THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lee County
Court of Common Pleas

Haigh Porter, Special Referee

Case No. 2010-CP-31-195

Cecil L. Josey, Jr., Respondent,

v.

Stanley D. Josey, Courtney Gamble, Spencer Josey, Elizabeth Ann Geddings, Cecil L. Josey, Jr. as Trustee of the Josey Family Trust, Defendants,

Of Whom Stanley D. Josey is the Appellant,

And of whom Courtney Gamble, Spencer Josey, Elizabeth Ann Geddings, Cecil L. Josey, Jr. as Trustee of the Josey Family Trust, are Respondents.

FINAL BRIEF OF RESPONDENTS COURTNEY GAMBLE, SPENCER JOSEY, ELIZABETH ANN GEDDINGS, AND CECIL L. JOSEY, JR., AS TRUSTEE OF THE JOSEY FAMILY TRUST

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND OTHER AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

Respondents/Defendants Josey Family Trust, Spenser Josey, Elizabeth Ann Geddings, and Courtney Gamble would restate the issues on appeal as:

I. Did the trial court properly order partition in kind of certain jointly-owned real property when more than one joint tenant asserted a right of first refusal, under S.C. Code Ann. §15-61-25, to buy out the interest of the Plaintiff and the other co-Defendant(s)?

A. Did the Appellant/Defendant Stanley Josey preserve his challenge to the partition in kind where he did not timely raise this ground at trial or in his post-trial Rule 59 motion?

B. Is there any legal basis to grant Defendant Stanley Josey a right of first refusal to buy out his co-owners based on the fact that the other co-Defendants asserting a competing right of first refusal cooperated with the Plaintiff?

II. Is the trial court's order of partition in kind fair and impartial and without injury to any of the parties in interest?

A. Did the Appellant /Defendant Stanley Josey preserve his challenge to the partition in kind where he did not timely or sufficiently raise this ground at trial or in his post-trial Rule 59 motion?

B. Does the expense Stanley will incur in removing and storing his personal property elsewhere constitute a cognizable injury or render the partition award unfair under the partition statute, S.C. Code Ann. §15-61-50?

STATEMENT OF THE CASE

Cecil L. Josey, Jr. (known and referred to throughout this litigation as "Rainey") commenced this action, petitioning the court to partition certain jointly owned parcels of land and personal property. [ROA 27; Complaint, filed September 30, 2010.] The property includes a note and mortgage, three parcels of real property: Britton Farm, a fertilizer plant, and 32.98 acres (referred to throughout as "the 32 acres"), and personal property consisting of eight vintage automobiles along with a countless number of parts and tools in nine buildings and sheds located on the 32 acres. The property was once owned by the late C.Wofford Josey, who bequeathed and devised the property jointly to his sons Stanley and Cecil (now deceased). Stanley Josey owns a 50% interest in the property; and Cecil's half is now owned by Cecil's four children, the Plaintiff Rainey and Defendants Spencer Josey , Elizabeth Ann Geddings and Courtney Gamble, who each individually hold one percent (1%), and the Defendant Josey Family Trust holds the remaining (46%) share. In his complaint, Rainey gave all the Defendants notice, pursuant to S.C. Code Ann. § 15-61-25, of their right of first refusal to purchase the interests in the property.

Stanley Josey filed an answer and counter-claim. [ROA 34; Answer and Counterclaim, filed October 20, 2010.] Stanley asked the Court to equitably divide the personal property and the Britton Farms and the Fertilizer Plant, but he invoked his right of first refusal and gave notice that he wanted to purchase the 32 acres. By counterclaim, Stanley also sought declaratory and injunctive relief giving him an easement for ingress and egress to the 32 acres over an asphalt driveway on Rainey's home. Stanley later filed an amended answer, counterclaim and cross-claim, asserting

additional causes of action for false imprisonment, malicious prosecution, and abuse of process founded on allegations that the Plaintiff and Co-Defendants had filed warrants against him for malicious injury to property and trespass. [ROA 41; Amended Answer, filed December 13, 2010.]

Rainey filed a reply to the counterclaim on January 14, 2011. [ROA 50; Reply.] The Trust and Spencer, Courtney, and Elizabeth Ann (hereinafter, "the Trust Defendants"), filed an Answer and Reply and they also gave notice that they were invoking their right of first refusal to purchase the 32 acres (¶18). [ROA 53; Answer & Reply, filed March 8, 2011.]

The matter was referred to the Honorable Haigh Porter, as Special Referee, to enter a final judgment who conducted a trial on the merits on April 26, 2011. [ROA 58, 1; Motion to Refer, filed September 30, 2010; Order of Reference, filed March 31, 2011.] After the trial, the Special Referee issued his order, filed July 7, 2011. The Special Referee declined to grant any of the non-petitioning parties the right to purchase, determined that a public sale would create chaos, and held that the assets could be divided fairly and equitably. The Special Referee ordered partition in kind, dividing the property and awarding certain items of personal property and real property to the parties. He gave Stanley the note and mortgage, Britton Farm, the Fertilizer Plant, all the eight vintage automobiles and a specified portion of the parts and tools, and he gave Cecil's Heirs the 32 acres and the rest of the parts and tools. [ROA 58; Order, filed July 7, 2011.]

The Special Referee gave Stanley 180 days to remove his personal property from the 32 acres and provided specific requirements regarding the logistics of the removal,

including: "Stanley shall not enter the property except on those dates and times designated for removal of the items of personal property." [ROA 7-8; Order, p. 5-6.]

On July 14, 2011, Stanley served a Rule 59 motion for a new trial, and on July 19, 2011, he filed an "Addendum" to supplement his Rule 59 motion. [ROA 60, 61; Motion, Addendum] The Special Referee denied the motion in an order filed August 9, 2011. [ROA 12; Amended Order.]

