Bell v. Knight 376 S.C. 380, 656 S.E.2d 393 (Ct. App. 2008), holding that the issuance of a deed is not necessary to give effect to a court order because the court order, by itself, is sufficient regarding title to real property interests. Plaintiffs motions seek to change the substantial rights of the parties contrary to Judge Condon's own order rather than correcting a mere clerical error. The Bell Court phrased the issue as follows: "The question ... is whether the issuance and recording of a deed was necessary to give effect to the probate court's order." Bell, 376 S.C. at 383, 656 S.E.2d at 395. I have concluded that a Masters' Deed is not necessary to give effect to Judge Condon's Order because his order, by itself, was sufficient to partition the Subject Property in 1982 when said order was issued. Declaring a subdivision of Parcel 5 into six (6) lots as null and void would not assist the Plaintiffs in their request for a current title in the Subject Property given the present and exclusive title interests of the Defendants obtained after the partition via adverse possession as set forth

below. The Subject Property was subdivided into six (6) lots in April, 2004, by a plat recorded at Plat Book EH, page 46, RMC Office of Charleston County and approved by the Charleston County Planning Board. This Subdivision Plat was recorded some twenty-two (22) years after Judge Condon's Order and after Defendants had already acquired title thereto by adverse possession.

26. Did the Master address incapacity, or lack thereof, evident in the record before Judge Condon? Though there is evidence of incapacity of the Plaintiffs AFTER September 28, 1982, such incapacity was not evident in the record before the then Master in Equity (Condon) as of the time of the 1982 Condon Order when the property was partitioned in favor of the Plaintiffs.

27. Does Judicial Estoppel even apply in this case? Plaintiffs' cause of action styled as "Judicial Estoppel" does not apply under the facts and evidence of this case because the facts giving rise to the Defendants under adverse possession and ouster occurred after the 1982 order. (emphasis added). Judge Condon's Order could not and did not immunize the Subject Property from adverse possession by Defendants or any other parties after the date of his order. As to Plaintiffs' allegation about the Subject Property not being listed in the Estate of Charles Chisolm prior to the Deed of Distribution being recorded, it is clear that Defendants' title need not rest upon said Deed of Distribution which acted merely as a release of claims by the Estate against the Subject Property acquired by Defendants via adverse possession and ouster as set forth herein. Because South Carolina law requires, that a disability for tolling purposes must have existed at the time the adverse possession began, (here, September 28, 1982), and because the evidence before the Master in Equity shows that such a disability of the Plaintiff's father did not occur until after the 1982 Order. The statutory "clock" started running for the Twenty year (20) period required for a showing of adverse possession and ouster in 1982. Whatever disability then attributable to the Plaintiff's mother, the successor in interest to his father, is moot since Defendants gained title by presumption of grant and constructive ouster before her period of disability.

28. Were the equities in this balanced by the Master in Equity? There should be a balancing of the equities in this case in favor of the Defendants because, though the elements of adverse possession require actual or constructive possession as against the legal rights of the Plaintiffs, such continuous use and sustained possession was not evidence of unclean hands because it was done in harmony with the policy of the law of adverse possession to favor the vigilant with respect to property rights and the actual or constructive possession thereof. Rewarding Defendants for their actual use of the abandoned property is equitable given that the Plaintiffs, whether with clean or unclean hands, have not appeared to defend their erstwhile property rights for more than twenty (20) years. Given that the Defendants are now vested with the Subject Property, their efforts to quiet the same against Plaintiffs and all the world is not against equity but is supported as rewards for the vigilance and their efforts in preserving the property. Any contract, circa 1981-1982, between Plaintiffs and Defendants merged into

Judge Condon's Partition Order and was fully executed upon issuance thereof. Further, any contractual rights Plaintiffs might have had in 1982 have long since been foreclosed by the equitable doctrine of Laches and the applicable statute of limitations for contractual rights. No credible evidence was before the Master that the Defendants caused any deeds or Masters' Deeds not to be recorded or that the Defendants took any actions such that said deeds not be issued. Whether or not Defendants listed the Subject Property as an asset of the Estate of Charles Chisolm is not dispositive in this case. There was no evidence before the Master in Equity as to material false representations on the part of the Defendants. Again, the remedy that Plaintiffs seek (a *nunc pro tunc* deed per Judge Condon's 1982 Order) would not change title to the property given the adverse possession and ouster of all possible claimants by the Defendants which transpired after Judge Condon's Order. Any alleged family agreement outlined in the 1982 order were merged into said order and thus were fully executed upon execution of said order: the property was partitioned in kind by Judge Condon and vested the then Plaintiffs with title which has since been adversely possessed by Defendants.

29. Are corrections of Clerical Errors relevant or substantial? Regarding Plaintiffs cause of action for Correction of a Clerical Error and Plaintiffs' motions of record under Rules 60(a) and 60(b), SCRCP, requesting that this Court Correct Clerical Mistakes Under Rule 60(a) as to the Masters' Deed of Judge Condon 's 1982 Order and as to the subdivision of Parcel 5 into six lots and under Rule 60(b) to Void a Deed of Distribution, because the Defendants are vested with title, these Motions moot and as such, whether untimely or not, they are not relevant. Granting the Plaintiffs their requested relief in this case would not change any substantial rights of the Plaintiffs if such a Masters' Deed were issued, it would necessarily have to be one that relates *nunc pro tunc* and the grantees would be the deceased ancestors of the Plaintiffs whose heirs lost title via the Defendants actions. Such relief is not necessary or useful to the Plaintiffs cause. The Deed of Distribution is a mere release of claims of the Estate of Charles Chisolm, Sr., and it did not vest title in the Defendants. Defendant's acts, consistent with ownership, adverse to any claims by the Plaintiffs, vested title in them. Voiding a subdivision of property that Plaintiffs' no longer own would not benefit the Plaintiffs or be within their rights to seek redress under the facts of this case. This Court has the power to issue Masters' Deeds for clerical errors, the relief sought by Plaintiffs under Judge Condon's order would have to be *nunc pro tunc* given Defendants' title by adverse possession, and the same would be redundant. *See Bell v. Knight* 376 S.C. 380, 656 S.E.2d 393 (Ct. App. 2008), holding that the issuance of a deed is not necessary to give effect to a court order because the court order, by itself, is sufficient regarding title to real property interests. Plaintiff's request that this court find that the Deed of Distribution from the Estate of Charles Chisolm, Sr., null and void and of no force and effect, this Court concludes that such Deed of Distribution did not vest any title interests in Defendants but merely served as a release of the Subject Property from any claims of the

Estate of Charles Chisolm, Sr., as to Parcel Five. The Deed of Distribution did however bolster the Plaintiffs claim that Parcel Five was claimed by the Estate of Charles Chisolm, Sr.

30. Was Ouster at issue in this case? Even though it appears that Defendants' adverse possession would have also amounted to a presumption of "ouster" by possession if they were cotenants with Plaintiffs at the time Judge Condon's 1982 order was issued, I need not address the law of ouster in this case because ouster is a matter law only for adverse possession between co-tenants. Defendants' were not co-tenants with Plaintiffs' but strangers to title at the time Judge Condon's 1982 order was issued.

a. Testimony evidence before this Court was clear and convincing that the Defendants held adverse possession of the Subject Property for more than ten (10) years, and in fact for more than twenty (20) years, following Judge Condon's 1982 Order.

b. Defendants continuously farmed the Subject Property consistent with the historical uses thereof.

c. As to lots of the Subject Property situated at the water's edge, Defendants actively harvested oysters next to the Subject Property and allowed trees on these lots to serve as a natural buffer against chemicals and other aspects of their farming operations.

d. Defendants possession and acts of ownership constituted adverse possession as against the Plaintiffs who had by all evidence abandoned the Subject Property and, by such adverse possession, Defendants were in continuous, active, hostile, actual, open, notorious and exclusive possession of the Subject Property for the statutory ten (10) period.

e. Based upon the clear and convincing evidence, portions of the Subject Property were in the actual possession of the Defendants for more than ten (10) years following Judge Condon's 1982 Order in a manner that satisfies adverse possession in favor of the Defendants.

