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 RESPONDENT CECIL L. JOSEY, JR.

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STATEMENT OF THE ISSUES ON APPEAL

Respondent Rainey Josey would restate the issues on appeal as:

I. Whether Appellant Stanley Josey timely and sufficiently preserved his issues on appeal where:

A. Appellant did not raise any challenge at trial or in his post-trial motion to the validity of the Trust Defendants' right of first refusal under S.C. Code Ann. §15-61-25 on the ground that the Respondents have all colluded against him in bringing this partition action?

B. Appellant did not raise his challenge at trial or in his post-trial motion to the fairness of the partition of the 32 acres on the ground that it will be expensive for him to move and store his personal property?

II. Whether the Special Referee properly ordered partition in kind of the jointly-owned real property because there is no legal or logical basis to grant Stanley a right of first refusal where the other Defendants also asserted a right of first refusal under §15-61-25?

III. Whether the Special Referee's partition award is fair and impartial under the partition statute, S.C. Code Ann. §15-61-50 because, regardless of how much Stanley may have to spend moving and storing his personal property, there is no challenge to the valuation of the properties or the division of the shares?

STATEMENT OF THE CASE

This action was commenced by Cecil L. Josey, Jr. ("Rainey") with the filing of a summons and complaint on September 30, 2010, seeking a partition in kind of certain parcels of land and personal property he jointly owns with the Defendants. (R.p. 27; Summons and Complaint.) The jointly owned property at issue consists of a note and mortgage, three parcels of real property (Britton Farm, a Fertilizer Plant, and 32.98 acres[1] with nine buildings and sheds"), and a considerable number of items of personal property consisting of eight vintage automobiles along with parts and tools in the buildings/sheds on the 32 acres.

The individual Defendants are surviving heirs of the late C. Wofford Josey, who bequeathed and devised the subject 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 held by the Josey Family Trust (46%) and his four children, Plaintiff Rainey (1%), and Defendants Spencer Josey (1%), Elizabeth Ann Geddings (1%) and Courtney Gamble (1%).

By that complaint, the Defendants/joint owners were given notice of their rights to purchase the property pursuant to S.C. Code Ann. § 15-61-25, which provides that when a joint tenant files petition for partition, the nonpetitioning joint tenants have a right of first refusal to purchase the interests in the property.

Stanley Josey filed an answer and counter-claim. (R.p. 34; Answer and Counterclaim, filed 10/2010.) Stanley requested that the Court equitably divide the

[1] Throughout this litigation, this parcel has been referred to as "the 32 acres." For continuity, the Respondent will also use that reference.

personal property (¶ 8) and two of the parcels of land -- the Britton Farms and the Fertilizer Plant (¶ 9). However, Stanley gave notice that he wanted to purchase the 32 acres (¶10.). Stanley also counterclaimed for a declaration that he holds an easement over a paved driveway to the 32 acres, which is located on land personally owned by Rainey Josey, and he sought injunctive relief to prevent Rainey from obstructing his right of ingress and egress. Stanley thereafter filed an amended answer, counterclaim and cross-claim, adding claims of false imprisonment, malicious prosecution, and abuse of process based on allegations that the Plaintiff and Co-Defendants had filed warrants against him for malicious injury to property and trespass. (R.p. 41; Amended Answer, dated 12/13/10.)

Rainey filed a reply to the counterclaim on January 14, 2011, denying the allegations and giving notice that he is willing to purchase Stanley's interest in the 32 acres. (R.p. 50; Reply.) The Trust and the other individual owners, Spencer, Courtney, and Elizabeth Ann ("the Trust Defendants"), filed an Answer and Reply to the cross in which they gave notice that they will purchase the interest of Rainey and Stanley in the 32 acres (¶18). (R.p. 53; Answer & Reply, filed 3/8/11.)

On motion of the Plaintiff Rainey Josey and by agreement of the other parties, the matter was referred to the Honorable Haigh Porter, as Special Referee, to enter a final judgment. (R.p. 58, 1; Motion to Refer, filed 9/30/10; Order of Reference, filed 3/31/11.) The matter came before the Special Referee for a trial on the merits on April 26, 2011. Thereafter, 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 fairly and equitably divided. The Special Referee ordered partition in

kind, dividing the property and awarding certain items of personal property and real property to the parties. Stanley receives the note and mortgage, Britton Farm, the Fertilizer Plant, all the eight vintage automobiles and a specified portion of the parts and tools. Cecil's heirs receive the 32 acres and all the parts and tools not otherwise allocated to Stanley. (R.p. 3; Order, filed 7/711.)

