THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-In-Equity

Case No. 2016-001298

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 od The United States of America, being fictitious names designating as a class any unknown person or persons who may be an heir, distributee, 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, Roxanna Pinckney, Daniel Simmons, Horace Robinson, Elizabeth Williams, Mabel Robinson, Julian Robinson, Patricia Williams, Albertha 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. Mithcell, James Heyward, Clarence Brisbane, Swackie Brisbane, Jr., Susan Richardson, Janie Simmons a/k/a Janie Richardson Brisbane, 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 Manigault, 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.

BRIEF OF RESPONDENT ASSOCIATED DEVELOPERS, INC.

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STATEMENT OF THE ISSUES

I. Did Appellant Nordic Group, Inc., preserve its arguments and evidence for review where they appear for the first time in support of its post-trial Rule 59(e), SCRCP, Motion to Reconsider?

II. Did the trial court properly approve the sale of heirs property to Respondent Associated Developers, Inc., instead of Appellant Nordic Group, Inc., where Appellant failed to present a valid purchase contract for consideration by the court?

III. Does the evidence and testimony properly admitted at the final hearing support the trial court's decision to approve the sale of heirs property to Associated Developers, Inc., where Appellant Nordic Group, Inc., offered no competent evidence at trial, its offer was not in writing, its offer was contingent, and it had not made an agreement with the heirs to preserve their family grave sites?

STATEMENT OF THE CASE

Plaintiffs commenced this action on February 13, 2015, pursuant to the South Carolina Uniform Declaratory Judgment Act seeking to determine the lawful owners of certain heirs property located in Charleston County, South Carolina. **(R. pp. 51-52)**. Plaintiffs also sought a partition by sale of the subject property to Respondent Associated Developers, Inc. ("Associated"), which had contracted with Plaintiffs to purchase it for the sum of $455,000. **(R. p. 53)**. Plaintiffs further requested an accounting for certain expenses paid in relation to the property. **(R. p. 52)**.

The appointed Guardian *ad Litem Nisi* answered, agreeing with the relief Plaintiffs requested in the Complaint. **(R. p. 55-57)**. After all other defendants were either placed in default or consented, the action was referred to the Master-In-Equity for the entry of a final decree. **(R. p. 6)** (Order of Default); **(R. p. 1)** (Consent Order of Reference).

On December 17, 2015, the trial court held what was expected to be a final hearing; however, only a determination of the lawful heirs occurred. The remaining

issues were not reached because Appellant Nordic Group, LLC ("Nordic") unexpectedly appeared and claimed it had an unsigned offer to purchase the property from another heir for the sum of $560,000. The trial court set a hearing for May 3, 2016, to determine the value and the remaining issues. **(R. pp. 16-17)**; **(R. pp. 29-30)**; **(R. p. 72)**. In the interim, both Associated and Nordic were permitted, to intervene. **(R. p. 11)**; **(R. p. 13)**; **(R. p. 59)**; **(R. p. 66)**.

At the May 3, 2016, hearing, all parties agreed that the value of the subject property was $560,000. **(R. p. 128** (Trans. 6, lines 6-22)); **(R. p. 130** (Trans. 13 ln. 24 to Trans. 14, ln. 4)); **(R. p. 131** (Trans. 18, ln. 3 to 19, ln. 9)); **(R. p. 142** (Trans. 63, ln. 22 to Trans. 64, ln. 12)). The only relevant[1] claim left to decide was whether to approve the sale of the property to Associated or to Nordic. **(R. pp. 29-32)**; **(R. pp. 128-129** (Trans. 6, ln. 6 to Trans. 9, ln. 21)); **(R. p. 131** (Trans. 19, lines 6 – 16));**(R. p. 133** (Trans. 27, ln. 16 to Trans. 28, ln. 10)); **(R. p. 135** (Trans. 36, lines 8 – 21)); **(R. pp. 141-142** (Trans. 59, ln. 5 to Trans. 62, ln. 9)); **(R. pp. 142-143** (Trans. 63, ln. 17 to Trans. 66, ln. 12). The trial court approved Plaintiffs' request to sell to Associated and entered a Form 4 Order dated May 5, 2016 to that effect. **(R. p. 14)**.

Nordic's Motion to Reconsider was heard June 7, 2016, and denied June 9, 2016. **(R. p. 15)**. This appeal follows.[2]

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[1] The trial court also heard and granted Plaintiffs' request for an accounting. This claim forms no part of this appeal. **(R. p. 16)**; **(R. pp. 143-144)**.

[2] The trial court entered a *supersedeas* preventing the transfer of the property during the appeal, requiring Nordic to post a $100,000 surety bond. **(R. p. 44)**.

STATEMENT OF THE FACTS

The dispositive facts are either undisputed or without contradiction in the record.