31. Was the laches issue fully addressed? Based upon the facts and evidence of this case, it is clear and convincing to me that Plaintiffs' delayed the bringing of this action for some 24 years (1982 to 2006) while the Subject Property was being farmed and otherwise adversely possessed, as indicated above, by the Defendants for well more than Ten (10) years. Is there any reason for the Plaintiff's neglect of the Subject Property? No credible facts were in evidence before the Master to provide any reason for Plaintiffs' neglect of the Subject Property under the circumstances of this case. For instance, there is no evidence of difficulty for the Plaintiffs to visit the Subject Property or that they lived too far to have visited the property over the period it was adversely possessed by the Defendants. Had Plaintiffs Abandoned the Subject Property? I do find evidence that the Plaintiffs' unreasonable delay in asserting their property rights given to them by Judge Condon's 1982 Order, thereby prejudicing the Defendants because, as to the viewpoint of the Defendants, Plaintiffs had abandoned or surrendered their claim or

rights which they only now assert too late. Plaintiff testified that he visited the adjacent property with his mother and was told not to communicate with the Charles Chisolm, Sr. family, saw the farming activity and did nothing; said action indicates that Plaintiff had knowledge of the use to which the Defendants were putting the land. Were the Defendants rewarded for active use of the Subject Property? Given the law in our State, which rewards the active use of property, I do not find that the Plaintiffs have unclean hands in their claim to the Subject Property which, after so many years, was abandoned. Did the Plaintiffs appear much too late to defend their erstwhile property rights: Plaintiff's present claim aged more than twenty (20) years and is therefore barred.

32. The ruling in the Order is inconsistent with the finding made during the trial that Roosevelt Chisolm was competent at the time of Judge Condon's order. This finding was based upon the well-reasoned conclusion based upon the fact that Roosevelt Chisolm was represented by counsel, that there was a court-appointed Guardian Ad Litem, and that the issue of the competency of Roosevelt Chisolm, after being discussed at the prior hearing an order issued without providing for any special protections for Roosevelt Chisolm.

Respectfully submitted,

HEIRS PROPERTY LAW CENTER, LLC

BY: Willie B. Heyward  
Willie B. Heyward, Esquire  
27 Gamecock Ave, Ste. 200  
Charleston, South Carolina 29910  
Tel: 843.225-8754  
Fax: 843.225-8765  
Email: willie@heirspropertylawcenetr.org

September 29, 2014  
Charleston, South Carolina

#### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Reconsideration was timely served on September 29, 2014, as follows: by depositing same in the United States Mail, postage pre-paid and properly addressed, and also by emailing a copy of the same, using the following contact information:

Barry I. Baker, Esquire  
1130 Third Avenue  
Post Office Box 31265  
Charleston, South Carolina 29417  
Phone: (843) 766-9007  
biblaw@bellsouth.net

1 A Not to my knowledge.

2 Q You were also asked about Big John  
3 Chisolm?

4 A Yes.

5 Q Very, very prominent figure in town?

6 A Yes.

7 Q To your knowledge, was he a party of this  
8 lawsuit in the 80's, the second lawsuit?

9 A I don't know because I wasn't here. I  
10 know he was involved in the first lawsuit, because  
11 he came to the courtroom.

12 Q Do you know if he had knowledge of the  
13 second lawsuit?

14 A I can't answer that question.

15 Q After the second lawsuit, to your  
16 knowledge, did he make any claims to Parcel 5?

17 A I can't answer that question.

18 Q Your relationship, John Chisolm's  
19 relationship to your father after this -- after this  
20 1980 lawsuit, was it still one of family?

21 A Yes.

22 Q Your relationship, his relationship to or  
23 Charles Chisolm after this 1980 lawsuit, was it one  
24 of family?

25 A Yes.

1 STATE OF SOUTH CAROLINA  
2 COURT OF COMMON PLEAS  
3 COUNTY OF CHARLESTON

4 Leon Chisolm, et al,

5 Plaintiffs,

6 vs.

CASE NO. 2006-CP-10-1772

7 Mary Frances S. Chisolm, et al.,

8 Defendants.  
9  
10  
11

Hearing before the Honorable Mikell R.  
12 Scarborough, reported by Christine A. Smith, Court  
13 Reporter and Notary Public, at 2:07 p.m. on  
14 January 8, 2015 at 100 Broad Street, Charleston,  
15 South Carolina.  
16  
17

18 **COPY**  
19  
20

21 Christine A. Smith, Court Reporter

22 Master-in-Equity

23 P.O. Box 30276

24 Charleston, South Carolina, 29417

25 (843) 958-5071

casmith@charlestoncounty.org

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APPEARANCES OF COUNSEL:

ATTORNEYS FOR THE PLAINTIFF:

Harold A. Oberman, Jr., Esq.  
Oberman & Oberman  
104 Church Street  
Charleston, SC 29401  
(843) 577-7010  
Obermanlaw@bellsouth.net

Barry L. Baker, Esq.  
Law Office of Barry Baker  
P.O. Box 31265  
Charleston, SC 29417  
(843) 766-9007  
Bbaker@bakerlawsc.com

ATTORNEYS FOR THE DEFENDANT:

Willie B. Heyward, Esq.  
Heirs' Property Law Center, LLC  
27 Gamecock Avenue  
Suite 200  
Charleston, SC 29407  
(843) 225-8754  
Heywarddwighth@msn.com

John Joseph Pinckney, Esq.  
Pinckney Law Firm, LLC  
Westbury Park Way  
Suite 200  
Bluffton, SC 29910  
(843) 815-3530  
John@pinckneylawfirm.com

P R O C E E D I N G S

1  
2  
3 THE COURT: We're here today on the case of  
4 Chisolm versus Chisolm, 2006-1772. This is a motion  
5 to reconsider. I have Mr. Baker, Barry Baker -- this  
6 is you-all's motion, right?

7 MR. BAKER: No, it's their motion.

8 THE COURT: Defendant's motion?

9 MR. HEYWARD: It's our motion, Your Honor.

10 THE COURT: And Mr. Oberman -- Mr. Pinckney  
11 and Mr. Heyward for the Defendant, Chisolm.

12 All right. Who is going to argue the motion  
13 this afternoon?

14 MR. PINCKNEY: We're both going to.

15 THE COURT: That's fine. Tell me about it.

16 MR. HEYWARD: Your Honor, this is a case that  
17 was heard by the Court previously. There's some  
18 property located on Wadmalaw Island. It's a ten-acre  
19 tract that has been designated over a period of time  
20 as Parcel 5.

21 There was a case done by Judge Condon of which  
22 HE ordered or signed September 28, 1982, of which he  
23 conveyed to certain individuals of -- the family of  
24 John Chisolm and the family of Tracy Chisolm -- John  
25 Chisolm and Tracy Chisolm being brothers.

1 Parcel 5 was never deeded to the persons who  
2 are the predecessors in interest of Mr. Bakers'  
3 clients. The deed was never issued by the Judge and  
4 the original action was brought to have the deed  
5 issued because the lack of the deed being issued was  
6 considered, at that time by Mr. Goldberg, to be a  
7 Scribner's error.

8 That issue was ruled on by the Court of  
9 Appeals saying that it was not only going on remand  
10 for a full -- was denied, and the case was to be  
11 heard on its merits. That motion was under Rule  
12 60(a) or 60(b) being filed on August 4, 2008.

13 Upon remand we had a hearing which lasted a  
14 number of days of which Your Honor took evidence  
15 through testimony, and exhibits as to a number of  
16 issues, one of which being the incapacity of  
17 Roosevelt Chisolm, who is -- Mr. Baker finds is the  
18 predecessor to the deceased.

19 At the time of Judge Condon's hearing,  
20 Roosevelt Chisolm was represented by Counsel and it  
21 also indicates a Guardian ad Litem was appointed to  
22 represent the interests of those who may be  
23 incapacitated. At the hearing there was testimony,  
24 both as to Mr. Chisolm's incapacity, his wife,  
25 Idells', incapacity, and also the issue of whether my

1 clients' father -- my clients through their father  
2 then acquired an interest in that property, a piece  
3 of interest in their property through adverse  
4 possession by way of ouster because of the actions of  
5 both their father and themselves as to possession of  
6 the property through farming, paying the taxes, and  
7 exclusion or ouster of all other possible interest  
8 holders.

9           There was an order signed by Your Honor.  
10 After the hearing -- subsequent to the hearing  
11 Your Honor ordered both parties to submit proposed  
12 orders to the Court of which Your Honor has signed  
13 the order.

14           Mr. Baker's proposed argument is now the rule  
15 in that case of which falsified -- the entire ten  
16 acres has been awarded to Mr. Baker's clients.  
17 Because -- and we're going to argue the specifics of  
18 that order -- one is the lack of the requisite  
19 elements for ouster and also the incapacity and the  
20 tolling of the statute against the deceased's father  
21 of Mr. Baker's client, Roosevelt Chisolm.