The Special Referee's order gave Stanley 180 days to remove his personal property from the 32 acres and set forth specific requirements regarding the logistics of the removal, including advance notice and time limits. The Special Referee specifically ordered that: "Stanley shall not enter the property except on those dates and times designated for removal of the items of personal property." (R.p. 8; Order, p. 6.)

Stanley served a Rule 59 motion for a new trial on July 14, 2011, and subsequently filed an "Addendum" to supplement his Rule 59 motion on July 19, 2011. (R.p. 60, 61; Motion, Addendum.) The Special Referee filed an order denying the motion on August 9, 2011. (R.p. 12; Amended Order.)

Stanley filed a notice of appeal with the Court of Appeals and made a motion in the trial court for a stay pending appeal. (R.p. 87; Motion, filed 8/18/11.) Rainey Josey also made a motion in the trial court to amend the order on September 13, 2011, seeking additional restrictions on Stanley's ability to enter upon the 32 acres for the single purpose of removing his personal property because Stanley had been coming on the 32 acres causing trouble, but not removing any of the personal property items he received under the partition. (R.p. 63; Motion to Amend Order, 9/13/11.)

The Special Referee denied Stanley's motion for a stay due to the problems and friction between Stanley and the other parties. The Special Referee also denied Rainey's

motion, however, he did clarify the intent of his order: "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." (R.p. 25-26; Order, filed 3/21/12, pp. 2-3.)

STATEMENT OF THE FACTS

The People and the Properties

Wofford Josey died November 4, 1998, survived by his two sons, Cecil and Stanley. He left considerable properties to his sons, which included the properties subject to the partition act:

1. Note and Mortgage due Josey Marital Trust[2] 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[3];

3. Fertilizer plant consisting of 4.6 acres on Harris Street in Bishopville appraised at $30,000[4];

4. 32.98 acres appraised at $65,960 ($2,000 per acre) with nine (9) buildings/sheds separately appraised at $61,000[5];

5. Vintage Automobiles, including[6]

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[2] This relates to property that Wofford sold and self-financed. The note and mortgage were held by the Josey Marital Trust created by Wofford. Stanley and Cecil were the beneficiaries and Rainey was named the trustee; Cecil's half went to his Josey Family Trust. (R.p. 246; Tr. 101.) Under the Special Referee's order, Stanley becomes the sole beneficiary of the Josey Marital Trust and can elect himself as trustee. (R.p. 7; Order, p. 5.)

[3]The appraisals of the three parcels of real property were provided by professionals selected by all the parties. (R.p. 450-473; Plaintiff's Ex. 1-3.) Stanley did not object to the appraisals at trial. (R.p. 384; Tr. 239.) Stanley does not challenge the valuations on appeal.

[4]This property was previously used as a fertilizer plant, but it is not currently operational. (R.p. 467; Plaintiff's Ex. 2.)

[5](R.p. 473; Plaintiff's Ex. 3.)

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

a 1922 Velie appraised at $20,000,

a 1926 Essix appraised at $2,500

a 1966 Ford appraised at $1,500,

a1924 Nash appraised at $2,500,

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

a 1960 MGA appraised at $2,500,

a 1928 Studebaker appraised at $2,500, and

a 1922 Jewett appraised at $3,500; and

6. Parts and Tools appraised at $45,900.[7] (See R.p. 534; Plaintiff's Ex. 30, attached to Order.)

Cecil conveyed his half to his Josey Family Trust, the beneficiaries of which are his four children. (R.p. 192, 504; Tr. 47, Plaintiff's Ex. 7.) The Trust conveyed 1% to each of the four children outright. (R.p. 192, 527; Tr. 47, Plaintiff's Ex. 20.)

As the Special Referee noted, "[t]he real bone of contention is whether the 32.8 acre parcel should be partitioned, allotted or sold." (R.p. 5; Order, p. 3.) The 32 acres – located on Elliott Highway in the City of Lynchburg in Lee County abuts 8.4 acres owned personally by Rainey Josey where he makes his home. Rainey's home tract was originally part of the joint property Stanley and Cecil inherited from Wofford, but Rainey

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[7] The appraisal of the parts and tools was prepared by Rainey with the assistance of Spencer. (R.p. 9; Plaintiff's Ex. 28.) Stanley did not introduce any appraisals to challenge the valuations; and he does not challenge the valuations on appeal. The Court noted that the Plaintiff's Exhibit 30 contains a math error - the total is $45,900, not $34,000. (R.p. 5; Order, p. 3.) There are also other items of personal property located in these buildings owned by various of the parties individually. (R.p. 10; Plaintiff's Ex. 29, as attached to the Order.)

purchased the property from Stanley[8] and the Trust in 2001. (R.p. 174-75, 510, 517; Tr. 29-30, Plaintiff's Ex. 8, 10.) Wofford had purchased the property in 1954 and then several years later, built the house where Stanley and Cecil were raised during the latter part of their childhood until they were grown and left home. (R.p. 281; Tr. 136.)