Stanley filed a notice of appeal with the Court of Appeals and moved in the trial court for a stay pending appeal. [ROA 87; NOA, Motion, filed August 18, 2011.] On September 13, 2011, Rainey Josey made a motion in the trial court to amend the order, asking the Special Referee to place additional restrictions on Stanley's access to the 32 acres and presented evidence that Stanley had been coming on the 32 acres causing trouble but he had not removed any of his personal property items. [ROA 63; Motion to Amend Order, September 13, 2011.]

The Special Referee denied both motions. However, the Special Referee did clarify the intent of his earlier order(s): "The only purpose for this Defendant, Stanley D. Josey, to enter upon the 32 acres was for the removal of personal property awarded to him. His access to this property awarded to the remaining properties should be limited to such removal of personal property. ... [I]ntent of the Order was for Mr. Stanley Josey to have the right to remove items of personal property as designated at specific times and the only purpose for him going on the 32 acres subject to this partition suit was for the removal of his personal property awarded him pursuant to the above referenced Orders." [ROA 25-26; Order, filed March 21, 2012, pp. 2-3.]

STATEMENT OF THE FACTS

Family History and Property Acquisitions

When Wofford Josey died on November 4, 1998, he left considerable properties to his sons, Cecil and Stanley, including the properties at issue in this partition action:

1. Note and Mortgage due Josey Marital Trust with outstanding principal and accumulated payments with an appraised value of $19,376;

2. Britton Farm consisting of 30 acres of wooded upland in southeast Lee County appraised at $38,000[1];

3. A fertilizer plant consisting of 4.6 acres on Harris Street in Bishopville appraised at $30,000[2];

4. 32.98 acres appraised at $65,960 ($2,000 per acre) with nine (9) buildings/sheds separately appraised at $61,000[3];

5. Vintage Automobiles, including[4]

a 1922 Velie appraised at $20,000,

a 1926 Essix appraised at $2,500

a 1966 Ford appraised at $1,500,

a 1924 Nash appraised at $2,500,

a 1919 Model T. Truck appraised at $2,500,

a 1960 MGA appraised at $2,500,

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[1][ROA 450; Plaintiff's Ex. 1.] These valuations are not challenged by Stanley on appeal.

[2][ROA 467; Plaintiff's Ex. 2.]

[3][ROA 473; Plaintiff's Ex. 3.] The plant is not currently operational.

[4] Stanley he does not challenge the valuations on appeal.

a 1928 Studebaker appraised at $2,500, and

a 1922 Jewett appraised at $3,500; and

6. Parts and Tools appraised at $45,900.[5] [See ROA 11; Plaintiff's Ex. 30, attached to Order.]

Cecil had given his 50% share to a trust he created ("Josey Family Trust"); his four children – Rainey, Spencer, Elizabeth Ann, and Courtney are the beneficiaries. [ROA 192, 504; Tr. 47, Plaintiff's Ex. 7.] The Trust has conveyed 1% to each of the four children. [ROA 192, 527; Tr. 47, Plaintiff's Ex. 20.]

The Special Referee stated that "[t]he real bone of contention is whether the 32.8 acre parcel should be partitioned, allotted or sold." [ROA 5; Order, p. 3.] The 32 acres, which is located in Lee County on Elliott Highway, abuts a parcel of 8.4 acres, which is personally owned by Rainey Josey as his residence. This parcel had been part of a larger parcel that Stanley and Cecil inherited from Wofford, but Stanley and the Trust sold it to Rainey in 2001[6]. [ROA 174-75, 510, 517; Tr. 29-30, Plaintiff's Ex. 8, 10.] The 32 acres also abuts a tract of 3.5 acres that Wofford gave to Cecil in 1994, where Cecil raised his children and where their mother live. Cecil deeded this tract to the Josey Family Trust in 2001. [ROA 172-73, 177, 196, 500, 504; Tr. 27-28, 32, 51; Plaintiff's Ex. #6, #7.] The 32 acres also abuts 3.5 acres, which Wofford had given directly to Cecil in 1994, who it turn deeded it to the Josey Family Trust in 2001. The house on this tract is where Cecil's

[5] Rainey and Spencer prepared the appraisal of the parts and tools. [ROA 9, 533; Plaintiff's Ex. 28.] Stanley did not introduce any appraisals to challenge the valuations; and he does not challenge the valuations on appeal.

[6] Wofford bought the property in 1954 and built a home several years later which Stanley and Cecil called home until they were grown and gone. [ROA 281; Tr. 136.]

children were raised and where their mother still lives. [ROA 172-73, 177, 196; Tr. 27-28, 32, 51.)

As identified in the appraisal, the nine (9) buildings and sheds on the 32 acres consist of: 40 x 80 woodsided shed/enclosure with a tin roof; 26 x 41 covered shed with a tin roof; 36 x 41 enclosed with a shed; 27 x 60 workshop with concrete floor and aluminum roof; 21 x 101 car storage with 10 door metal frame; 40 x 60 workshop with steel frame; 32 x 90 enclosed with rear shed CCB/Wood; 36x 60 Hoover building; and a two-story cabin 2150+ square feet. [ROA 473; Plaintiff's Ex. 3.] In addition to the jointly-owned vintage automobiles listed above, the nine buildings contain year's of accumulated car parts and equipment. Rainey and Spencer compiled a list of various big items (valued at more than $500) and grouped other items based on type and location. [ROA 9, 533; Plaintiff's Ex. 28.] Upon visiting the property and viewing the buildings, the Special Referee reported that he was "awestruck" by the great quantity and the magnitude of any attempt to appraise them by item.[7]

There was also a family partnership, Stoney Run Farms, which Wofford had created, and while that partnership is not part of the partition action, certain facts regarding those properties and the dissolution of the partnership are relevant to Stanley's claims of unfairness. The partners were Wofford, his sons Stanley and Cecil, and his grandchildren/Cecil's four children.[8] [ROA 169; Tr. 24.] In 2010, the Stoney Run partnership was dissolved and the assets were distributed. As part of that dissolution,

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[7] The parties also stored their own personal property in the buildings on the 32 acres. For example, each of these Respondents has their own vintage automobiles stored there. [See ROA. 10; Plaintiff's Ex. 29 – listing personal items.]