22           If I may let Mr. Pinckney argue the details  
23 involved in this matter? The property has  
24 substantial value. The property is located on  
25 Wadmalaw, on the water, having substantial value, and

1 my clients having a substantial interest in this  
2 property, and the fact that it adjoins the family  
3 home. They have always considered it to be a portion  
4 of the family property until this lawsuit was  
5 initiated.

6 MR. BAKER: If Your Honor please, if I can  
7 interrupt? I have a copy of the order if that will  
8 help you.

9 THE COURT: If you want to hand it up -- I'm  
10 looking at it online. I remember the case, but go  
11 ahead. It's had a tortured history to say the least.  
12 This case goes back to 1982. I wasn't even a lawyer  
13 back then. Okay. Mr. Pinckney?

14 MR. PINCKNEY: This case goes back, as we  
15 mentioned, back to 1982. Judge Condon issued his  
16 order, and this case boils down to a number of broad  
17 themes. It has lots of details, but it comes down  
18 to, in my estimation, to maybe three broader themes:  
19 The adverse possession, the incapacity. You will  
20 waste a lot of time, I think, looking at this deed  
21 situation.

22 I'm going to hand up a memorandum in support  
23 of our position. It's been given to Counsel. I  
24 think that when you look at an order that partitions  
25 property, quiets title to property, and that order is

7  
1 recorded with the County Clerk or in the RMC or  
2 both -- usually both, with a Master's Deed sometimes  
3 given at the option with a payment of an extra \$50 or  
4 so, mainly to provide a chain of title for title  
5 searches.

6 The transfer of the title, the quieting of the  
7 title is authorized by the judicial system for the  
8 Court to do by its order, and that order cannot be  
9 countermanded by lack of a deed. The deed is  
10 ministerial. A lot of the focus on this case has to  
11 do with trying to execute a deed nunc pro tunc, now  
12 for then. It has to also be nunc pro tunc as of  
13 1982, otherwise you're going outside Judge Condon's  
14 order. He didn't know what was going to happen  
15 afterwards.

16 The status of the title was confirmed whether  
17 or not there was a deed carried across the hall. It  
18 was confirmed by his order basically to the  
19 Plaintiff's Counsel, one of whom -- we're going to  
20 have to concede at this point, one of whom was  
21 disabled, incapacitated, and had a guardian appointed  
22 for him, had a committee appointed for him in  
23 Pennsylvania, I think.

24 Judge Condon, knew that. I think the proposed  
25 order states that. We agree with that. There's no

1 question that there was an incapacity at the time of  
2 the issuance of the order.

3 So then the question becomes what happened  
4 after that date, after the transfer of title by the  
5 Court's order, after the possession by our clients  
6 for some 23 years going forward; how do you account  
7 and apply the disability tacking or not tacking -- is  
8 it a tacking only to your descendants or is it  
9 tacking across to collaterals meaning it's my  
10 position that the case cited Massey versus Adams.

11 It's an early case, late 1800's talking for  
12 the first time about disability. In this case an  
13 infant -- the incapacity of the infant can't be taken  
14 advantage of by those who take title under that  
15 person but not those who don't.

16 So in our case there are some parties -- I  
17 think on the last page of the order that was  
18 signed that lays out the percentages, some of those  
19 parties are taking title not under Roosevelt and his  
20 wife, Idelle, who was also incapacitated. There's  
21 two successive incapacities in line.

22 So the position, based on the case cited by  
23 opposing Counsel, is that the other parties, the  
24 other Plaintiffs, cannot benefit from the tacking of  
25 incapacity for those they did not get title through.

1 THE COURT: Okay.

2 MR. PINCKNEY: So what happens then is you  
3 look at the behavior of the parties after 1982. Our  
4 clients and their predecessors farm the property.  
5 There's no question about that.

6 It comes down then to whether or not all of  
7 the elements of a 20-year presumption of grant are  
8 present. So the testimony given was transcribed in  
9 part, or at least what I saw was the tail end of Your  
10 Honor's findings, et cetera, going forward. I  
11 believe -- I wasn't at the hearing. I just came into  
12 this case late.

13 I think there was adequate testimony to  
14 provide the Court with evidence of adverse  
15 possession. As to those interests of the  
16 incapacitated parties, whether or not there was  
17 consent, an incapacitated party can't give consent.  
18 Even if -- I think the fellow's name was Big John,  
19 the leader of the family who basically spoke -- is  
20 alleged to have spoken on behalf of all of the owners  
21 under Judge Condon's order.

22 The allegation is, of course, that he gave  
23 consent to our parties to farm, so the evidence  
24 against that, of course, is the incapacitated party  
25 could not have given that consent. It wouldn't have

1       been applied either. It's just not available. So as  
2       to that interest the claims of our clients seem to  
3       stand up.

4               Also, prior to Judge Condon's case, there was  
5       what I call an in and out deed. It was actually John  
6       Bennett who represented some parties, and sometimes  
7       attorneys record the deeds for clients for purposes  
8       of putting color of title on the record, et cetera.  
9       That seems to have been done before the case began.

10              So that gives some evidence toward the  
11       intentions of our clients. They seem to think this  
12       property was theirs even before -- exclusively theirs  
13       even before Judge Condon had partitioned it out to  
14       others, and they continued that position going  
15       forward, paying taxes, et cetera, and with some  
16       reference back to the color of title, albeit filed  
17       before Condon's case, but no less it's on the record.

18              THE COURT: Did his order address that deed?

19              MR. PINCKNEY: Judge Condon's order?

20              THE COURT: Yes.

21              MR. PINCKNEY: I don't recall.

22              MR. BAKER: Your Honor, I'm not sure whether  
23       it addressed it or not, but it really is immaterial,  
24       because Charles Chisolm, Senior, who is the late  
25       father of the Defendants, he was a Plaintiff, and he

1 asked that the property be partitioned in a certain  
2 way, and under Judge Condon's order, this property  
3 was deeded to Big John Chisolm, to Leroy Chisolm, and  
4 to Roosevelt Chisolm, who is our client's father, but  
5 we represent all of those interests. So even if they  
6 had that deed prior to '82 they are judicially  
7 estopped from trying to send out the property's heirs  
8 because the order came after '82.

9 The order was issued in '82 after the John  
10 Bennett deed, and Judge Condon ordered by consent  
11 that that property belonged to not only Roosevelt but  
12 to the other branches of the family.

13 MR. OBERMAN: Right. I think there may be  
14 some confusion. Parcel 5 was ordered to be deeded to  
15 our clients so I --

16 THE COURT: And what happened was the deed  
17 never was done?

18 MR. OBERMAN: Right. The deed was never done  
19 after that.

20 THE COURT: And that's why you-all argued the  
21 Bell v. Knight case that the order --

22 MR. OBERMAN: Exactly. Correct.

23 THE COURT: So how do we address that?

24 MR. PINCKNEY: The reason I brought up the  
25 Bennett deed is not to show that it grants title, but

1 to show that our clients --

2 THE COURT: -- claim an interest.

3 MR. PINCKNEY: Have an interest in the  
4 property and continued to have it. It rings true  
5 that they would continue to do what they were doing,  
6 but before and after the deed that wasn't recorded  
7 came about in 1982.

8 THE COURT: Well, wasn't that the effect of  
9 the order then?

10 MR. PINCKNEY: It was but the activities after  
11 the order don't show that the Plaintiffs took any  
12 interest in the property by possessing it, by kicking  
13 our folks off, by paying the taxes, et cetera, for  
14 some 23 years. They're trying to hook all of that on  
15 an incapacity and then a successive incapacity which  
16 cannot be tacked across the owners.

17 THE COURT: It would only apply to that  
18 individual or that individual heir, right?

19 MR. PINCKNEY: Correct.

20 THE COURT: All right.

21 MR. PINCKNEY: So that would be Roosevelt,  
22 Idelle, and on the last page where you signed, those  
23 children of those parties. The other portion of  
24 which would have to be subject to an adverse  
25 possession claim.

1 THE COURT: The others would be, right?

2 MR. PINCKNEY: Yes.

3 THE COURT: Is it Roosevelt that was the  
4 incapacitated person?

5 MR. BAKER: Yes, sir. He was incapacitated  
6 and after he died his widow, Idelle, was  
7 incapacitated, and she didn't die until 2004 or  
8 something or 2006.

9 THE COURT: All right.

10 MR. OBERMAN: Just -- I'll address --

11 THE COURT: Let me make sure that he's  
12 finished. Mr. Pinckney?

13 MR. PINCKNEY: Do you want me to finish up  
14 with the motion, or just the points we were --

15 THE COURT: Go ahead with your points. Let me  
16 ask you this pointed question: Has it been your  
17 position that you-all's adverse possession argument  
18 would prevail against all but the heirs of Roosevelt  
19 and Idelle Chisolm? Or would it apply to them, too?