The 32 acres also abuts 3.5 acres, which Wofford had given directly to Cecil in 1994, who in turn deeded it to the Josey Family Trust in 2001. The house on this tract is where Cecil's children were raised and where their mother still lives. (R.p. 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:

1. 40 x 80 woodsided shed/enclosure with a tin roof;
2. 26 x 41 covered shed with a tin roof
3. 36 x 41 enclosed with a shed
4. 27 x 60 workshop with concrete floor and aluminum roof;
5. 21 x 101 car storage with 10 door metal frame;
6. 40 x 60 workshop with steel frame;
7. 32 x 90 enclosed with rear shed CCB/Wood
8. 36x 60 Hoover building; and
9. Two-story cabin 2150+ square feet.[9] (R.p. 473; Plaintiff's Ex. 3.)

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[8] Rainey paid Stanley $60,000 for his ½ interest. (R.p. 392; Tr. 247.)

[9] Rainey and Spencer helped their grandfather, Wofford, build that cabin. (R.p. 287; Tr. 142.)

Of the nine (9) buildings, 1, 3, 4, 5, and 9 pull electricity from Rainey's home meter; buildings 6, 7, and 8 have a separate power meter, however, the electric bill was paid by the Stoney Run partnership until it dissolved, and now it is paid by the Josey Family Trust. All the buildings draw water from a well located on Rainey's home tract. (R.p. 200; Tr. 55.)

In addition to the jointly-owned vintage automobiles listed above, the nine buildings are full of car parts and equipment of all kinds accumulated over the years from the family's long ago farming operations to the car restoration business as well as various household items that ended up in storage out there. Plaintiff's Ex. 28, which is attached to the Order, represents Rainey and Spencer's attempt to list big items (more than $500) and groups other items based on type and location. (R.p. 9.) The Special Referee actually visited the property and was "awestruck" by the great quantity and the magnitude of any attempt to appraise them by item. One might compare the property to what can be seen on the currently popular cable TV shows "American Pickers" on A&E.

In addition to the jointly-owned personal property, which is the subject of this partition action, the parties stored their individually owned property in these buildings and on the 32 acres. For example, Rainey has various farming and yard maintenance equipment and tools and each of Cecil's children as well as Stanley have their own vintage automobiles. The individually owned items are listed on Plaintiff's Exhibit 29 which is also attached to the Order. (R.p. 10.)

Wofford had also formed a family partnership, Stoney Run Farms, the partners in which included Wofford, his sons Stanley and Cecil, and his grandchildren/Cecil's four

children.[10] (R.p. 169; Tr. 24.) While this partnership is not the subject of this partition action, certain facts regarding those properties and the dissolution of the partnership are relevant to Stanley's claims of unfairness. When the Stoney Run partnership was dissolved and the assets were distributed in 2010, Stanley received 181 acres ("the Brown Home Place") which surrounds the home Wofford gave him[11] along with 1000+ /- acres of cropland, timberland, and bottomland ("the Georgia Pacific tract"). (R.p.183-88; Tr.. 38-43.)

The Family Discord

Family dissension over the jointly owned property began in 2006. The buildings were deteriorating and Stanley would not contribute to the upkeep on the properties.[12] (R.p. 208-09; Tr. 63-64.) Over the next several years, the parties still were communicating, getting the properties appraised, and trying to separate assets until things began to deteriorate in 2009, after an incident when Stanley and his wife trespassed into Rainey's office on his privately owned land. Rainey confronted them, words were exchanged, and Stanley assaulted Rainey. (R.p. 212; Tr. 67.) No police report was made; however, Stanley does not deny the incident happened. Stanley and his wife both

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[10]Stanley does not have any children.

[11] Wofford deeded the land to Stanley for his home on the same day he deeded the 3.5 acres to Cecil. (R.p. 523; Plaintiff's Ex. 11.)