[8] Stanley does not have any children.

Stanley received 181 acres, which abuts his home[9] along with 1000+/- acres of farmland, timberland, and bottomland. [ROA 183-188; Tr. 38-43.]

Family Dissension and Escalation to Physical Assault, Injury to Property and Law Enforcement Involvement

The troubles between Stanley and Cecil's Heirs started in 2006 over the fact that Stanley would not help with the upkeep on the jointly owned properties. [ROA 208-09; Tr. 63-64.] For the next several years, they went about getting the properties appraised and trying to divide the properties. Then in 2009, things took an ugly turn when Stanley and his wife trespassed into Rainey's office on his privately owned land and Stanley assaulted Rainey.[10] [ROA 212; Tr. 67.]

The problems continued into 2010, with Stanley turning on radios at the cabin at full volume and leaving them on day and night. Although Stanley claims that his purpose was to scare the squirrels away,[11] the noise was a big problem to Rainey and their mother because the cabin was so close to Rainey's house (90 yards) and their mother's house (60 yards). At first, Rainey would unplug the radios, but Stanley would come right back and plug them in, so Rainey finally just turned the electricity to the cabin off. [ROA 221-23; Tr. 76-78.] Whatever his motivation, Stanley's actions showed complete lack of respect for Cecil's family right to live in peace and quiet.

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[9] Wofford deeded the land to Stanley for his home on the same day he deeded the 3.5 acres to Cecil. [ROA 523; Ex. 11.]

[10] Stanley and his wife both admitted in their trial testimony that Stanley grabbed Rainey by the collar. [ROA 366, 407-08; Tr. 221:23-25; 262-63.]

[11] [ROA 333-36; Tr. 188-191.]

Another problem was the fact that Stanley started trespassing on Rainey's property to use the asphalt driveway.[12] [ROA 176, 499; Tr. 31, Plaintiff's Ex. 5.] The paved portion of the driveway runs from the road to Rainey's carport and then becomes a little dirt road that goes over to the cabin on the 32 acres. [ROA 283; Tr. 138.] When the troubles escalated, Stanley began driving fast up and down his driveway so Rainey issued a no trespassing notice to Stanley to stay off his land and the tract owned by the Trust where their mother lives. [ROA 224-25, 531; Tr. 79-80, Plaintiff's Ex. 26.]

Stanley claims that he retained an easement across that driveway when he sold the property to Rainey in 2001: "I didn't think when Rainey bought that property that that easement would go away. I thought once an easement, always an easement is the way I thought things worked. Just because you buy a piece of property where a man's been going up and down it for fifty (50) years, that doesn't cut him off from going in and out of it." [ROA 353-54, 392; Tr. 208:20 – 209:1; 247:1-14.]. Although Stanley asserted a counterclaim to determine his right to an easement over the driveway, he had not pursued the issue on appeal.

Because his home abuts the 32 acres, Rainey and his family suffered most from Stanley behavior. For example, even after Rainey issued the no trespass notice, Stanley would drive his truck right up to the property line at night and just shine his headlights at the house, which disturbed Rainey's children sleeping. [ROA 226-27; Tr. 81-82.] Then, in August 2010, Stanley disassembled part of the children's tree house and destroyed azaleas in Rainey's own yard, and Rainey called the police and had Stanley charged with malicious injury to personal property and trespassing. [ROA 228-29, 544, 549; Tr. 83-

[12] Prior to the troubles, Stanley mostly had been using the north access to the buildings on a dirt road shared with their neighbor.[12] [ROA 281-84; Tr. 136-39.]

84, Defendant's Ex. 1, 3.] At one point, Rainey recorded Stanley yelling profanity, cussing and threatening, and a Lee County Magistrate issued a mutual restraining order.[13] [ROA 250, 269-70; Tr. 105, 124-25.]

However, these Defendants also have been affected by Stanley's harassment. For example, Stanley would park his boat or stack materials in the buildings purposefully to block access by the other co-owners. [ROA 231-32; Tr. 86-87.] Stanley also trespassed on property held by the Josey Family Trust.[14] Their mother, who lives on Trust property, testified to an incident in the summer of 2010 when Stanley had a fit of temper and was raising and shaking what appeared to be pipe; while Stanley was not trespassing, she was afraid for her safety and Rainey's family safety.[15] [ROA 310-11; Tr. 165-66.] Spencer and Courtney each testified how they also have been affected. Courtney no longer uses the cabin for family outings, as she once did, because she wants to avoid the trouble. [ROA 417; Tr. 272.] Spencer has an antique automobile that he is working on, and someone (he suspects Stanley) has dismantled some of the parts and scattered them around in different buildings. [ROA 432-35; Tr. 287-290.]

The Record Clerk from the Lee County Sheriff's office testified that they had eight (8) incident reports of calls to the property in one year (4/30/10 – 4/10/11). [ROA 480, 339; Plaintiff's Ex. 4 – Incident Reports; Tr. 194.]