20 MR. PINCKNEY: My understanding is that --  
21 I've researched it. Mr. Oberman did a fairly good  
22 job of looking around the country at the other  
23 jurisdictions saying whether or not it's tackable or  
24 not and whether or not there's statutes in some  
25 states that provide for a period after the

1       incapacity, ten years in our case.

2               So at any rate, I believe that's a correct  
3       reading of the law, that we cannot have adverse  
4       possession against an incompetent --

5               THE COURT:   Okay.

6               MR. PINCKNEY:  -- but that we can against  
7       others.

8               THE COURT:   So your argument is that by virtue  
9       of -- that you've essentially adversely possessed as  
10      to -- what, 75 percent of the profit; is that what  
11      your argument is?

12              MR. PINCKNEY:  At least.

13              THE COURT:   I'm only saying that because of  
14      the recap in the order that says the children of  
15      Roosevelt and Idelle have 25 percent interest.

16              MR. PINCKNEY:  Correct.

17              THE COURT:   And you're acknowledging that you  
18      don't have a right to that?

19              MR. PINCKNEY:  To the incapacitated's share.  
20      It cannot be attacked under adverse possession  
21      because they brought a suit within ten years after  
22      the successive --

23              THE COURT:   After Idelle was dead, right.

24              MR. PINCKNEY:  -- incapacity.

25              THE COURT:   Okay.  I'm with you.

1 MR. PINCKNEY: I think that's a good time to  
2 rest.

3 MR. OBERMAN: Let me just start off --  
4 Roosevelt Chisolm was incapacitated up until the time  
5 of his death. He died in 12 of 1996. We brought  
6 suit within ten years after that. So as to the  
7 incapacity issue we actually don't need Idelle in  
8 there.

9 I think the case law that we cited Toal on is  
10 an incapacity of just one of the people. You would  
11 get some really odd results, I think, if you said,  
12 well, it's adverse possession only as to these folks.  
13 I don't think you can --

14 THE COURT: Why could you not adversely  
15 possess against somebody who's competent and knows  
16 what they're doing and doesn't assert their rights?

17 MR. OBERMAN: I guess the Court's have ruled  
18 that way as they have because they didn't want the --  
19 you might have the heirs on different parts of it and  
20 on the property I guess. If they say they own the  
21 whole property by adverse possession, but we don't  
22 own it against those folks -- I don't think you could  
23 divide it up. I think that's how the Court said that  
24 where --

25 THE COURT: All right. Well, we might be

1 briefing that one a little bit further. I think if  
2 tenants in common they're owned by the interest. If  
3 it's joint tenancy, which I don't think anybody's  
4 alleged here, we don't have that.

5 MR. OBERMAN: They said tenants in common, one  
6 disability protects all of them. Let me just  
7 backtrack a little bit to the adverse possession. I  
8 think that's pretty clear where -- remember, this is  
9 case where we had the testimony of Gary Chisolm, and  
10 he talked about Big John Chisolm, and said Big John  
11 Chisolm, who was an owner -- he was on our side --  
12 gave permission to Charles Chisolm to own the  
13 property.

14 If you remember Gary Chisolm was called by  
15 both of us, both sides, and his testimony was  
16 uncontradicted where he said, Big John Chisolm was  
17 aware of this property, thought he owned it. He said  
18 he gave Charles permission to use it. Knowing that  
19 he gave permission to Charles -- let me just address  
20 that. So you don't have anything adverse. You don't  
21 have anything hostile.

22 THE COURT: If you give permissive use then  
23 you don't have hostility, right?

24 MR. OBERMAN: Exactly.

25 THE COURT: Permissive use can't ripen into

1 hostility, correct?

2 MR. OBERMAN: Exactly. And Big John Chisolm  
3 died in 2004. The case was brought in 2006, so even  
4 if his permission ended upon his death they don't  
5 have the ten years. Also, there's testimony from  
6 their side and our side. If you look back through --  
7 I've looked back through the deposition excerpts  
8 we've submitted of their witnesses, and they all said  
9 that Eddie Chansom Chisolm farmed this property also  
10 along with Charles Chisolm, Senior, so it was not  
11 exclusive.

12 THE COURT: Okay.

13 MR. OBERMAN: So that's just a strong element  
14 on that. That's what you ruled in your order. If  
15 you look back through those deposition excerpts -- I  
16 think we've marked some of them -- they farmed this  
17 up until at least 1992. This is when Eddie Chansom  
18 Chisolm farmed it. Charles Chisolm, Senior died in  
19 1999. So that's only seven years. So you don't have  
20 but ten years, and if you extend that out 20 years  
21 you don't have but 20 years also.

22 So there's no way, since this property was  
23 farmed -- it wasn't exclusive. Back to -- as to the  
24 permissive use, the uncontradicted testimony of Derek  
25 Chisolm saying that Big John was the family leader --

1 he knew precisely what he was doing. He gave the  
2 permission to Charles, Senior to farm it. As it  
3 turns out he also gave permission to someone else to  
4 farm it, too. They have to prove adverse possession  
5 by clear and convincing evidence, and I think we have  
6 it on the other side, especially as to those two  
7 elements there.

8 That way you don't get into the Toal. I think  
9 our case is pretty strong. On the Toal, I know they  
10 disagree. We can reread those cases.

11 We actually cited a whole South Carolina Law  
12 Review article with respect to disability of land  
13 owner with respect to the acquisition of adverse  
14 right by another by Statute of Limitations,  
15 presumption of grant, and presumptive rights in South  
16 Carolina, and from what I read of that, that's of  
17 course, our position, too.

18 I can hand up a copy of that whole Law Review  
19 article to you. It might be in your file already.  
20 I'll just leave it at that.

21 THE COURT: Mr. Heyward?

22 MR. HEYWARD: Thank you, Your Honor. As far  
23 as -- Big John Chisolm was a fixture in Charleston  
24 and everybody knew him. He was a man of prominence.

25 THE COURT: I knew him.

1 MR. HEYWARD: Right. He used to take children  
2 to school in a station wagon.

3 THE COURT: He was a client of mine for a  
4 while.

5 MR. HEYWARD: Really? Now, as far as what Big  
6 John knew, and it was testified to by a third person  
7 that after this order was signed in 1982 Big John  
8 didn't assume he owned the entire property. He knew  
9 about this order, and he was involved in this  
10 particular action. He could not give permission for  
11 permissive use for this property even though folks  
12 might consider him being some sort of trustee or  
13 having influence over this property.

14 He knew who had title and he was involved in  
15 this lawsuit. As far as Chansom is concerned, whose  
16 property is adjacent to this property. His son  
17 testified that as farmers they would rotate. You  
18 grow such and such this year and I'll grow such and  
19 such and they would rotate uses and commingle that if  
20 you will, uses of the property.

21 In no way was this commingling of the uses  
22 ripened into them exchanging title or relinquishing  
23 any title to this property. Just simply the way they  
24 used the property was incompetent maybe because they  
25 were adjacent farmers and they were also family

1 members.. There was also testimony that they hated  
2 each other's guts, but they knew farming. They were  
3 farmers and they did what was best economically as  
4 farmers as far as the property was concerned.

5 That was the testimony that I remember after  
6 our last hearing. There was no testimony that his  
7 father, called Chansom, in any way relinquished any  
8 rights to -- as far as the property was concerned to  
9 my client's father, Mr. Chisolm.

10 There's also the testimony that was taken as  
11 to my client's use of the land, which was very  
12 specific as to the farming activities, of why they  
13 didn't use certain portions of the land, why there  
14 was some harm to the shellfish from the runoff from  
15 the fertilizer, how they used it for hunting and so  
16 on and so forth, how they let certain portions of the  
17 land develop and so on and so forth.

18 So as far as my client's use and possession of  
19 the land I would categorize that as very intensive --  
20 very intensive, paying the taxes, taking possession.  
21 At no time did I hear anything about anyone else  
22 making any claims to this property. I would also  
23 like to bring to the Court's attention our other  
24 defense which is laches.

25 THE COURT: Before you go there, all this

1       pertains to Parcel 5, though, right? What Judge  
2       Condon discussed in his '82 order?

3               MR. HEYWARD: Yes. In his '82 order, Your  
4       Honor. The Plaintiff's contention is that Big John  
5       assumed or everyone else assumed -- or Big John  
6       rather, assumed that he owned this land and he had  
7       the ability to convey it or acquiesce the title to  
8       this property. He could only speak for -- if it's to  
9       be believed says Big John who is now on the stand --  
10      as far as what Big John said and what Big John's  
11      intent was.