[12] When Rainey wanted to build a dock at the cabin, Stanley refused to contribute, so Rainey built and paid for it personally. The roof on Building One was rotten and Rainey paid to have it replaced. Rainey bought a lawn mower and maintains the yards around the buildings himself. Rainey also bought two (2) air conditioners for the cabin. (R.p. 232-33, 235; Tr. 87-88, 90.) Stanley admitted that he did not want to put his money into those properties: "When I invested my money, I wanted it to be on my things, yes sir." (R.p. 387; Tr. 242.)

testified that he grabbed Rainey by the collar, although they deny that Stanley actually grabbed Rainey by the throat. (R.p. 366, 407-08; Tr. 221, ll. 23-25; 262-63.)

The problems continued in January of 2010, when Stanley started turning on radios at the cabin at full volume and leaving them on day and night. He claims that he was doing it to scare the squirrels away because he supposedly has a soft spot for wildlife and he did not want to shoot the squirrels. (R.p. 333-36; Tr. 188-191.) However, the noise was particularly problematic because of the proximity of the cabin to Rainey's house (90 yards) and his mother's house (60 yards), but Stanley did not care about disturbing Rainey's family in their homes. (R.p. 215, 333-34; Tr. 70, 188-89.) Rainey would unplug the radios, and Stanley would come right back and plug them in. (R.p. 221; Tr. 76.) This was particularly disruptive to Mrs. Josey whose home is closest to the cabin. (R.p. 307-08; Tr. 162-63.) Finally, Rainey just turned the electricity to the cabin off.[13] (R.p. 222-23; Tr. 77-78.)

Other problems included Stanley trespassing on Rainey's property to use the asphalt driveway. The driveway is located on the 8.44 acres that Stanley and the Trust sold to Rainey in 2001. (R.p. 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 goes over to the cabin. (R.p. 283; Tr. 138.) For many of the years after Rainey bought and moved there, Stanley most often would use the north access to the buildings on a dirt road shared with their neighbor.[14] (R.p. 281-84; Tr. 136-39.) However, when the

[13] Rainey notified Stanley's attorney of his intent to do so, and he did turn the power on with notified that Stanley wanted to use the cabin. (R.p. 222-23; Tr. 77-78.)

[14] The first half of the dirt road in on the Defendant's property and the second half in on the property of Ms. Richardson. (R.p. 284; Tr. 139.) Ms. Richardson has never

troubles escalated, Stanley started 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. (R.p. 224-25, 531; Tr. 79-80, Plaintiff's Ex. 26.)

Stanley claims that he automatically retained an easement across that driveway when he sold his half interest 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." [15] (R.p. 353-54, 392; Tr. 208, l. 20 – 209, l. 1; Tr. 247, ll. 1-14.). Stanley asserted a counterclaim to determine his right to an easement, which was not addressed or ruled upon in the Order. And although Stanley raised the easement issue in his Motion for a New Trial, the Amended Order still does not address the issue. However, Stanley has not raised any issue on appeal regarding the easement.

Eventually the situation became so difficult, that Rainey installed cameras on his house to monitor the property and document Stanley's trespassing. (R.p. 225-26; Tr. 80-81.) 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. (R.p. 226-27; Tr. 81-82.) Sometimes Stanley would do this everyday or night when he was mad about something. (R.p. 227-28; Tr. 82-83.) Stanley

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restricted access to her half. (R.p. 284; Tr. 139.) Stanley admits in his Petition for Supersedeas that this has been the primary road used by the Josey family for many years.

[15] Stanley testified that he would be needing to widen the paved driveway because he intends on farming and he will need to get the tractors out. (R.p. 346; Tr. 201.)

also resorted to other harassing conduct; as examples, he would park his boat in one of the sheds to block access by the other co-owners, and he has stacked materials in such a way as to block Rainey's access to his own farm equipment. (R.p. 231-32; Tr. 86-87.)

The harassment took an even more personal and physical nature in August 2010 when Stanley disassembled part of the children's tree house and destroyed azaleas in Rainey's own yard[16]. (R.p. 228-29; Tr. 83-84.) That event prompted Rainey to call the police and Stanley was charged with malicious injury to personal property and trespassing. (R.p. 228, 544, 549; Tr. 83, Defendant's Ex. 1, 3.) A courtesy summons was also issued to Stanley for trespassing (hunting) on property formerly part of the Stoney Run Farms, but now owned by the Josey Family Trust, in October 2010.[17] (R.p. 230, 549; Tr. 85, Defendant Ex. 5.) 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). (R.p. 480, 339; Plaintiff's Ex. 4 – Incident Reports; Tr. 194.)

