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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEALS**

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APPEAL FROM CHARLESTON COUNTY
Honorable Mikell R. Scarborough

Appellate Case Tracking No. 2016-001298
Trial Court Case No. 2015CP1000939

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Vivian B. Cromwell, Susan Prioleau Simmons, Ruth Nelson Gadsden, Robert Blake Brisbane and Mildred Chapman, Plaintiffs

v.

Alberta Brisbane, Jeanie Geathers, LeRoy Brisbane, Francena B. Lawton, James B. Watson, Helen Davis, Rosalee Simmons, LaVerne Hamilton, Minerva Gadsden, Daniel Simmons, Jr., Mary Mosely, Horace Robinson, Jr., James Robinson, Henry Robinson, Avis D. Robinson a/k/a Avis Robertson, Dora Robinson, Jamie Williams, Desiree Williams, Mark Williams, Grace Ettison, Dannion Jordan, Ronald Williams, William Drayton, Keith Drayton, Jerome Hopkins, Joseph Hopkins, Jr., Tracy Hopkins, Alethia Gillian, Samuel Brown, Jeannette Brown, Arthur Brown, Antonio Brown, Dwayne Brown, Polly Brown, Keith Brown, Kenny Brown, Dexter Brown, Marie Brown, Starcia Stewart, James L. Brown, Jr., Glen Brown, Ernestine Brown, Veronica Brown, Calvin Brown, Jr., Harold Brown, Jr., Mary Anne Brisbane, Harvey Brisbane, Jr., Danny Bolds, Raymond Bolds, Michael Bolds, David Bolds, Carolyn Logan, Mary Jane Brown, Miriam Grant a/k/a Muriel Grant, Edward Grant, Jr., Gilbert Grante, Perry Grant, Junata O'Kieffe, Martha Lions, Margie Marine, Gurtha Forrest, Gloria Gibbs, Christopher Gathers, John D. Heyward, Allen Mitchell, Jr., Tiffany N. Daley, Michael S. Mitchell, Allen Mitchell, III, Frederica Coleman, Dorothy Boykin, Lavinia Brisbane, Clarence Brisbane, Jr., Betty Brisbane, Fred Brisbane, Evelyn Palmer, Mary Brisbane, Carl Brisbane, Carlotta Bickham, George Brisbane, Elias Brisbane, Maxine Brisbane, Evan Brisbane, Jesse Simmons, Jr., Odell White, Christina Hartfield, Sarah Mitchell, Arthur Albert Mitchell, Suzanne Mitchell, Olethia Gadsen, Wand Mitchell Harley, Arthur Mitchell, Jr., Benjamin Mitchell, Barbara Johnson, Diane B. Samuel, Kathy L. Nelson, Thelma E. Nelson, Carolyn Singleton, LaMotta Nelson, Rodney Nelson, Jerome Hopkins, Joseph Hopkins, Jr., Tracy Hopkins, Lottie Brown, Sylvia Johnson, Raymon Brown, Ronald Brown, Bernard Frasier, Barry Frasier, Kelvin Frasier, Marie Richardson, Delores Richardson, William Richardson, Robert Heyward, Katina Heyward, Valorie Heyward, Karvin Dotson, Youlonda Brisbane, Kermit

Brisbane, Meka Brisbane, Jermaine Brisbane, Peggy Nelson, Joseph Elliott, Cynthia Elliott, Jackie Elliott, Net Elliott, Stephanie Elliott, Rodney Elliott, Nancy Brisbane, William Albert Brisbane, Jr., Bernard Brisbane, Gary Brisbane, Bonnie Brisbane, Jametta Brisbane Hamilton, Elizabeth Hamilton and Rosetta B. Brown, John Doe, adults and Richard Roe, infants, Insane persons, incompetents and persons in the military Service of the United States of America, being fictitious Names designating as a class any unknown person or Persons who may be an heir, distribute, devisee, legatee, Widower, widow, assign, administrator, executor, Creditor, successor, personal representative, issue or Alienee of James Brisbane, James Brisbane, Jr., James Brisbane, III, Jimmy Brisbane, Emily Brown, Harvey Brisbane, Rosa Robinson, Henrietta Brisbane Geathers, Laura Geathers, Geneva Grant, Viola Heyward, Henrietta Bolds, Estelle Nelson, Swackie Brisbane, Wilhemenia Young, Roxanne Pinckney, Daniel Simmons, Horace Robinson, Elizabeth Williams, Mabel Robinson, Julian Robinson, Patricia Williams, Alberta Graham, Joseph E. Hopkins, Emily Brown, Steve Brown, Steve Brown, Jr., Roger Brown, James LeRoy Brown, Harold Brown, Theodore Heyward, Theodore Heyward, Jr., Mary E. Mitchell, James Heyward, Clarence Brisbane, Swackie Brisbane, Jr., Susan Richardson, Janie Simmons a/k/a Janie Richardson Briwbane, Ruby Mitchell, Jesse Simmons, William Nelson, Ruth Hopkins, Thomas Brown, Wilhemenia Frasier, Helen Brown Allen, Albertha Lee Richardson, Louise Heyward, Herbert Lee Heyward, Loretta Brisbane, Gail Davis, William Nelson, Jr., Edward Grant, Sr., Eartha Lee Elliott, William Albert Brisbane, Betty Manifault, Steven Christopher Brown And Rosetta Brisbane all of whom are deceased, and any or all other persons or legal entities, known and unknown, claiming any right, title, interest or estate in or lien upon the parcel of real estate described in the Lis Pendens and Complaint herein filed, Defendants,