12              When everyone in this case, Your Honor --  
13      everyone in this case, this family, and very close  
14      family members even though they might not have gotten  
15      along, one thing they did do is protect this family  
16      property.

17              THE COURT: Well, isn't that one of the  
18      problems you've got with adverse possession?

19              MR. HEYWARD: Absolutely.

20              THE COURT: Because when you have adverse  
21      possession and you've got a family you've got to have  
22      more than just adverse possession, right?

23              MR. HEYWARD: We have to have ouster.

24              THE COURT: Correct.

25              MR. HEYWARD: And I believe -- the testimony

1 during the hearing, there was specific testimony as  
2 to ouster as far as their client, specifically Leon  
3 was concerned, when he came and approached them as  
4 far as where is his interest and where is his  
5 father's interest, and he got turned on his heels.  
6 There was no other family member besides -- and this  
7 is where laches comes in -- there was no other family  
8 member besides himself who I made any claims about,  
9 paid a dime in taxes, asserted any quitclaim or  
10 otherwise any interest in this property besides their  
11 client and their client would approach Mr. Chisolm,  
12 John Chisolm -- when his family came to their house  
13 he got turned out. He got turned on his heels.

14 So they don't have to look for persons to  
15 oust. All they have to do is stand their ground, and  
16 I think they did that, Your Honor.

17 MR. BAKER: Your Honor, if I could respond to  
18 a couple of things? Let's talk about ouster. I'm  
19 glad that Councilman Heyward brought that up. Well,  
20 ouster is not ten years. It's a 20-year deal. Of  
21 course, the transcript will speak for itself, but my  
22 vivid recollection is on cross examination of every  
23 one of the Defendants:

24 "Q. Did you ever let any of our clients or  
25 their predecessors in title know that you are

1 claiming ownership of this property?

2 A. No.

3 Q. Did you ever oust him from property?

4 A. No."

5 So there is no ouster. I think the evidence  
6 is very clear on that.

7 I want to address your issue about can one  
8 person give consent for everybody. I think it's  
9 pretty fairly common when you have a lot of members  
10 of a family of a property there's always one person,  
11 as a rule, that takes care of the property.

12 THE COURT: We used to call them the head  
13 heir.

14 MR. BAKER: You used to call them what?

15 THE COURT: The head heir.,

16 MR. BAKER: The head heir. All right. And in  
17 your order you found on Page No. 4, after the order,  
18 meaning Judge Condon's order -- I think it's the  
19 second paragraph -- Carl Chisolm, Senior, and Eddie  
20 Chansom Chisolm continued to farm Parcel 5. Gary  
21 Chisolm, a witness with no interest in the outcome of  
22 the litigation, was called by both the Plaintiffs and  
23 the Defendants. There's no doubt about it. He was  
24 each of our witnesses.

25 He testified that Big John gave, you know,

1 permission to Charles Chisolm, Senior, to use  
2 Parcel 5. Gary Chisolm stated Big John Chisolm knew  
3 that the property was his, his immediate family, and  
4 Big John Chisolm gave permission to both Charles and  
5 to Gary's daddy, Eddie, to farm the property.

6 This testimony was not contradicted, and I  
7 found it credible. It is the only competent evidence  
8 proffered on this issue. Big John Chisolm was the  
9 leader of the family. They did not question his  
10 authority. The family members understood that Big  
11 John Chisolm was protecting their interest. He did  
12 this until his death in 2004.

13 If you remember, Mr. Heyward eluded to an  
14 animosity between Gary Chisolm's father and Charles  
15 Chisolm, Senior, and my recollection is one of  
16 Mr. Heyward's clients testified that when there was  
17 some type of a dispute -- that on one occasion John  
18 Chisolm was personally there. He went in the bedroom  
19 and he broke the argument up.

20 I think the only evidence is that Big John  
21 Chisolm controlled the property for the family. The  
22 testimony shows that he went there on a regular  
23 basis. Big John Chisolm, whose interest is now  
24 passed to the Plaintiff of Roy Chisolm, he owned a  
25 50 percent interest in the property. 25 percent is

1 owned by Roosevelt Chisolm, Senior, who was  
2 incompetent, and they acknowledge that they don't  
3 have any adverse possession against him, and the  
4 other 25 percent was owned by one of Roosevelt's  
5 brothers after everybody died.

6 So I think that their whole argument as I see  
7 it out of this motion, that it rests on adverse  
8 possession. I just don't think that they have it.

9 As far as the laches is concerned, John  
10 Chisolm owned the property until 2004. The Roy  
11 Chisolm testimony, he and his wife came out in 2004,  
12 and they couldn't find any real property in the name  
13 of John Chisolm, so they assumed that something must  
14 have happened to him, but they were in no -- Roy  
15 Chisolm was in no position to bring any action  
16 involved in this case until he had an interest in it.

17 He didn't get an interest in it until 2004.  
18 He joined in the action with Leon Chisolm in 2006.  
19 Leon Chisolm was not in a good position to bring the  
20 action until after his father died in 1996. He  
21 brought it within the ten-year time.

22 If you are going to talk about ouster that  
23 would take like 20 years, not ten years, so I don't  
24 think laches is really an issue in this case.

25 THE COURT: Anything further?

1 MR. HEYWARD: One more issue, Your Honor.  
2 It's hard to recollect what happened in this case  
3 when we had the hearing much less trying to  
4 reconstruct everything that happened and transpired  
5 that resulted in Judge Condon's issuing an order.

6 THE COURT: And that's why there's no need for  
7 me to go behind that. I can't go back and relitigate  
8 another judge's orders. If they issue an order and  
9 that order exists for 20 something years, I'm going  
10 to live or die by that order. I'm not going to go  
11 back and change it, and I think that's our starting  
12 point for this whole case.

13 MR. HEYWARD: Since Big John now seems to be  
14 the pivotal point in the case --

15 THE COURT: He would be happy with that.

16 MR. BAKER: He certainly would.

17 MR. HEYWARD: And that Big John -- I see no --  
18 there's an inference when someone says that Big John  
19 had control of this property. Whether he is the most  
20 esteemed person in the family or the shock collar as  
21 we call it, does not negate the fact that my clients'  
22 father took control and possession of this property  
23 against everyone, paid the taxes. Big John didn't  
24 pay the taxes, Big John didn't farm the property, and  
25 Big John did not live on the property.

1           So our contention still remains today that the  
2           portion that their father controlled -- when he died  
3           they controlled it, and it was the family's source of  
4           income. He sold the produce from that land to take  
5           care of his family. He didn't share it with anyone  
6           else. He didn't ask anybody else's permission  
7           including Big John -- all those years until their  
8           client comes forward and brings a lawsuit to assert a  
9           claim through his supposed father.

10           He said -- there was testimony -- how did you  
11           learn about that? My mother told me it was in the  
12           strong box under the bed. It's all these  
13           suppositions and who knows what. At the end of this  
14           order, 1982 when it ended -- that's when Judge Condon  
15           signed the order. There was another portion of the  
16           property that was a part of this original action that  
17           was sold.

18           So in 1982, if that's the cutoff date, there  
19           were still actions, still proceedings in this same  
20           case, in which Judge Condon sold another portion of  
21           this property. So who knows what the quid pro quo is  
22           between these family members as far as them coming to  
23           some agreement which is going to settle this matter  
24           between them as far as partitioning this property.

25           THE COURT: Okay. I did know John Chisolm.

1       He was a large member of the community. I used to be  
2       the attorney for the Election Commission. He was on  
3       that Election Commission at least 20 years, at  
4       least -- a lot longer than I was.

5               So when Big John's name got dropped that's the  
6       first time I realized about this interest. I didn't  
7       even know he was from Wadmalaw. He lived on Line  
8       Street when I knew him. What I do remember  
9       specifically about this case during the trial was  
10      Gary Chisolm coming in, and he was extremely  
11      uncomfortable testifying. As you-all pointed out,  
12      both sides called him. I find that his testimony was  
13      credible. His testimony was pivotal to this case,  
14      and that was that Big John gave permission.

15             The problem that you-all have in this case is  
16      that permissive use cannot ripen into adverse use.  
17      That's the problem. If it's family then there's got  
18      to be more than just adverse possession. There's got  
19      to be ouster, which requires more and also takes  
20      longer to establish. It's a difficult thing to go  
21      back and to resurrect what's happened after 24 years  
22      since this case was brought. It's been over 30 about  
23      the time it was tried, since the order was entered in  
24      1982.