At one point, Rainey recorded Stanley standing on the property line on his backyard yelling profanity, cussing and threatening. (R.p. 269 ; Tr. 124.) Rainey became concerned for the safety of his family so he approached the Sheriff and then took that recording to a Lee County Magistrate who issued a mutual restraining order.[18] (R.p.

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[16] Stanley admitted that he cut the azaleas, although he characterizes it as "trimming" them so he could drive down Rainey's driveway without scratching his vehicles. (R.p. 362; Tr. 217.) He also admitted that he took down a zipline attached to the treehouse, but his excuse was that it was hitting the roof of his truck when he drove down Rainey's driveway. (R.p. 363; Tr. 218.) Stanley insists that it was his right to do so because of the alleged easement he had retained. (R.p. 363-65; Tr. 218 - 20.)

[17] Courtney and Spencer reported Stanley to the DNR. (R.p. 421, 441; Tr. 276, 296.)

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

250, 269-70; Tr. 105, 124-25.) Rainey's wife also testified that she feared for her family's safety, and recounted an incident in the summer of 2010 when Stanley let strangers use the cabin without even telling them. These strangers were shirtless and shooting bow and arrows on the property right next to the children's play area. (R.p. 293-94; Tr. 148-49.) On another occasion, Stanley called ranting and raving, yelling and threatening Rainey's wife, to the point that she had to lock herself and her children in the house in fear. (R.p. 295-96; Tr. 150-51.)

Mrs. Josey, their mother, testified to another occasion in the summer of 2010 when she observed Stanley in a temper, raising and shaking what appeared to be pipe; he was on the jointly owned property, but she still was afraid for her personal safety and the safety of Rainey's family. (R.p. 310-11; Tr. 165-66.) 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. (R.p. 366; Tr. 221.)

Fear of Stanley's erratic behavior has greatly affected Rainey's family to the point that his children have to restrict their outdoor activities around their own home. (R.p. 301-02; Tr. 156-57.) And, while most of the problems and confrontations have involved Rainey because he lives there, Spencer and Courtney testified how they also have been affected. Courtney can no longer use to the cabin for family outings, as she once did, because she wants to avoid the trouble. (R.p. 417; Tr. 272.) Spencer has an antique automobile that he is working on, and someone, suspected to be Stanley, has dismantled some of the parts and scattered them around in different buildings. (R.p. 432-35; Tr. 287-290.)

Evidence submitted during the post-trial motions establish that 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. (R.p. 67, 72; Affidavit of Rainey Josey, Ex. 2 – attorney letters.)

Spencer had installed video cameras on the 32 acre property and Stanley was documented entering onto the property on numerous occasions, for relatively short periods of time,[19] but he removed very little, if any of his property. (R.p. 68-69, 77; Affidavit of Rainey Josey, Ex. 3 - calendar.) The video cameras also recorded Stanley making lewd, obscene and vulgar gestures towards the cameras; covering the cameras to hide what he was doing while in the buildings; ripping down posted signs "camera surveillance in progress;" and using tools and equipment which were awarded to the Trust Defendants. (R.p. 90, 394; Affidavit of Spencer Josey, dated October 10, 2011; Tr. 249.)

In addition, even though the Order only allowed Stanley access to the 32 acres to remove his personal property, Stanley had the audacity to try and claim the right to use the cabin, by posting a calendar in the cabin marking off for days/weeks at a time in the fall and winter of 2011 for his exclusive use, namely: September 9-17, 23-25, 2011; October 1-7, 22-23, 29-20, 2011; November 4-5, 23-26, 29-30, 2011, December 1-3, December 23-25, 2011. (R.p. 68, 83; Affidavit of Rainey Josey, Ex. 4 – cabin calendar.)

[19] Ranging from 5 minutes to very rarely more than 1 hour.

Hearing all this evidence in addition to that presented at trial, the Special Referee refused to grant Stanley's request for a stay, and made it abundantly clear that Stanley was only allowed on the 32 acres to remove his property during that 180-day period. At the conclusion of that hearing on October 10, 2011, Stanley's counsel advised the Special Referee that their appellate counsel was working on a motion to the Appellate Court to seek relief, (R.p. 124; 10/10/11 Tr. 33, ll. 14-22.)

The Applicable Law

Issue Preservation

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. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997).

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).

As to specificity, Rule 7(b)(1), SCRCP, provides that motions "shall state with particularity the grounds therefor, 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).

