STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

MIKELL R. SCARBOROUGH, MASTER IN EQUITY

APPELLATE CASE NO. 2023-000599

Marc K. Knapp Appellant,

v.

James Douglas Jenkins, IV, Peter Barnwell Jenkins, and Alicia J. Roy, Respondents.

APPELLANT'S FINAL REPLY BRIEF

October 10, 2023

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TABLE OF AUTHORITIES

Cases:

Rules:

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ARGUMENT IN REPLY

I. APPELLANT PROPERLY PRESERVED HIS ARUGMENT THAT THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT.

Respondent fallaciously asserts that the Appellant did not properly preserve his arguments for this appeal. South Carolina law is clear that "[P]ost-trial motions are required in two primary circumstances: to preserve issues that have been raised to the trial court but not yet ruled upon or when the trial court grants relief not requested or rules on an issue never raised at trial." Jean Hoefer Toal, et al., Appellate Practice in South Carolina (2d Ed. 2002), pp. 59-60; Elam v. South Carolina Department of Transportation, 361 S.C. 9, 602 S.E.2d 772 (2004). In fact, South Carolina appellate courts have held that issues are preserved for appeal even when a form order is issued, as long as the issues were raised and argued to the court and the record on appeal contains a transcript of the court proceedings. Elam, Id; Bailey v. Segars, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001).

In this case at bar, the trial court issued a Form 4 Order December 12, 2022, (R.p. 1) for which the Appellant filed a Motion Pursuant to Rule 59, SCRCP on December 18, 2022;(R.pp. 253-256) a Written Order dated January 24, 2023,(R.pp. 6-14) to which the Appellant responded by filing on March 29, 2023 the Supplement to Motion Pursuant to Rule 59, SCRCP; (R.pp. 270-276) and the Form 4 Order deciding Appellant's Motion Pursuant to Rule 59 on March 13, 2023; (R.p. 63)to which Appellant commenced this timely appeal on April 11, 2023.(R.pp. 229-348) Therefore, all the arguments now raised by Appellant were preserved and properly placed before the trial court pursuant to the SCRCP.

Furthermore, Respondent relies on subterfuge by asserting a canard that the Appellant never objected to the Respondent's Motion for Summary Judgment; as there are no indications in the record that such motion was properly placed, argued and considered before the trial court prior to

issuance of the January 24, 2023 Written Order (R.pp. 6-14) as the hearing transcript is void of the term "summary judgment." Then, once Appellant learned that court ruled on Respondent's Motion for Summary Judgment after the December 12, 2022 hearing by way of the January 24, 2023 Written Order,(R.pp. 6-14) the Appellant immediately moved to supplement his previously file Motion Pursuant to Rule 59, SCRCP.(R.pp. 270-276) To muddy the waters further, the December 12, 2022 Form 4 (R.p. 1) Order patently ends the action; while the January 24, 2023 Written Order states in its final line to continue the matter without addressing the effect of the previous order terminating the action. (R.pp. 6-14)

II. THE TRIAL COURT INCORRECTLY AWARDED SUMMARY JUDGMENT BECAUSE A GENUINE ISSUE OF FACT EXISTED.

Respondents own brief confirmed that a triable issue of fact patently exists and the trial court incorrectly awarded summary judgment in favor of Respondents. The January 5, 2022 contract that the parties entered into explicitly stated that Respondents agreed to convey to Appellant marketable title to the Jenkins Tract by way of a general warranty deed free of all encumbrances and liens, and subject to all easements, reservations, rights of way, restrictive covenants of record, and to all government statutes, ordinances, rules, permits, and regulations, provided they do not make the title unmarketable or adversely affect the use/value of the Jenkins Tract in a material way (See Exhibit D of the Appellant's Complaint). (R.pp. 30-37) The key clause contained in that recital of conditions is "marketable title."

During the December 12, 2022 hearing and again in the Respondents' brief, the Respondents conflate the terms "marketable title" with "insurable title." It is widely recognized and acknowledged in the real estate industry that marketability and insurability of title to real property are two separate and distinct classifications. (R.pp. 292, line 10-14) Most real estate

contracts, as with the one controlling the transaction of this controversy, provide that the seller will deliver to the buyer marketable title. Chapter 3 Insurable Title vs. Marketable Title (and curing title defects) (Handbook for South Carolina Dirt Lawyers (SC Bar) (2nd Edition 2008)). Black's Law Dictionary (8th Edition) defines marketable title as:

> **"(A title that) is free from reasonable doubt in law and in fact;... one which readily can be sold or mortgaged to a reasonably prudent purchaser or mortgagee; one acceptable to a reasonable purchaser, informed as to the facts and their legal meaning; ... one under which a purchaser may have quiet and peaceful enjoyment of the property; one that is free from material defects ... and reasonably free from litigation."**

When the standard is marketable title, the arbiter is generally, the prudent purchaser, or the buyer's attorney, and, ultimately, a court of law. Id. (emphasis added). When the standard is insurable title, the arbiter is a title insurance underwriter. It is an industry-wide standard that a parcel of land may be insurable, but not marketable; and that marketable title is a much higher standard to achieve rather than insurable title.

In the case at bar, during the due diligence period provided to the Appellant in the real estate contract, the Appellant learned of evidence of the existence a possible cemetery located on the parcel which raised questions as to affording access to others to said possible cemetery. When the Appellant requested additional time to investigate this development, the Respondents denied the request and instead purported to obtain a commitment to provide title insurance from an attorney and/or title insurance, not related to any other party or counsel already engaged with this matter. Respondents offer to secure a title insurance policy did not remedy this probable marketability issue caused by the possible cemetery. In fact, it just attempted to mask the issue and further cloud the situation; as this Court, as well as any South Carolina "Dirt" Attorney and/or any Title Insurance Underwriter, already knows that the existence of, or in this case, the

mere promise to provide title insurance, does not cure the defect to title and the existence of said defect will remain an affect on the parcel's ultimate marketability.

Therefore, the revelation that a parcel of land contained a possible cemetery situated within its boundaries created a question of fact concerning the real property's marketability and thus should have been decided at trial if the parties failed to voluntarily reach a resolution.

CONCLUSION

For the reasons stated, Appellant respectfully request that the trial court's order granting summary judgment be reversed and that this matter be remanded for trial.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Reply Brief is in compliance with Rule 211 (b) SCACR, and that no changes were made from the Initial Reply Brief of Appellant other than the correction of obvious typographical errors and misspellings. .

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