25             So the Court's got to start somewhere. So the

1 Court starts with that prior order. Based upon  
2 that -- I understand you-all's argument. I'm not so  
3 sure that you don't have a strong argument on the  
4 legal question of whether or not the incapacity  
5 applies across the board, but as Mr. Oberman has  
6 indicated, I don't know that you ever get to that  
7 point. You've got permissive use. You just don't  
8 have adversity. It's on that basis that I'm going to  
9 deny the motion. Okay? You can proceed as you need  
10 to. All right?

11 MR. HEYWARD: Thank you, Your Honor.

12 MR. BAKER: Thank you, Your Honor.

13 MR. OBERMAN: Do you want me to draft  
14 something?

15 THE COURT: I think you should. I can do a  
16 Form 4, but I think it would be clearer if you would  
17 state the grounds for why we did what we did. If I  
18 was you-all I would be appealing. I think it's a  
19 good argument both ways. I just think that's the  
20 law. Okay?

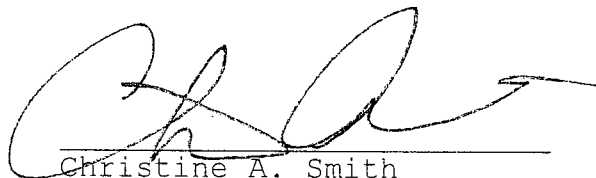
21 (The proceedings were concluded at 2:48 p.m.)  
22  
23  
24  
25

1 State of South Carolina)  
2 County of Charleston ) C E R T I F I C A T E  
3

4 I, Christine A. Smith, Court Reporter and  
5 Notary Public for the State of South Carolina at  
6 Large, do hereby certify that the foregoing  
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to  
9 nor counsel for any party to the cause pending or  
10 interested in the events thereof.

11 Witness my hand, I have hereunto affixed my  
12 official seal this 28th day of January, 2016 at  
13 Charleston, Charleston County, South Carolina.  
14

15  
16  
17 

18 Christine A. Smith  
19 Notary Public  
20 My Commission Expires  
21 May 12, 2021  
22  
23  
24  
25

1 STATE OF SOUTH CAROLINA  
2 COURT OF COMMON PLEAS  
3 COUNTY OF CHARLESTON

4 Leon Chisolm, et al,  
5 Plaintiffs,

6 vs. CASE NO. 2006-CP-10-1772  
7 Mary Frances S. Chisolm, et al.,  
8 Defendants.  
9  
10

11 Hearing before the Honorable Mikell R.  
12 Scarborough, reported by Christine A. Smith, Court  
13 Reporter and Notary Public, at 11:25 a.m. on March  
14 10, 2016 at 100 Broad Street, Charleston, South  
15 Carolina.  
16  
17

18 **COPY**  
19  
20

21 Christine A. Smith, Court Reporter

22 Master-in-Equity  
23 P.O. Box 30276  
24 Charleston, South Carolina, 29417  
25 (843) 958-5071  
casmith@charlestoncounty.org

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PLAINTIFF:

3 Barry L. Baker, Esq.  
4 Kyle Varner, Esq.  
5 Law Office of Barry Baker  
6 P.O. Box 31265  
7 Charleston, SC 29417  
8 (843) 766-9007  
9 Bbaker@bakerlawsc.com

7 ATTORNEYS FOR THE DEFENDANT:

8 Willie B. Heyward, Esq.  
9 Heirs' Property Law Center, LLC  
10 27 Gamecock Avenue  
11 Suite 200  
12 Charleston, SC 29407  
13 (843) 225-8754  
14 Heywardddwighth@msn.com

P R O C E E D I N G S

THE COURT: The matter before the Court is the case captioned Leon Chisolm and others as Plaintiffs versus Mary Francis Chisolm and others as Defendants. The Case Number is 2006-CP-10-1772. The Plaintiffs here today are represented by Mr. Willie Heyward, and the Defendants are represented by Mr. Barry Baker and Mr. Kyle Varner.

I believe the matter before the Court is the Defendant's Motion for Recusal and Set Aside Order; is that correct, Mr. Heyward?

MR. HEYWARD: That is correct, Your Honor.

THE COURT: Any other matters that we need to take up?

(No verbal response.)

THE COURT: This case has got an extremely tortured history, and I've tried to go back and get it straight, but anyway the Court issued -- the Court tried this case in August of 2012 -- August 21 and 22 of 2012. The Court didn't issue its order until September of 2014. It was filed September 18th, 2014.

There was a Motion to Reconsider filed September 30, 2014 on which -- the Court had a

1 hearing on January 8, 2015, and issued its order  
2 basically denying that Motion to Reconsider on  
3 January 22, 2015.

4 This motion was filed January 6, 2016. There  
5 was some intervening appeal at some point in time by  
6 some pro se party, and I'm informed that the appeal  
7 was never perfected. I issued some Form 4 saying I  
8 didn't have the authority to entertain some motion.  
9 I can't remember which one it was now.

10 Anyway, this case goes back to a 1982 order  
11 from Judge Louis Condon, and now a September 2014  
12 order from myself, and so Mr. Heyward, you may make  
13 your presentation, sir.

14 MR. HEYWARD: May it please the Court? Thank  
15 you, Your Honor. Your Honor, there was an order  
16 issued as a result of -- let me first address the  
17 'recusal. My client's contention after the order  
18 dated January 20th, 2015 -- as a result of their  
19 reconsideration hearing, Your Honor indicated that  
20 there was some knowledge of -- that he had some  
21 knowledge of Big John Chisolm being -- since he was  
22 such a prominent person in the community that --  
23 Your Honor at that time, I believe, was on the  
24 Election Commission.

25 THE COURT: I was the attorney for the

1 Election Commission from about '98 until about 2002,  
2 and I think Mr. Chisolm was on that Election  
3 Commission from 1980 until wherever he died -- 2004  
4 or something like that. My client was the Election  
5 Commission, but he was on the Commission. I got to  
6 know him. That's how I got to know him.

7 MR. HEYWARD: Our contention, Your Honor, just  
8 to be clear, is not that Your Honor is prejudiced in  
9 this matter, but the appearance of impropriety is one  
10 that we ask Your Honor for the recusal simply because  
11 there's an appearance of impropriety because of the  
12 relationship of Your Honor to Big John Chisolm and  
13 the Election Commission and Your Honor's position at  
14 that time..

15 My client's knowledge, our knowledge, of that  
16 came as a result of the Motion for Reconsideration  
17 hearing. That said, we asked for a different trier  
18 of the fact because the result of that  
19 reconsideration hearing turned on Big John Chisolm  
20 with the testimony of Gary Chisolm, the witness.

21 THE COURT: It was the testimony of Gary  
22 Chisolm. Big John didn't testify in this trial, did  
23 he? Big John is long dead, right?

24 MR. HEYWARD: That is correct.

25 THE COURT: He was dead ten years by the time

1 I issued that ruling.

2 MR. HEYWARD: Yes, sir.

3 THE COURT: And Gary Chisolm, you would agree  
4 with me, is probably the pivotal witness in this  
5 case; would he not be?

6 MR. HEYWARD: Absolutely. He is the one.

7 THE COURT: He testified -- both sides called  
8 him. He testified, and I think my order accurately  
9 reflects what I said at the time of the hearing  
10 because I'm looking at my transcript. He was the  
11 pivotal witness in the case.

12 MR. HEYWARD: He was a pivotal witness, and  
13 Your Honor also stated absolutely in the order that  
14 in issuing this order, he specifically recalled the  
15 testimony of Gary Chisolm and his observation of him.

16 THE COURT: And I found him to be extremely  
17 credible.

18 MR. HEYWARD: Credible. Since that time we  
19 have gotten the transcript of Gary Chisolm's actual  
20 testimony, and the actual testimony of Gary  
21 Chisolm -- I believe Your Honor has a copy of it?

22 THE COURT: I don't have it in front of me.  
23 Are you talking about from the trial now?

24 MR. HEYWARD: Yes. Gary Chisolm's testimony  
25 at the trial, and he was questioned by both myself

7

1 and Mr. Baker.

2 THE COURT: All right. So that took care of

3 one of your issues in your motion, didn't it?

4 MR. HEYWARD: Concerning the -- correct.

5 Concerning the --

6 THE COURT: Lack of a transcript? We now have

7 a transcript?

8 MR. HEYWARD: I have a transcript.

9 THE COURT: Thank you.

10 MR. HEYWARD: I have a copy, and I think

11 Mr. Baker has --

12 THE COURT: Is that just Gary Chisolm's

13 testimony?

14 MR. HEYWARD: This is just Gary Chisolm's

15 testimony.

16 THE COURT: It looked awful thin to be a

17 two-day trial.