Partition in Kind

"Partition is a division of property between its co-owners, which every cotenant has a right to demand." 6 S.C. Jur. *Cotenancies* § 47; S.C. Code Ann. § 15-61-10:

> 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.

The law favors partition in kind, over partition by sale, when it can be fairly made without injury to the parties. Anderson v. Anderson, 299 S.C. 110, 382 S.E.2d 897, 899 (1989) (citing Smith v. Pearson, 210 S.C. 524, 43 S.E.2d 479 (1947)); S.C. Code Ann. § 15-61-50:

> 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.

In Few v. Few, 242 S.C. 433, 131 S.E.2d 248, 252 (1963), 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." However, in Anderson v. Anderson, supra, the Court held that the opinion in Few v. Few does not constitute a change to the statutory preference for partition in kind, and confirmed that if a party seeks a partition by sale, he 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).

A relatively new statutory enactment, 2006 Act No. 302, § 1, eff. May 25, 2006, as codified in S.C. Code Ann. § 15-61-25, modified 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.

Standard of Review

A partition action is an equitable action, and, on review, the Appellate Court may find facts in accordance with its view of the preponderance of the evidence. Anderson v. Anderson, 299 S.C. 110, 382 S.E.2d 897, 899 (1989). "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).

ARGUMENT

I. The Appellant Stanley Josey did not timely or sufficiently preserve his issues as raised on appeal.

A. Stanley never objected at trial or in his post-trial motion to the Trust Defendants' Right of First Refusal on the ground that they were colluding with the Plaintiff Rainey Josey.

Stanley and the Trust Defendants all asserted their statutory right of first refusal to purchase the 32 acres under § 15-61-25, but the Special Referee declined to grant any of them the right to purchase and awarded partition in kind, for the reasons that:

> 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 Defendants 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.]. (R.p. 6; Order, p. 4.)

Stanley challenges the Special Referee's decision, as stated in his Statement of the Issues on Appeal, on the grounds that: "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?" Respondent Rainey Josey submits that the issue was not preserved for review by this Court.

Rainey gave notice to all the Defendants of their rights under § 15-61-25 in his Complaint. (R.p. 32; Complaint ¶11.) While Stanley gave notice asserting his right of first refusal under §15-61-25, the other Defendants also asserted their right of first refusal in their pleadings. Stanley did not make any objection prior to or at trial that his co-Defendants' right of first refusal was in any way invalid. At the beginning of the trial, Stanley and the Trust Defendants both placed their requests to buyout the other tenants

on the record, but the record will show that Stanley did not make any objection to the Trust Defendants' request. (R.p. 156; 4/27/11 Tr. 11.) At the conclusion of the trial, Stanley again asserted his demand to buyout Cecil's heir, but he still did not make any objection to his co-tenants' right of first refusal. (R.p. 447-48; Tr. 302-03.)

Although Stanley filed a post-trial motion pursuant to Rule 59 for a new trial , or in the alternative, for reconsideration, his motion did not contain any grounds; rather, the motion only stated: "for reasons to be set out at a hearing on the instant motion." (R.p. 60; New trial motion, dated July 14, 2011.) Stanley served an "Addendum" July 19, 2011, in which he attempted to "supplement" his Rule 59 motion, by stating three grounds:

> 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.

(R.p. 61; Addendum, dated July 19, 2011.)

At the hearing on his post-trial motion, Stanley acknowledged that the statute does not address the situation, as here, where there are multiple co-tenants asserting competing rights of first refusal. (R.p. 129-31; 8.2.11 Tr. 5-7.) Stanley also acknowledged that this is a new statute that has not been interpreted by our appellate courts; yet, he 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." (R.p. 140-44; 8.2.11 Tr. 7, ll. 16-20.) In his

argument, Stanley alleged that the Trust Defendants were attempting to prevent him from buying the property:

> 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." (R.p. 132; 8.2.11 Tr. 8, ll. 11-19.)

However, Stanley's vague reference to how Rainey came to hold his 1 % was too little, too late to preserve any such argument because the issue cannot be raised for the first time in a post-trial motion. Moreover, Stanley did not even raise any grounds in his post-trial 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.'").

B. Stanley did not argue at trial or in his post-trial motion that it was unfair to award the 32 acres to Cecil's Heirs because it will be expensive for him to move and store his personal property.

