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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA11-156

GREENWAY LAND COMPANY, INC. APPELLANT	**Opinion Delivered** June 1, 2011 APPEAL FROM THE CROSS COUNTY CIRCUIT COURT [NO. CV-2007-76-3]
V.	HONORABLE BENTLEY E. STORY, JUDGE
BETH IMBODEN HINCHEY APPELLEE	AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from an order granting appellee partition in kind of a jointly held interest in real property. Appellant contends that the trial court erred in permitting partition in kind and, in the alternative, that the trial court erred in granting appellee an easement to access her portion of the property because a request for an easement was not expressly pled. Both arguments lack merit, and we affirm.

The first question is the applicable standard of review. Appellant argues that the question is one of statutory interpretation and that our review is thus de novo. *See Pulaski County v. Arkansas Democrat-Gazette, Inc.*, 371 Ark. 217, 264 S.W.3d 465 (2007). Appellant asserts that the trial court was without authority to partition the land where the commissioners opined that partition could not be accomplished without great prejudice to the owners. For this proposition appellant cites Ark. Code Ann. § 18-60-415(a)(1) (Repl. 2003), which

provides that "[t]he commissioners shall immediately proceed to make partition, according to the judgment of the court, unless it shall appear to them, or a majority of them, that partition of the premises cannot be made without great prejudice to the owners." Appellant also cites Ark. Code Ann. § 18-60-420(a) (Repl. 2003), which provides:

> If the commissioners so appointed shall report to the court that the land or tenements of which partition had been directed are so situated, or that any lot or portion thereof is so situated, that partition thereof cannot be made without great prejudice to the owners thereof, the court may, if satisfied that the report is just and correct, make an order that the commissioners sell the premises so situated, at public auction, to the highest bidder.

Appellant's argument ignores the important proviso, expressed in both of the quoted subsections, that the commissioners' authority is subject to the approval of the trial court. The workings of the partition statutes, properly construed, have been summarized as follows:

> Under our statutory scheme the chancellor ordinarily initially determines the interests of the parties and whether partition should be ordered. Those issues having been resolved, the chancellor may then appoint commissioners to partition the land, if possible, according to the interests previously determined. Of course, if the complexities of the case are such that the commissioners deem it impossible to partition the land, they report back to the court and the chancellor then decides whether to confirm, set aside, or remand that report, the final decision resting with the chancellor.

Bell v. Wilson, 298 Ark. 417, 419, 768 S.W.2d 23, 25 (1989).

Appellant also argues that reversal is mandated by *McNeely v. Bone*, 287 Ark. 339, 698 S.W.2d 512 (1985), asserting that this case stands for the proposition that the trial court in a partition action may not consider the willingness of a party to take a lesser share of the property. Appellant reads *McNeely* too broadly. Although the appellant in that case did express

a desire to accept a tract comprising a lesser percentage of the entire property than his proportional interest, the *McNeely* court did not hold that the trial court could not consider this willingness. Instead, it held that his willingness to take a lesser percentage of the land area was insufficient because it did not take into consideration both the quantity and the quality of the land being divided.

In the present case, the record shows that the appellee was willing to take a share that was less in both quantity and quality to that to which she was entitled. The commissioners reported that partition was impossible because the quality of the land varied substantially at different points, given that it was used for farmland, because some portions had poorer access to water for irrigation. The question to be decided, then, is whether the trial court clearly erred in finding that partition was in fact possible without great prejudice to the landowners. Appellant argues that there was great prejudice, but this argument is based on nothing more than the prejudice suffered by the appellee in receiving a share of lesser value than that to which she was entitled. This, however, provides no basis for reversal: we do not reverse for nonprejudicial error, *Jim Halsey Co., Inc. v. Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985), and the appellant has the burden of showing prejudice on appeal. On this record, where appellant's argument is based on the premise that it received more than that to which it was entitled, appellant has failed to demonstrate prejudice.

Appellant finally argues that the trial court erred in awarding appellee an easement to access her portion of the land when no request for an easement was specifically pled. We

disagree. Although there are no Arkansas cases specifically on point, Arkansas has generally recognized the authority of a court of equity to grant relief incidental to partition, *see Bingham v. Rhea*, 201 Ark. 200, 143 S.W.2d 1087 (1940), and several other courts have recognized that the power to grant easements in a suit for partition is necessarily implied in a suit for partition. *See Sclafani v. Dweck*, 856 A.2d 487 (Conn. App. Ct. 2004); *Hart v. Hart*, 497 S.E.2d 496 (Va. Ct. App. 1998); *Young Properties v. Wolflick*, 87 P.3d 235 (Colo. App. 2003). Because this power is implicit, appellant should have anticipated that the trial court might grant appellee an access easement, and consequently it had a fair opportunity to defend against this eventuality. *See Pineview Farms, Inc. v. A.O. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989).

Affirmed.

VAUGHT, C.J., and WYNNE, J., agree.