18 MR. HEYWARD: It's just his testimony,

19 Your Honor.

20 THE COURT: Go ahead. You want to point

21 something out to me? Go ahead.

22 MR. HEYWARD: Yes, Your Honor. I believe

23 Mr. Baker has a copy of it?

24 MR. BAKER: No.

25 MR. HEYWARD: He doesn't? There. If I may,

1 Your Honor?

2 THE COURT: Sure. Go ahead, Mr. Heyward.

3 MR. HEYWARD: Just in reflection, Gary Chisolm  
4 was the son of Eddie Chisolm, that he called Chansom  
5 Chisolm, who was also the brother of Mr. Charles  
6 Chisolm and both were, I believe, adjoining  
7 landowners.

8 On Page 12 of the transcript, and I'm now  
9 pointing to Line 18 -- and this is the questioning by  
10 Mr. Baker, I believe.

11 THE COURT: On Direct?

12 MR. HEYWARD: On Direct. And he asks:

13 "Q. When did you come back?

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

18 THE COURT: What page are you on?

19 MR. HEYWARD: This is, I believe, 12 --  
20 Page 12, Line 18.

21 THE COURT: All right.

22 MR. HEYWARD: And I pointed that out to  
23 specifically indicate that Gary Chisolm's contact  
24 with this property and with both his uncle and his  
25 father -- that he lived in another state. He came by

1 periodically to visit, left again, and then he came  
2 back again in 1985 and left again. That his -- by  
3 his testimony he came and went. He did not live  
4 there permanently.

5 On Page 18, and that is Line 15, he says that:

6 "Q. Even at that, you know, even though  
7 I was an adult, I was much younger than them,  
8 and it's a part of our lifestyle that you just  
9 don't mix with the older folks. So I knew them  
10 but -- I respected them and they were my elders."

11 I point that out to indicate that whatever  
12 family issues, land issues, that were between his  
13 uncles, he indicated that he was much younger than  
14 them, and he was not a part of that conversation.

15 On Page 20, and I'm reading now from Line 6 --  
16 I'm sorry from Line 3, the query from Mr. Baker --  
17 the question is:

18 "Q. In your conversation with Big John  
19 did he always consider that he had his interest  
20 in Parcel 5?

21 A. I wouldn't have had any conversation  
22 with him like that. I didn't have any  
23 conversation with him. He was just -- when  
24 he came out he came to talk with my father or  
25 Charles." Meaning Charles Chisolm.

1           Then when we go down to Line 10, the next line,  
2 down, it says:

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

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

7           And then on Page 26 -- I'm sorry, Your  
8 Honor -- and that is correct -- on Page 26, Line  
9 17 --

10          THE COURT: He's now on Cross-Examination from  
11 you, right?

12          MR. HEYWARD: Cross-Examination from me.

13          THE COURT: Okay.

14          MR. HEYWARD: He says, Well, let's go to  
15 Line 14. He says:

16          "Q. Was he respected -- also respected  
17 among your family members?

18          A. Yes, he was."

19          And then Line 17, once again:

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

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

25          Then he goes on and on about the farming and

1 so on and so forth. His testimony, his actual  
2 testimony -- and it reflects that he is far from  
3 unequivocal in his answers both concerning the  
4 property and concerning the relationship between his  
5 father, his uncle, and Big John Chisolm.

6 Now, he also indicated that he was much  
7 younger than them, that any arrangement, any  
8 permissive use, he does not indicate anywhere in his  
9 testimony that Big John gave either his father, and  
10 in this specific instance, Charles Chisolm,  
11 permission to use, farm, and take possession of  
12 Parcel 5. To the contrary, Your Honor.

13 The only claims have been Charles Chisolm by  
14 the Probate Deed of Distribution and the -- there was  
15 a transfer between Charles Chisolm and Attorney John  
16 Bennett.

17 So the only claims that we can see in looking  
18 at this long convoluted case are the claims by  
19 Charles Chisolm and his family.

20 THE COURT: Notwithstanding Judge Condon's  
21 1982 order, right?

22 MR. HEYWARD: That's what I'm -- Judge  
23 Condon's 1982 order gave Tracy Chisolm interest in  
24 Paragraph 5. At that time no one made any move, any  
25 positive action, to make claims to Parcel 5 except

1 Charles Chisolm, and obviously -- not obviously but  
2 in reading the transcript of Gary Chisolm, he states  
3 when he boiled it all down he does not -- he was too  
4 young. He wasn't privy to that conversation between  
5 his elders.

6 Opposition is that given his testimony, his  
7 actual testimony in the transcript of the hearing,  
8 after both Direct and Cross, there's nothing here to  
9 indicate that his testimony is anything but  
10 equivocal. He stated he didn't know that he was  
11 transient. He went back and forth, and he was not a  
12 party or privy to that conversation except -- I'm  
13 sorry -- to the conversations concerning family  
14 matters as he states very honestly.

15 He just did not know, so he could not give  
16 Big John Chisolm the power and the authority then to  
17 be trustee over this land of which he parcelled it  
18 out to his other relatives. Thank you, sir.

19 THE COURT: All right, sir. Any response?

20 MR. BAKER: Yes, sir, I do, Your Honor.

21 Nothing or everything that Mr. Heyward just argued  
22 about is not before the Court. That's been decided.  
23 His motion is that you should recuse yourself because  
24 of the fact that you were the lawyer for the Election  
25 Commission and knew Mr. Chisolm.

1 I think it's very interesting that in the  
2 January of 2015, 59(e) motion Mr. Heyward made the  
3 statement, Thank you, Your Honor. As far as Big John  
4 Chisolm was a fixture in Charleston and everybody  
5 knew him.

6 Now, based on Mr. Heyward's motion, I think  
7 he's saying, not just you but if any Judge happens to  
8 know of anybody that you can't hear the case which is  
9 preposterous. The big thing is that Big John Chisolm  
10 was never a party to the present action in 2006 or  
11 brought in 2006. Big John Chisolm died in 2004 and  
12 Mr. Heyward acknowledges -- obviously, Mr. Chisolm  
13 was not here. He didn't testify.

14 Your decision was based not on John Chisolm  
15 but on the testimony of a Gary Chisolm, who was a  
16 very uncomfortable and reluctant witness. He's close  
17 with both families. He didn't want to be here. Both  
18 sides called him.

19 THE COURT: He was the son of Eddie Chansom  
20 Chisolm, right?

21 MR. BAKER: Yes, sir.

22 THE COURT: That was the other family that  
23 farmed this property?

24 MR. BAKER: He farmed it with Charles, yes,  
25 sir. And the Supreme Court has promulgated their,

1 you know, detailed rules about when a Judge should  
2 voluntarily recuse himself. One, if the Judge has a  
3 personal bias against a party or parties needing  
4 counsel or has personal knowledge of the disputed  
5 evidentiary practice -- well, I mean, that's not  
6 alleged, and you don't have any knowledge of the  
7 facts. You didn't have any bias against any of the  
8 parties.

9 The Judge served as counsel in the matter in  
10 controversy or was a material witness concerning the  
11 matter. We don't have that. That's the second  
12 ground.

13 The third ground is that the Judge -- this is  
14 under Rule 501, Canon 3E(c), the Judge or his family  
15 have an economic interest in this matter. I'm not  
16 aware of the fact that either you or your family have  
17 any interest in this property, and (d), the Judge or  
18 his family are either a party to the proceeding,  
19 acting as counsel in the proceeding, or are material  
20 witnesses in the proceeding. None of that is present  
21 here.

22 Now, a Judge can recuse himself or herself if  
23 they believe that their impartiality can be  
24 questioned, but as I stated earlier, their claim that  
25 you could not be impartial due to the fact that you

1 knew Big John Chisolm -- there's not any merit to  
2 that because he wasn't a party.

3 I also think that as cited in the case of Ness  
4 versus Eckerd Corporation, whether Judge -- well at  
5 that time Chief Justice Harwell on his own motion  
6 recused himself. The Court said in that case that  
7 you've got to file a 59(e) motion with the Judge, and  
8 if you don't file a 59(e) motion, and a 59(e) motion  
9 was not filed in this case asking you to recuse  
10 yourself, then there's nothing on appeal for any --  
11 an Appellate Court, and we had the hearing in January  
12 of 2015. You issued the order.

13 Ten days is long past due to file a 59(e)  
14 motion, so I just think that the motion is -- that  
15 there's not any merit to it, and it needs to be  
16 denied. Now, as I said -- and then the other motion  
17 that -- and then again, Mr. Heyward says, well under  
18 60(b) that you have the right to vacate your earlier  
19 order because a transcript wasn't filed. Well, we  
20 have a transcript in the first place, but in the  
21 second case let's look at 60(b), I mean at 60.