While Stanley did make an argument at trial about the unfairness of giving the 32 acres to Cecil's Heirs, he did not base his argument on the expenses he will incur to move and store the personal property he has been awarded. Rather, Stanley steadfastly insisted that he deserves all or some part of the 32 acres because he is the last surviving son in his family. (R.pp. 359, 600, 361, 384-85; Tr. 214, l. 24 – 215, l. 7; Tr.216, ll. 3-12; Tr. 239, l. 25 – 240, l. 11.)

To the extent that Stanley did complain about how 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," (R.p. 390; Tr.

245, ll. 19-21); he never mentioned any moving expenses and he certainly never offered any evidentiary basis for his costs/expenses.

Also, as mentioned above, Stanley did not specify any grounds in his Rule 59 motion, and in his untimely Addendum, he only stated three issues, none of which raises the fairness of the award on any grounds. Stanley did make a belated attempt to raise the unfairness issue at the hearing on the post-trial motion; yet, again Stanley argued that the award was unfair because he is 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. (R.p. 135-36; 8.2.11 Tr. 11, l. 6 – 12, l. 7.)

And, while Stanley did make some mention of having to arrange for storage for his antique cars, this Respondent maintains that such a bare contention, without any evidentiary support, does not meet the issue preservation rules. *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.")

The purpose of error preservation rules is to enable the trial court to consider all relevant facts, law, and arguments so that it may rule properly. Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543, 546 (2000). The record will show that Stanley did not submit any evidence of his speculative moving and storage expenses nor has he ever moved before the Special Referee to make an adjustment in the shares to account for his anticipated moving and storage expenses. Accordingly, the issue is not preserved for appellate review.

II. The Special Referee properly ordered partition in kind because there is no legal or logical basis to grant Stanley a right of first refusal where the other Defendants who also asserted a right of first refusal under §15-61-25, 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...." On appeal, Stanley contends that he is the only non-petitioning party because Cecil's Heirs all have a common interest and coordinated the partition together. However, Stanley has not cited any legal authority supporting his argument that the Trust Defendants should lose their rights of first refusal because they have a common interest in severing their joint ownership with Stanley or because they have cooperated in pursuing this partition action. Since the statute does not provide for any procedure where more than one non-petitioning party asserts a right of first refusal, the Special Referee reasonably and properly applied the basic equitable principles that have been applied in partition cases for many years. Based on the overwhelming evidence of Stanley's harassment and the family acrimony, the Special Referee wisely concluded that Cecil's Heirs should receive the 32 acres.

There is no factual or legal basis for any argument that Cecil's Heirs wrongfully colluded or illegally conspired to deprive Stanley of his legal rights. Neither collaboration and cooperation nor a community of interest in the outcome of the litigation establish any type of collusion which might be subject to such a judicial remedy. Moreover, the fact that the Trust gave each of the beneficiaries 1% does not establish collusion. See Benedict v. Seiberling, 17 F.2d 841, 852-53 (N.D. Ohio 1927) (Collusion is not proven by the fact that the plaintiff acquired the interest sued upon for the express purpose of bringing the action.) (See R.p. 138; 8.2.11 Tr. 14.)

This is a new statute which has not been the subject of any reported appellate decision, so as Stanley acknowledged at the post-trial motion hearing, the Special Referee would have to "think it through."[20] (R.p. 130; 8.2.11 Tr. 6.) The Special Referee gave it serious thought and wisely concluded that it would be inequitable to grant the right of first refusal to one party.

Stanley argues that the Special Referee should have let each of the five Defendants buy part of Rainey's single 1%. Beyond the impracticality of deeding out .20% shares, the fact is that Stanley has been demanding the right to purchase all of the 32 acres. In addition, this case was tried before the Special Referee for the purpose of partitioning all the property, and Stanley was given sole ownership of the Fertilizer Plant and Britton Farm as well as the note and mortgage

[20] Stanley suggested that persuasive authority might be found from another state such as North Carolina or Georgia or somewhere else in the southeast. (R.p. 131; 8/2/11 Tr. 7.) Georgia has a new statute dealing with cotenants requesting partition, Ga. St. §44-6-185, which goes into affect January 1, 2013. However, the Georgia statute differs from our statute in that it only provides a right to buyout when a cotenant seeks partition by sale, and it also provides for purchase of fractional shares where more than one cotenant elects to buyout.