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[13] A previous effort to obtain a restraining order had been denied because Rainey did not have sufficient evidence. [ROA 249, 268-69; Tr. 104, 123-24.]

[14] A summons was issued to Stanley for trespassing (to hunt) in October 2010.[14] [ROA 230, 549; Tr. 85, Defendant Ex. 5.]

[15] Stanley admitted that he was frustrated that Rainey was taking a picture/video of him, and took a rubber hose and beat on a metal table in one of the buildings. [ROA 366; Tr. 221.]

Continuing Post-trial Harassment by Stanley

Stanley's harassment continued after the trial. During the 180 days following entry of the order directing him to remove his personal property from the 32 acres, Stanley's attorney notified Rainey's attorney that Stanley would be on the property for days and weeks at a time: July 20-22, July 27-29, August 3-6, August 9-12, August 16-19, August 23-26, August 30-31, all of September 2011. [ROA 67, 72; Affidavit of Rainey Josey, Ex. 2 – attorney letters.] However, Stanley removed very little if any of his property. Instead, Stanley was recorded making lewd, obscene and vulgar gestures towards the security cameras installed by Spencer. [ROA 90; Affidavit of Spencer Josey, dated October 10, 2011; see also ROA, 394, Tr. 249.] In addition, Stanley tried to claim the right to use the cabin for day and weeks at a time in the fall and winter of 2011 for his exclusive use, even though the order only gave him access to the 32 acres for the sole purpose of removing his personal property. [ROA 68; Affidavit of Rainey Josey.]

ARGUMENT

Applicable South Carolina Law on Partition

State law provides that every cotenant has the right to demand partition of property held jointly or in common:

> All joint tenants and tenants in common who hold, jointly or in common, for a term of life or years or of whom one has an estate for a term of life or years with the other that has an estate of inheritance or freehold in any lands, tenements or hereditaments shall be compellable to make severance and partition of all such lands, tenements and hereditaments.

S.C. Code Ann. § 15-61-10; see also S.C. Jur. *Cotenancies* § 47.

State law also favors partition in kind, rather than partition by sale, when it can be fairly made without injury to the parties:

> The court of common pleas has jurisdiction to make partition in kind or by allotment to one or more of the parties upon their accounting to the other parties in interest for their respective shares or, in case partition in kind or by allotment cannot be fairly and impartially made and without injury to any of the parties in interest, by the sale of the property and the division of the proceeds according to the rights of the parties.

S.C. Code Ann. § 15-61-50; see also *Anderson v. Anderson*, 299 S.C. 110, 382 S.E.2d 897, 899 (1989).

In *Few v. Few*, the Court stated that in kind partitions are appropriate "only where they may be made fairly and impartially without injury to any of the parties." 242 S.C. 433, 131 S.E.2d 248, 252 (1963) However, in *Anderson*, supra, the Court clarified the apparent conflict between the statute and the Court's opinion and that the opinion in *Few* does not alter the statutory preference for partition in kind. The Court held that a party seeking a partition by sale bears the burden of proof to show that partition in kind "is not practicable or expedient." 382 S.E.2d at 899 (citing *Smith v. Pearson,* 43 S.E.2d at 482); *Wilson v. McGuire*, 320 S.C. 137, 463 S.E.2d 614, 616 (Ct. App. 1995).

In 2006, the Legislature enacted a new statute, 2006 Act No. 302, § 1, eff. May 25, 2006, as codified in S.C. Code Ann. § 15-61-25, which modifies the law of partitions by creating a statutory right of first refusal:

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

(B) In the circumstances described in subsection (A) of this section, and in the event the parties cannot reach agreement as to the price, the value of the interest or interests to be sold shall be determined by one or more competent real estate appraisers, as the court shall approve, appointed for that purpose by the court. The appraisers appointed pursuant to this section shall make their report in writing to the court within thirty days after their appointment. The costs of the appraisers appointed pursuant to this section shall be taxed as a part of the cost of court to those seeking to purchase the interests of the joint tenants or tenants in common petitioning to sell their interest in the property described in the petition for partition.

(C) In the event that the petitioning joint tenants or tenants in common object to the value of the interests as determined by the appointed appraisers, those joint tenants or tenants in common shall have ten days from the date of filing of the report to file written notice of objection to the report and request a hearing before the court on the value. An evidentiary hearing limited to the proposed valuation of the interests of the petitioning joint tenants or tenants in common shall be conducted, and an order as to the valuation of the interests of the petitioning joint tenants or tenants in common shall be issued.

(D) After the valuation of the interest in property is completed as provided in subsection (B) or (C) of this section, the nonpetitioning joint tenants or tenants in common seeking to purchase the interests of those filing the petition shall have forty-five days to pay into the court the price set as the value of those interests to be purchased. Upon the payment and approval of it by the court, the court shall execute and deliver or cause to be executed and delivered the proper instruments transferring title to the purchasers.

(E) In the event that the nonpetitioning joint tenants or tenants in common fail to pay the purchase price as provided in subsection (D) of this section, the court shall proceed according to its traditional practices in partition sales.

Since a partition action is an equitable action, the Appellate Court may find facts in accordance with its view of the preponderance of the evidence. *Anderson*, 382 S.E.2d at 899. "However, this broad scope of review does not require the appellate court to disregard the findings of the master, who saw and heard the witnesses and was in a better position to evaluate their credibility." *Perry v. Heirs at Law & Distributees of Gadsden*,

313 S.C. 296, 437 S.E.2d 174, 177 (Ct. App. 1993), *aff'd as modified*, 316 S.C. 224, 449 S.E.2d 250 (1994).

I. THE RIGHT OF FIRST REFUSAL UNDER SECTION 15-61-25

The trial court properly ordered partition in kind of the jointly-owned real property when Stanley Josey and the Trust Defendants both asserted a right of first refusal to buy out under §15-61-25.