22 THE COURT: Let me stop you there.  
23 Mr. Heyward, are you withdrawing that part of your  
24 motion? You've got the copy of the transcript or  
25 access to the transcript?

1 MR. HEYWARD: Presently, I have the  
2 transcript, Your Honor, or we have a copy of it.

3 MR. BAKER: And it will be filed with the  
4 clerk's office.

5 MR. HEYWARD: Right.

6 MR. BAKER: Well then that motion is moot.

7 THE COURT: I was concerned about that motion  
8 because if there's no transcript, there's no  
9 transcript. This is my third court reporter since  
10 2012.

11 MR. HEYWARD: Let me be clear. There was a  
12 transcript of the hearing. We just didn't have a  
13 physical copy.

14 THE COURT: That's not my problem. All right?  
15 We've got it.

16 MR. BAKER: So all the arguments that  
17 Mr. Heyward made about why you should overturn it,  
18 that's not before you. The only question before you  
19 is, should you have to recuse yourself.

20 THE COURT: All right. Very good.  
21 Mr. Heyward?

22 MR. HEYWARD: Thank you, Your Honor. The fact  
23 that Mr. Baker mentioned as far as recusal, and he's  
24 absolutely correct, we are only asking because of the  
25 appearance of impropriety because of the relationship

1 Your Honor had with Big John. Although Big John was  
2 not a party, Your Honor's January 20th, 2015 order  
3 states that, and this is the testimony of Gary  
4 Chisolm, who was a party to -- not a party -- he was  
5 a witness, and he testified that Big John Chisolm  
6 expressly gave permission to Charles Chisolm, Senior  
7 and Eddie Chansom Chisolm to farm Parcel 5.

8 Big John Chisolm was the owner of Parcel 5.  
9 He was the owner of Parcel 5. He was the leader of  
10 the family. He did not die until 2004. Because the  
11 use was permissive, it was not hostile, therefore  
12 negating the ouster at first possession.

13 Crucial, after all these years, is Gary  
14 Chisolm's testimony concerning the role of Big John  
15 Chisolm, and now determining the character of the use  
16 by the Plaintiff's father, Charles Chisolm.

17 THE COURT: All right. Thank you,  
18 Mr. Heyward.

19 You know, I think part of the problem here is  
20 this motion comes too late. The other problem on the  
21 Motion for Recusal is that I certainly don't have any  
22 personal animosity towards one side or the other. I  
23 just have to make a decision. Okay? I understand  
24 when somebody doesn't win they're not happy with the  
25 decision. I also understand that my ruling changes

1 years of conduct out there. I have no doubt about  
2 that. I can tell you that I wrestled with this case.  
3 You have to know I've wrestled with this case --  
4 okay -- but I have to make a decision, and that  
5 decision was made back in 2014. Very seldom do I go  
6 back on my decisions.

7 That's the position I find myself in today. I  
8 am not even going to award one side, punish the other  
9 side -- I just have to make a decision.

10 My specific recollection, and this is why I  
11 went into this at the hearing we had back in January  
12 of '15, 15 months ago. I don't think I knew of John  
13 Chisolm's involvement in this property as a family  
14 member until Gary Chisolm got on the stand. He was  
15 apparently the first witness called. It was apparent  
16 to me, and I stated this at that hearing, that he was  
17 extremely uncomfortable testifying, and apparently  
18 there is a long history between these two branches of  
19 the Chisolm family.

20 There's some reference to people pulling guns  
21 out and I guess cops having to be called out there,  
22 so it's hotly contested out there on Wadmalaw as to  
23 who has what and who owns what.. Like I said, I've  
24 got to make a decision.

25 I find that his testimony was credible. I

1 find that it provided authority for the issue of  
2 permissive testimony -- permissive use of the  
3 property and because permissive use cannot ripen into  
4 adverse possession is why I ruled the way I did. I  
5 understand that there was use of the property. I'm  
6 going to give you-all some answers to some of these  
7 specific questions in a minute.

8 I understand there was use of the property.  
9 There was farming of the property, and then farming  
10 was continuous for a number of years. It was also  
11 shared, so it was not exclusive use, and I find it  
12 was not hostile use. It was use, but it was not  
13 proven to this Court by clear and convincing  
14 evidence, which is the standard required to show  
15 adverse possession.

16 The order from the January 2015 Motion to  
17 Reconsider only addressed really the credibility  
18 issue of this pivotal witness, Gary Chisolm. I'm  
19 going to run down briefly -- and you-all will have to  
20 get a copy of the transcript from the court reporter  
21 if you want it addressed directly in an order.

22 On the Motion to Reconsider, did the Master  
23 consider Defendants' actual possession? Yes. The  
24 property was farmed with possession -- with  
25 permission is what I stated.

1 Did the Master consider Defendants' open,  
2 notorious, and hostile possession? Yes. But I find  
3 it was not proven by clear and convincing evidence.

4 Did the Master consider Defendants'  
5 continuance possession? Yes. I find possession was  
6 continuous.

7 Did the Master consider Defendants' exclusive  
8 possession? Not exclusive. Shared with the Gary  
9 Chisolm family.

10 Did the Master address the fact that a lack of  
11 a Master's Deed did not change the title as  
12 previously ordered? I'm not sure what that means,  
13 but this case piggy backs on the Bell versus Knight  
14 case from 2008 that a court order is sufficient to  
15 transfer title of the property. From that standpoint  
16 I'm following what I believe the law to be.

17 Did the Master address incapacity, or lack  
18 thereof, evident in the record before Judge Condon?  
19 I don't know what the answer to that question is.

20 Does Judicial Estoppel even apply in this  
21 case? The argument is Defendants' gained title by  
22 presumption of grant and constructive ouster before  
23 the disability. I think the 1982 point is the  
24 starting point for this particular case. You have to  
25 come forward with adverse possession by clear and

1 convincing evidence for ten years or ouster of family  
2 in 20 years.

3 Were the equities balanced by the Master? I  
4 believe that they were.

5 Are corrections of clerical errors relevant or  
6 substantial? You know, I -- it's a real problem to  
7 void a subdivision. I can tell you that. I'm well  
8 aware of that fact.

9 Was ouster at issue? I think it was.

10 Was latches fully addressed? I think it is.

11 I think that takes care of the individual  
12 items. All right. I'm going to deny the motion.  
13 You-all go appeal if that's what you want to do. I  
14 have no problem with that. Okay?

15 MR. HEYWARD: Thank you, Your Honor.

16 MR. BAKER: Thank you, Your Honor.

17 THE COURT: Very good.

18 MR. BAKER: Judge, I'm sorry. Do I understand  
19 that you want an order from us?

20 THE COURT: On this issue?

21 MR. BAKER: Yes.

22 THE COURT: Yes, you can get me an order. I'm  
23 denying the Motion to Recuse. That's really what's  
24 before me. I just went down that list of all of  
25 those items if there was something in the motion of

1 whether or not I addressed all of the issues that  
2 were raised in 59(e), and that's why I went down the  
3 line. Okay? That's just to set the matter for  
4 appeal. All right?

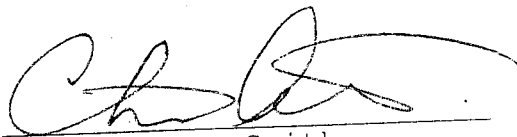
5 (The proceedings were concluded at 12:00 p.m.)  
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1 State of South Carolina)  
2 County of Charleston ) C E R T I F I C A T E  
3

4 I, Christine A. Smith, Court Reporter and  
5 Notary Public for the State of South Carolina at  
6 Large, do hereby certify that the foregoing  
7 transcript is a true, accurate, and complete record.

8 I further certify that I am neither related to  
9 nor counsel for any party to the cause pending or  
10 interested in the events thereof.

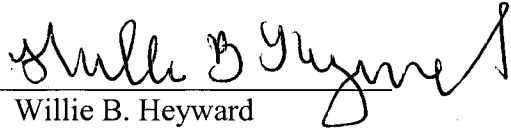
11 Witness my hand, I have hereunto affixed my  
12 official seal this 16th day of March, 2016 at  
13 Charleston, Charleston County, South Carolina.  
14  
15

16   
17

18 Christine A. Smith  
19 Notary Public  
20 My Commission Expires  
21 May 12, 2021  
22  
23  
24  
25

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.

December 8, 2017



Willie B. Heyward  
27 Gamecock Avenue, Suite 200  
Charleston, SC 29407  
(843)225-8754  
Attorney for Appellants

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