And Associated Developers, Inc. and Nordic Group, LLC, Intervenors,

Of Which Associated Developers, Inc. is the Respondent,

And of which Nordic Group, LLC is the Appellant.

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**FINAL REPLY BRIEF OF APPELLANT**

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## ARGUMENT

### I. NORDIC'S ARGUMENTS WERE PROPERLY PRESERVED FOR APPEAL.

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Supreme Court with a platform for meaningful appellate review. *Herron v. Century BMW*, 719 S.E.2d 640 (S.C. 2011). In general, for an issue to be preserved on appeal, it must be presented to the trial court and ruled on by the trial court. *Foster v. Foster*, 711 S.E.2d 878 (S.C. 2011). The issue on appeal in this case is whether the Master-in-Equity erred in failing to consider an oral offer when directing the sale of certain heirs property. The Master-in-Equity's Decree clearly shows that the issue was before the Court and ruled on by the Court. Specifically, Paragraph Seventy-Nine of the Master-in-Equity's Decree states as follows:

> ". . . Although counsel for Nordic indicated that his client would be willing to negotiate a higher price, no such binding offer or agreement was presented on Nordic's behalf. It appears to the Court that the contract writing between Plaintiffs and Associated is more likely to close at this time."

See Decree p. 16 (R. p. 031).

The Court's decree finds that because Appellant's (Nordic) increased offer to $650,000.00 was not presented to the Court at the valuation hearing in writing and is therefore non-binding. The Court's ruling is in error and the issue is preserved for appeal.

Going into the May 3, 2016 hearing, Nordic was under the impression that the contract it had for $560,000 was in competition to the contract Associated Developers had for $455,000. Nordic had an appraisal to submit to the Court that supported a $560,000.00 value for the property. Because of the appraisal, and because of Nordic's

$560,000.00 contract, Associated Developers amended its prior contract and presented a $560,000.00 contract to the Court without any prior notice to Nordic. As a result, Nordic amended its offer in Court to the $650,000.00 contract amount, which the Master-in-Equity refused to consider because it was not in writing.

Thus, at the start of the valuation hearing, Respondent's contract with the landowners was for $455,000.00. Respondent, through the course of the valuation hearing, was allowed to enter an amendment to its contract increasing the offered purchase price to $560,000.00, matching Appellant's contract proposal. As stated in Appellant's initial brief, the trial court, through partition, ultimately made a selection of one contract over the other, similar to a judicial sale. (Appellant's Initial Brief pg. 8) The trial court noted that had Appellant's $650,000.00 contract offer been presented in writing at the May 3, 2016 hearing, it may have decided differently.

## II. NORDIC'S RULE 59(e) MOTION WAS PROPER

Respondent's assertion that Nordic's Rule 59(e) motion was an attempt to create a record post-trial lacks merit. It is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also a vehicle to seek "reconsideration" of issues and arguments. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). The Supreme Court has expressed the view that there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity. *Id.*

The purpose of Nordic's Rule 59(e) motion was to call to the court's attention an error in its failure to give consideration to Nordic's oral offer of $650,000.00. See

Motion to Reconsider (R. p. 90). The evidence submitted by affidavit at the Rule 59(e) motion hearing was a memorialization of the $650,000.00 offer presented by Nordic at the May 3, 2016 hearing. See Affidavits of James A. Bruorton IV (R. p. 103); Sheneatha Brisbane (R. p. 112); and Germaine Brisbane (R. p. 114). In the absence of a statute providing otherwise, an oral bid is sufficient. 68 C.J.S Partition § 177 (citing *Holliday v. McFadden*, 188 S.C. 187, 198 S.E. 392 (1938)). South Carolina's Partition Statute does not provide that an oral bid is insufficient nor does it disallow a memorialization of a verbal offer at a later date. The Master-in-Equity decision is in error and warrants reversal or remand for consideration of Nordic's $650,000.00 contract.