While each and all of the Defendants asserted a right of first refusal under § 15-61-25 to purchase the 32 acres, the Special Referee declined to grant any of the Defendants the right to purchase and, instead, awarded partition in kind, for the reasons explained in his order:

> The court declines to grant to any of the non-petitioning parties the right to purchase the petitioning parties' interest in the subject real estate for the following reasons: First, the Court cannot grant to more than one party the same right. If the Court were to grant to one of the non-petitioning parties the right of first refusal, the remaining defendants in this matter would by default be deprived of the same right. Second, the Court would be forced to arbitrarily award one of the petitioning parties the right of purchase under the circumstances of this case. This Court does not desire to, nor should it be forced to, arbitrarily award the right of purchase to one party among the five possible selections in this case. Third, the grant to one party of the right of purchase the petitioning party's interest will not resolve the problem which exists among the Plaintiff and the other Defendants and Defendant Stanley Josey. The parties in this matter deserve a final resolution of this matter and a purchase by one of the non-petitioning parties will leave the parties in essentially the same situation that currently exists. For instance, if Stanley is allowed to purchase the 1% interest owned by the Plaintiff, the parties will still own an interest in contiguous tracts of land and the problems which have brought the parties to this litigation will continue. Fourth, the proposal submitted by Plaintiff in this matter provides for a reasonable financial resolution to this matter consistent with the equitable principles to be imposed by this Court that an award of the right of purchase would not adequately address.
> Therefore, when the Court considers all of the equities in this matter, it declines to grant to any Defendant as non-petitioning party the right to purchase any of the petitioning party's interest in the subject real estate or personality [sic.].

[ROA 6; Order, p. 4.]

Stanley challenges the denial of his right of first refusal on the ground articulated in his Statement of the Issues on Appeal: "In an action to divide jointly owned property, whether a group of co-tenants may lawfully defeat an opposing co-tenant's right to purchase the property by having one of them act as a plaintiff is a partition action so that the remainder – named as defendants but cooperating with the plaintiff – can also request a buyout?" Respondents submit that Stanley did not timely or properly preserve his stated ground in the trial court, and that there is no legal basis to favor Stanley's asserted right of first refusal over the competing assertion by the other Defendants.

A. The Appellant/Defendant Stanley Josey did not preserve his challenge to the partition in kind.

In his Complaint, Rainey alleged that the Josey Family Trust had conveyed a 1% interest to each of the four heirs [¶6] and gave notice to all the Defendants of their rights under § 15-61-25 [¶11]. [ROA 31-32; Complaint.] Each and all of the Defendants gave notice asserting their right of first refusal under §15-61-25 in their pleadings. Stanley made no pretrial objection to the assertion of a right of first refusal by his co-Defendants. Nor did Stanley make any objection at the beginning of the trial, when he and the Trust Defendants both reasserted and placed on the record their requests to buyout the other tenants. [ROA 156; 4/27/11 Tr. 11.] At the conclusion of the trial, Stanley reasserted his demand to buyout the others and complained about their efforts to make him the "bogeyman," but still, he made no objection to their right of first refusal. [ROA 447-48; Tr. 302-03]

Stanley did file a post-trial Rule 59 motion for a new trial and/or reconsideration; however, he did not articulate any grounds. Instead, Stanley simply stated: "for reasons to be set out at a hearing on the instant motion." [ROA 68; New trial motion, dated July

14, 2011.] On July 19th, Stanley served an "Addendum" to "supplement" his Rule 59 motion, in which he asked the Court to reconsider its motion in regards to: "1. The purchase of the property by a non-petitioning co-tenant." [ROA 61; Addendum, dated July 19, 2011.]

At the hearing on August 2, 2011, Stanley acknowledged that the Court was presented with multiple co-tenants asserting a right of first refusal and that the statute does not address such a situation of competing interests. [ROA 129-31; 8.2.11 Tr. 5-7.] Stanley noted that it was a new statute and there was no case law yet, and argued that: "[I]n that case where you have got these competing interests, I think that Your Honor should have allowed both of them to buyout the partitioning co-tenant or allow it to go up for public sale." [ROA 140-44; 8.2.11 Tr. 7:16-20.] In the process of his argument, Stanley asserted:

> But the fact of the matter is the way that they captioned the case and the way that they deeded out the property in those One Percent (1%) interest; you know, obviously, it was an attempt to prevent Stan from being able to buy out the property, which is what that Statute is for, is to keep the property in the family, and if a non-partitioning co-tenant wants to buy it, he should be able to buy it." [ROA 132; 8.2.11 Tr. 8:11-19.]

Respondents submit that the Stanley's attempt to raise this issue of the alignment of the parties at the hearing on his post-trial motion was too late to preserve the issue for appeal.

It is well settled that no issue will be considered on appeal unless it has been raised to and ruled upon by the trial court:

> It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.

Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731, 733 (1998). It is also well settled that an issue may not be raised for the first time in a post-trial motion. *McGee v. Bruce Hosp. Syst.*, 321 S.C. 340, 468 S.E.2d 633, 637 (1996).

> 'There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.' Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002).

S. C. Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903, 907 (2007). Respondents submit that any objection to the alignment of the parties or the validity of the Trust Defendants' right of first refusal should have been made by Stanley at the beginning of trial when the Defendants each and all asserted their right of first refusal, or at least at the conclusion of the trial. Under the issue preservation rules, Stanley's attempt to raise the issue for the first time in his post-trial motion simply was too late.