At trial Stanley stipulated that Stanley and Cecil's Heirs do not like one another. However, the evidence in this record, as recounted above, demonstrates more than just mutual dislike. The testimony and exhibits show an escalation of the discord between Stanley and Cecil's Heirs from a family disagreement over how to divide the jointly owned property to Stanley's assault on Rainey and his ongoing harassment of Rainey's family. The Sheriff has been called eight times and Stanley has been issued three criminal charges. All this evidence fully supports the Special Referee's 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. Inasmuch as there is no statutory provision regarding competing rights of first refusal, and on this record, the Special Referee wisely ordered partition in kind. *See* Anderson v. Anderson, 382 S.E.2d at 899 (1989) ("[property] certainly must be partitioned due to the enmity between the parties...").

III. The Special Referee's partition award is fair and impartial under §15-61-50 because, regardless of how much Stanley may have to spend moving and storing his personal property, there is no challenge to the valuation of the properties or the division of the shares.

Stanley argues 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, the jointly owned property to be partitioned also included a note and mortgage and two other parcels of land which Stanley was awarded. Stanley is not challenging the valuation of the property, and he admits that the division of all the property is "in roughly the appropriate proportions." (Appellant's Brief, p. 15; *see also* p. 15 n. 4 – referencing math errors as "not significant.") Rather, Stanley is

arguing that the award is unfair because he will have to pay for moving and storing his own personal property.

Respondent maintains that under the applicable case law, Stanley's moving and storage expenses are not an appropriate factor for gauging the fairness of the property division. In prior partition cases addressing the fairness of a partition award, the Appellate Courts have held that while length of ownership and sentimental attachment to property are permissible considerations, the determining factor is the pecuniary interests of all of the parties. Campbell v. Jordon, 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 Campbell, the Court focused on the value of the properties and the 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) (finding no prejudice to heir complaining about who received what tract of land where there was no evidence that tract at issue was more valuable than the other tracts)).

Stanley has not cited any cases where the courts have considered moving or storage expenses in determining whether a partition in kind is fair. However, if such was an appropriate factor, then the Trust Defendants could make the same argument if Stanley received the 32 acres because then they would have similar expenses in moving their personal property and storing it.[21]

[21] Stanley has argued in his Petition for a Writ of Supersedeas that he cannot afford to move his property or acquire storage. However, his argument rings specious because the trial record alone shows that the Stanley is a man of considerable wealth by virtue of the property received from Wofford in 1994, and the 1200+/- acres he received from Stoney Run Farms dissolution, and he is getting the note and mortgage, Britton Farm, and the Fertilizer Plant in this partition action.

While sentimental attachment to property is a permissible consideration in dividing jointly owned property, there is no support in law or equity for Stanley's argument that he deserves the 32 acres because he is the sole surviving son. When Wofford died, Stanley and Cecil both received equal shares of their father's property. Stanley has no superior right to the 32 acres than Cecil's Heirs because he outlived Cecil. Rainey, Spencer, Elizabeth Ann, Courtney, and the Josey Family Trust are fully entitled to Cecil's share of the jointly-owned property.

Lastly, while the enmity between the parties and Stanley's harassment may not affect the property values or the shares each party receives, they are proper equitable considerations in the determination that partition in kind is necessary and in the distribution of the properties to the parties. Given the evidence of physical altercations, three criminal charges, and eight incident reports filed by with 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

The record will show that Appellant Stanley Josey did not properly preserve his issues for appeal and that the Special Referee's award of partition in kind is proper under §15-61-25, and fair and impartial and without any cognizable injury to any of the parties under §15-61-50.

WHEREFORE, based on the foregoing, the Respondent Rainey Josey respectfully requests that the Court affirm the partition award.

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

The undersigned hereby certifies that he is an attorney with the law firm of Jennings & Jennings, P. A.; that copies of the FINAL BRIEF FOR RESPONDENT, CECIL L. JOSEY, JR. were served in the foregoing action by depositing the same in the United States mail with sufficient postage affixed thereto and return address clearly visible on the 22nd day of January, 2013, addressed to the following:

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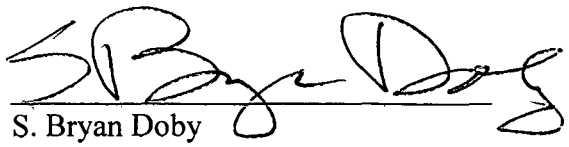

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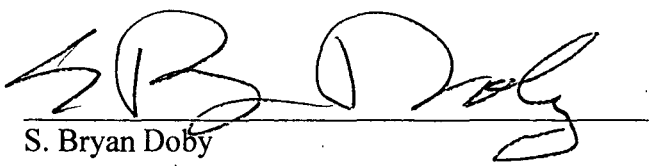
January 22, 2012

Certification of Counsel

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



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