Under Rule 59(f), SCRCP, a Rule 59(e) motion "may in the discretion of the court be determined on the briefs filed by the parties without oral argument." *Pollard v. County of Florence*, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994). Here, the trial court elected to have a hearing on Nordic's motion. Nordic did not present new evidence at the hearing, Nordic simply submitted an executed contract memorializing its $650,000.00 offer that was rendered to the Court at the May 3, 2016 hearing. See Affidavit of James A. Bruorton IV (R. p. 103). All parties and the court were aware of the $650,000.00 offer that had been presented to the Court and there was no surprise or prejudice by that offer being memorialized in writing.

## III. CROSS-EXAMINATION OF PROFFERED ADDITIONAL EVIDENCE IS NOT PRECLUDED

Respondent argues that Nordic's use of post-trial affidavits filed after May 3, 2016 deprives other parties of the "opportunity for cross examination with respect to the proffered, additional evidence." As noted by the Respondent in its initial brief, the trial court was expected to hold a final hearing in this matter on December 17, 2015.

(Respondent's Brief pg. 1) The issue of the sale of the heirs property was not reached because Nordic unexpectedly appeared and claimed it had an unsigned offer to purchase the property from another heir for the sum of $560,000.00. (Respondent's Brief pg. 2) As a result, the trial court set a hearing for May 3, 2016 to determine the value and remaining property issues, including approval of the sale of the property to Associated or Nordic. In the interim, both Associated and Nordic were permitted to intervene. See Associated's Motion to Intervene (R. p. 59); Order Granting Associated's Intervention (R. p. 11); Nordic's Motion to Intervene (R. p. 66); Order Granting Nordic's Intervention (R. p. 13).

At the May 3, 2016 hearing, Nordic's executed contract for $560,000.00 along with an appraisal in support of the value were before the Court. Associated, for the first time, increased its contract amount from $455,000.00 to $560,000 in order to match Nordic's appraised value for the property of $560,000.00. As a result, Nordic offered to purchase the property for $650,000.00, a value in excess of the appraised value of the property. If Associated or the Court had concern over Associated's inability to cross-examine Nordic on its increased contract amount, no decision should have been made by the Court and the valuation hearing should have been continued. A trial judge may continue a case *sua sponte*. *Pioneer Electronics (USA) Inc. v. Cook*, 294 S.C. 135, 363 S.E.2d 112 (Ct. App. 1987). To completely disallow and give no consideration to Nordic's $650,000.00 offer, which was submitted in response to an amended contract with an increased amount from Associated, is in error and an abuse of the trial court's discretion.

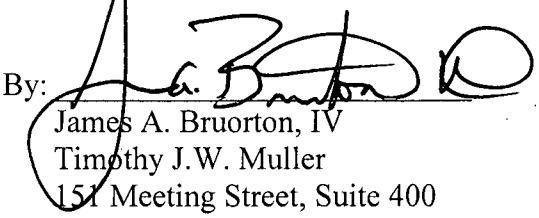
Also, as stated in Nordic's initial brief, if the trial court had concern over

Appellant's ability to perform the proposed contract, it could have given Appellant a timeline to close on the Property. If Appellant failed to comply with the trial court's ordered timeline, then the Property could be sold to Respondent pursuant to Respondent's presented contract. Such action would have resulted in no prejudice to the parties, provided the timeline was consistent with that presented for closing of Respondent's contract.

## CONCLUSION

For all the foregoing reasons and for those set forth in the Brief of the Appellant, this Court should reverse the Master-in-Equity's Form 4 Order dated May 5, 2016 and the Master's Decree dated June 16, 2016 directing the sale of Property to Respondent and instead direct the sale of the Property to Appellant pursuant to its purchase agreement with Defendants or remand to the trial court for further consideration.

ROSEN, ROSEN & HAGOOD, LLC

By: 

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November 15, 2016

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Of Which Associated Developers, Inc. is the Respondent,

And of which Nordic Group, LLC is the Appellant.

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## CERTIFICATE OF COUNSEL

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

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