In addition, Respondents would note for the Court's attention that Stanley did not note any issues in his Rule 59 motion; thus, it does not meet the requirement of Rule 7(b)(1), SCRCP, that motions "shall state with particularity the grounds therefore, and shall set forth the relief or order sought." An objection must be meaningful with sufficient specificity to inform the trial court of the point being argued. *Wilder Corp. v. Wilke*, 497 S.E.2d at 733; *S. C. Dept. of Transp. v. First Carolina Corp. of S.C.*, 641 S.E.2d at 907. The particularity requirement "is to be read flexibly in 'recognition of the peculiar circumstances of the case.' " *Camp v. Camp*, 386 S.C. 571, 689 S.E.2d 634, 636 (2010). Here, there is more than a lack of particularity in that Stanley did not state any grounds in his motion. See *Ulmers v. Willingham*, 238 S.C. 503, 120 S.E.2d 859, 860 (1961) ("It has been held that 'where no ground is stated in the motion for a new trial no

question is presented by the motion, and the order denying the motion must be affirmed.'"). To the extent that it might be argued that Stanley arguably raised the issue in the Addendum with the most obscure reference to the topic of "The purchase of the property by a non-petitioning co-tenant," Respondents maintain that the Addendum was served beyond the 10 day period and still is insufficient to inform the Special Referee that he was objecting based on the alleged collusion between Cecil's Heirs.

B. There no legal basis to grant Defendant Stanley Josey a right of first refusal to buy out his co-owners based on the fact that the other co-Defendants asserting a competing right of first refusal cooperated with the Plaintiff.

Section 15-61-25(a) provides that: "The nonpetitioning joint tenants or tenants in common shall be allowed to purchase the interests in the property...." Stanley argues that he is the only non-petitioning party because his nieces and nephews are all on the other side of the "battlefield" jointly seeking the partition and "the record shows complete coordination and commonality of interest between them." [Appellant's Brief, p.7.] These Respondents submit that Stanley has not cited to any legal authority that supports his proposition that should lose their right of first refusal because they have a common interest in severing their joint ownership with Stanley or because they have cooperated with Rainey. In the absence of any statutory provision for how to handle the situation, as here, where more than one non-petitioning party asserts a right of first refusal, and in particular given the family dynamics and history of animosity and harassment, the Special Referee properly looked to the long-standing, equitable principles generally applied in partition cases and wisely concluded that Cecil's Heirs, as abutting landowners and homeowners, should receive the 32 acres.

In the context of this partition action, collusion must be distinguished from collaboration and cooperation. Collusion – in the context of some type of wrongful conspiracy and subject to such judicial remedy – cannot be predicated upon a mere community of interest in the outcome of the litigation between the plaintiff and certain of the defendants. Collusion is not proven by the fact that the plaintiff acquired the interest sued upon for the express purpose of bringing the action. See *Benedict v. Seiberling*, 17 F.2d 841, 852-53 (N.D. Ohio 1927). Moreover, the only evidence is that the Trust gave each of the beneficiaries 1%; there is no other evidence about the motivation of the parties for that decision. [See ROA 138; 8.2.11 Tr. 14.]

As to the language of the statute itself, it should first be noted, as the Special Referee and all counsel agreed, this is a new statute and there are no reported cases addressing any issues related to this newly-created right of first refusal. At the post-trial motion hearing, Stanley argued that the statute does not allow for any exceptions to the right of first refusal based on the fact that "folks don't get along." However, Stanley also acknowledged that where there are competing interests willing to buyout the partitioning co-tenant, the trial court would have to "think it through."[16] [ROA 130; 8.2.11 Tr. 6.] The Special Referee gave serious consideration and "thought it through" and concluded that he could not grant the right of first refusal to more than one party and that dividing

[16] Stanley suggested that persuasive authority might be found from another state such as North Carolina or Georgia or somewhere else in the southeast. [ROA 131; 8/2/11 Tr. 7.] Yet, on appeal, Stanley cites to no such authority for any other jurisdiction. Research reveals that in fact, Georgia does have a new statute dealing with cotenants requesting partition, Ga. St. §44-6-185, however, it is does not go into effect until January 1, 2013. In addition, the Georgia statute is distinctly different in many aspects from our statute. It only provides a buyout right where a cotenant requests partition by sale, and it provides that if more than one cotenant elects to buyout, then they each are allowed to buy a fractional share.

Rainey's 1 % between Stanley and the other four Defendants would not resolve the problem which exists them.

On appeal, Stanley is taking the position that the Special Referee could have let each of the five Defendants buy part of Rainey's single 1% - which simply seems unfathomable, and in fact, that is not how this case was tried to the Special Referee. This case was not tried as a partition of just Rainey's single 1%. Throughout the trial, the case was tried to the court for the purpose of partitioning all the property. Notably, Stanley joined in Rainey's request to physically partition the fertilizer plant and Britton Farms and the personal property, [Answer ¶ 9; ROA 36], and Stanley is receiving ALL of the Fertilizer Plant and Britton Farm even while he has been demanding the right to purchase all of the 32 acres.

Stanley's Counsel stipulated at trial that these people do not like one another, and the history of the dissension and escalating hostilities is well-documented in the evidence as recited above. The evidence surely supports the conclusion that it is not in the best interests of any of the parties for them to own property jointly or adjacent to each other. Since the statute does not direct how the courts must handle competing rights of first refusal, and in light of all the facts and circumstances showing upon the record, the Special Referee wisely ordered partition in kind. See *Anderson*, 382 S.E.2d at 899 ("[property] certainly must be partitioned due to the enmity between the parties...").

II. THE FAIRNESS OF THE PARTITION IN KIND UNDER §15-61-50

The trial court order of partition in kind is fair and impartial and without injury to Stanley Josey.

There is no disagreement with Stanley's recitation of the fairness standard of partition in kind. As stated above, the law favors partition in kind if it is fair and

impartial without injury to any of the parties in interest. Stanley argues that: "The Special Referee's order injures Stanley and is not fair because Stanley must remove his property and store it at his own expense." [Appellant's Brief, p. 14.] The Trust Defendants submit, however, that this issue is not preserved for appeal because Stanley did not timely or properly raise the issue at trial. In addition, the Trust Defendants maintain that Stanley's expenses in removing and storing his property does not make the partition unfair when Stanley has conceded that all the jointly-owned property have been divided in "roughly the appropriate proportions." [Appellant's Brief, p. 15.]

A. Stanley Josey did not timely or properly preserve his challenge to the fairness of the partition in kind on the ground now raised on appeal.

At trial, Stanley argued about the fairness of a partition, but the basis of his argument was that he deserves all or some part of the 32 acres because he is the last surviving son in his family:

> [F]irst of all, I am the last surviving son in my family; my whole family is gone. I'm sixty (60) years old. I've recently retired and I'm – I'm too old to start over. I'm too old – to build new buildings, start all of that over again, and I'm already established back there. And there's a fair way to divide that land back there so we both get expansion room, we both getting buildings, we both get a pond. There's a fair way to do it." [ROA 359-60; Tr. 214:24 – 215:7.]
>
> ****
>
> I want what's fair, and when they started this with me and when I decided, I said, "Well, since I'm the last son, if anybody is to buy anything out back there, it should be the son, not the nieces and nephews." In my book, the way things work – it's like wild animals respect the pecking order. You've got your mothers and your fathers, you've got your sons and your daughters, and then you've got your nieces and nephews. And they don't jump ahead. They should respect me and at least see that. But they have never respected me." [ROA 361; Tr.216:3-12.]
>
> ****

> Q. Your testimony is simply that you've got to have some part of the thirty-two (32) acres?
>
> A. I think I deserve it. I'm a son. I'm the last son. They're nieces and nephews. I think the son should deserve half of that back there. I sure do." **** Yes, because I have plans for back there. I'm retired and I want to use it. I want to fish, and I want to – I want to enjoy my antique cars. I want to use them. Sure."
>
> [ROA 384-85; Tr. 239:25 – 240:11.]

When Stanley testified at trial that he did not want to start over, he did mention that he would have to build a new upholstery shop and a new woodworking shop - "by the time you build a building that will handle my stuff and put all that in it, the price is just astronomical." [ROA 390; Tr. 245:19-21.] However, Stanley did not mention moving expenses and he did not offer any evidence to quantify building a new building.

As noted above, Stanley did not specify any grounds in his Rule 59 motion, and in his untimely Addendum, he only stated three issues:

> 1. The purchase of the property by a non-petitioning co-tenant.
>
> 2. The lack of a ruling in regards to Stanley Josey's request for declaratory judgment in regards to the easement, and
>
> 3. The Court's decision in regards to the causes of actions relating to criminal charges brought against Stanley Josey by the Plaintiff and co-Defendants. [ROA. 61; Addendum.]

None of these groups even arguably raise the alleged unfairness of the partition with any degree of specificity.

While Stanley did raise the unfairness issue at the post-trial motion hearing, the Respondents submit that it was too late. In addition, Stanley reasserted his unfairness argument in the context of his position as the "only living son:"

> [I]t is our position that you should have given more consideration to the equities of it and the inequities of it that result to my client, Stan. He is the

> only living heir – only living son ... of Wofford Josey and he has been – he grew up on that property, he has been working on that property for fifty-three years or fifty-four years, and for him to be left without any of that Thirty-two point nine (32.9) acres is just an inequitable result. And as a practical matter, Your Honor, for you to award him half of those antique cars out there and then to not allow him any storage space for them, not only does he lose the thirty-two point nine (32.9) acres, but he also loses access to the buildings And he is going to have to buy buildings or build buildings somewhere to store those cars. So, I just think that it is, you know, it is inequitable; I don't think it is fair. I think Your Honor should have considered more the sentimental side of it and Stan's place in the family tree more that you did and given some consideration to sentimental value. [ROA 135-36; 8.2.11 Tr. 11:6 – 12:7.]

To the extent that Stanley made a passing reference to the fact that he was going to have to provide storage for the cars, such reference does not approach the specificity requirement of Rule 7. The Respondents submit that a bare assertion that it will be expensive is not sufficient to preserve his claim of unfairness. *Compare Moore v. Sumter County Council*, 300 S.C. 270, 387 S.E.2d 455, 458 (1990) ("A bare assertion that an administrative remedy is too expensive would not suffice to support excuse for not exhausting administrative remedies.")

"Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.' " *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543, 546 (2000) (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). Stanley has never submitted any evidence to attempt to quantify his moving and storage expenses and he has never asked the Court to make any adjustment in the division to factor in his moving and storage expenses. Accordingly, he has not preserved his argument for review in this Court.

B. The expenses Stanley will incur in removing and storing his personal property elsewhere does not constitute a cognizable injury or render the partition award unfair.

If the Court reaches the merits of Stanley's unfairness issue, it is important for the Court to note that the partition does not deal only with the 32 acres and the personal property in those buildings. There is also a note and mortgage and two other parcels of real estate, and the fairness of the partition must consider all the properties. Stanley contends that "it is not fair to divide the 32 acre tract, the buildings on it, and the personal property in the buildings by giving the land and buildings to the Josey Family Trust and awarding Stanley a sizeable amount of the personal property." [Appellant's Brief, p. 16.] However, Stanley is getting more than just a share of the personal property in the buildings. He was awarded the note and mortgage as well as the Fertilizer Plant and Britton Farm, and he admits that the division of all the property is "in roughly the appropriate proportions."

The Respondents further note that Stanley has not cited any legal authority for his argument that his moving and storage expenses should be a factor in the fairness analysis. In *Campbell v. Jordan*, the Court discussed the factors that go into the consideration of whether a partition is fair and equitable to all parties of the action. The Court noted that the length of ownership and sentimental attachment to property may be considered, but the determining factor is the pecuniary interests of all of the parties. 382 S.C. 445, 675 S.E.2d 801, 804 (Ct. App. 2009) (*citing Zimmerman v. Marsh*, 365 S.C. 383, 618 S.E.2d 898, 901 (2005)). In considering the pecuniary interests of the parties in that case, the Court focused on the value of the properties and found that the there was no evidence of any current property values is in the record, and the appellants had not

challenged the special referee's valuation of the property or his division of the ownership interests to each party. *Id.* at 95 (citing *Wilson v. McGuire*, 320 S.C. 137, 463 S.E.2d 614, 616 n. 2 (Ct.App.1995) (stating that the allocation of a preselected tract to one heir is not prejudicial to other heirs unless evidence is presented to demonstrate that the preselected tract is more valuable than the other tracts)). In comparison, Stanley, likewise, has not challenged the property values or the division of the ownership interests.

In contrast to the cited authorities above which focus on the pecuniary interests in terms of the valuation of the jointly owned property, Stanley has not cited any cases in which ancillary costs, such as moving or storage expenses, are an appropriate consideration in determining whether the partition in kind is fair. Stanley has also ignored the countervailing consideration that if he is awarded the 32 acres with the nine buildings, then these Respondents will be put to the burden of having to move and store their own antique cars and personal property.[17]

To the extent that sentimental attachment to property may be a consideration, Stanley's argument that he deserves the 32 acres because he is the sole surviving son is not supported by the law or equity. In the first place, Wofford was survived by two sons – Stanley and Cecil – and they each received half which arguably fulfilled any rational argument based on family heritage. Stanley has no basis for his argument that he is more deserving of the 32 acres than Cecil's Heirs who are fully entitled to their father's share

[17] In addition, to the extent that Stanley has argued to this Court in his Petition for a Writ of Supersedeas, that he cannot afford to move his property or acquire storage, Stanley would have to ask this Court to ignore the evidence in the trial record that he is by no means a poor man. Stanley owns the property his father gave him back in 1994 to make his home, and he received over 1200+/- acres of farmland, timberland, and bottomland in the dissolution of the Stoney Run Farms family partnership, and he is getting the note and mortgage, Britton Farm, and the Fertilizer Plant in this partition action. His claims that he cannot afford to move or store the property ring bogus.

of the jointly-owned property. In addition, as to Stanley's sentimental attachment because he grew up there, the record shows that Stanley sold his share in this childhood home to Rainey. The record shows that Stanley has received over a thousand acres of Josey family land, as a result of the dissolution of the family partnership and the partition award, and the fact that Cecil died first, does not give him any greater right to the 32 acres than Cecil's Heirs.

Finally, the animosity between the parties and Stanley's harassment of the Respondents both on the 32 acres and their neighboring property may not be a factor in valuing the property or in dividing the property in the appropriate shares. However, those considerations of enmity, amply shown in this record, are proper equitable considerations for deciding that partition in kind is necessary and in distributing the various properties to the parties. Given the evidence of physical altercations, three criminal charges, and eight incident reports filed by the Sheriff's Department, the Special Referee wisely realized that it is best for all the parties that the 32 acres be awarded to Cecil's Heirs.

CONCLUSION

Based on the foregoing, the Respondents submit that the record will show that Appellant Stanley Josey did not properly preserve the issues he is raising on appeal. As to the merits of the issues, the Respondents maintain that the evidence in the record and the applicable law fully support the Special Referee's award of partition in kind as fair and impartial and without any cognizable injury to any of the parties.

First, there is no legal basis to grant Defendant Stanley Josey alone the right of first refusal based on the fact that the Trust Defendants cooperated with Rainey Josey. Second, the expenses Stanley will incur in removing and storing his share of the personal property elsewhere do not constitute a cognizable injury or render the partition award unfair under §15-61-50.

Accordingly, the Respondents/Defendants Josey Family Trust, Spenser Josey, Elizabeth Ann Geddings, and Courtney Gamble respectfully request that the Court affirm the partition award.

Respectfully submitted,

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Certification of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

January 22, 2013

Deborah H. Sheffield

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lee County
Court of Common Pleas

Haigh Porter, Special Referee

Case No. 2010-CP-31-195

Cecil L. Josey, Jr., — Respondent,

v.

Stanley D. Josey, Courtney Gamble, Spencer Josey, Elizabeth Ann Geddings, Cecil L. Josey, Jr. as Trustee of the Josey Family Trust, — Defendants,

Of Whom Stanley D. Josey is the — Appellant,

And of whom Courtney Gamble, Spencer Josey, Elizabeth Ann Geddings, Cecil L. Josey, Jr. as Trustee of the Josey Family Trust, are — Respondents.

Certificate of Service

I certify that on this 22nd day of January 2013, a copy of the foregoing **Final Brief of Respondents Courtney Gamble, Spencer Josey, Elizabeth Ann Geddings , and Cecil L. Josey, Jr., as Trustee of the Josey Family Trust** was served on Appellant and co-Respondent Cecil L. Josey, Jr. by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed to his Counsel of Record of as listed below:

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