1. Background

This appeal involves two unimproved tracts of heirs property, measuring approximately 7.0 acres, in Charleston County, South Carolina (the "Property"). **(R. pp. 51-52)**; **(R. p. 129** (Trans. 10, lines 3-22)). Plaintiffs entered into a real estate contract dated August 11, 2014, to sell the Property to Associated for the sum of $455,000. **(R. p. 53)**; **(R. p. 152)**; **(R. p. 159)**; **(R. pp. 127** (Trans. 4, lines 14-16)); **(R. pp. 128-129** (Trans. 8, ln. 19 to Trans. 9, ln. 19)); **(R. pp. 129-130** (Trans. 11, ln. 1 to Trans. 13, ln. 7)). Because Plaintiffs and Defendants, all of whom are heirs, did not agree on the disposition of the Property, Plaintiffs brought this action to quiet title, partition the Property by sale, and seeking approval of the contract of sale to Associated. **(R. pp. 51-53)**. After contracting with Plaintiffs to buy the Property, Associated expended significant funds and engaged in substantial due diligence and development efforts in anticipation of the closing. **(R. pp. 131-133** (Trans p. 20, ln. 20 to Trans. 25, ln. 3)); **(R. p. 148** (Trans. 9, ln. 23 to Trans. 10, ln. 2)).

At the December 17, 2015, hearing, Nordic first appeared, claiming it had contracted with another heir, Defendant Ernestine Brown, to buy the Property for $560,000. **(R. p. 127** (Trans. 3, lines 16-19)). According to the Master's Decree, Nordic did not present a signed contract. **(R. p. 16)**. But, because Nordic's offer raised an issue about the value of the Property, the trial court set a final hearing on May 3, 2016 (the "May 3rd Hearing"), to address valuation and the competing contracts of Associated and Nordic. **(R. p. 72)**; **(R. p. 150** (Trans. 17, ln. 6 to Trans. 18, ln. 23)).

Thereafter, Associated and Nordic moved to intervene **(R. p. 59)**; **(R. p. 66)**. To support its Motion to Intervene, Nordic argued:

> [Nordic] has a right to participate in the hearing scheduled on May 3, 2016, to present evidence and testimony regarding the appraisal it obtained and why its contract[3] is the more favorable and equitable for the parties.

(R. p. 68) (emphasis added).

After becoming a party, Associated filed an Amended Answer, Counterclaim, and Cross-Claim seeking approval of its contract with Plaintiffs, just as Plaintiffs requested in their Complaint. In the alternative, Associated brought a claim for unjust enrichment to recover the significant sums it expended for the benefit of the Property in anticipation of closing. **(R. pp. 84-89)**. Nordic also submitted an Answer as an exhibit to its Motion to Intervene, requesting that its contract with Ernestine Brown be approved. **(R. p. 70)**

2. The May 3rd Hearing

On May 3, 2016, a final hearing was held to: (i) determine the value of the Property, (ii) approve the sale to either Associated or Nordic, and (iii) address Plaintiffs' accounting claim. All parties stipulated the value of the Property was $560,000, resolving the first issue by consent **(App. Br., p. 3)**; **(R. p. 128** (Trans. 6, lines 6-22)); **(R. p. 130** (Trans. 13, ln. 24 to Trans. 14, ln. 4)); **(R. p. 131** (Trans. 18, ln. 3 to Trans. 19, ln. 9;)); **(R. p. 142** (Trans. 63, ln. 22 to Trans. 64, ln. 4)). Plaintiffs then placed into evidence their amended contract with Associated matching the $560,000 stipulated value. **(R. pp. 152, 159, 166)**; **(R. p. 130** (Trans. 13, ln. 24 to Trans. 14, ln. 4)); **(R. pp. 130-131** (Trans. 16, ln. 16 to Trans. 18, ln. 5)). Plaintiffs also placed into evidence

[3] The "contract" Nordic referenced in its Motion to Intervene is its contract with Ernestine Brown. **(R. pp. 67-71)**.

Associated's agreement to preserve the family grave sites on the Property. **(R. p. 162)**; **(R. p. 129** (Trans. 12, lines 5-25)). All other parties, including Nordic and Ernestine Brown, declined the trial court's offer to accept further evidence about value. Thus, the trial court moved on to weigh the competing positions of Associated and Nordic, inquiring first into their respective due diligence. **(R. p. 131** (Trans. 18, ln. 6 to Trans. 19, ln. 12)).

Associated's representative testified about its due diligence, including: (i) inspecting the Property; (ii) delineating wetlands, (iii) conducting boundary, topographic and tree surveys, (iv) meeting with City of Charleston engineers and consultants, and (v) developing concept plans, all at a cost of $35,000.[4] **(R. pp. 50-52)**; **(R. pp. 131-134** (Trans.20, ln. 15 to Trans 32, ln. 12)). Associated also obtained approval from the City of Charleston to annex the Property. **(R. p. 132** (Trans. 23, ln. 15 to Trans. 24, ln. 15)).

Associated also testified to its agreement with Plaintiffs to preserve the grave sites, allowing family members open visitation. **(R. p. 162)**; **(R. p. 129** (Trans. 12, lines 5-25)); **(R. pp. 131-132** (Trans. 20, ln. 25 to Trans. 21, ln. 7)); **(R. pp. 133-134** (Trans. 28, ln. 13 to Trans. 29, ln. 10)). The record proves the importance of this agreement to the heirs[5] and Associated's commitment to them. **(R. p. 129** (Trans. 12, lines 3-25)); **(R. p. 130** (Trans. 14, lines. 5-20)); **(R. p. 134** (Trans. 31, ln. 6 to Trans. 32, ln. 12)). In light of

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[4] When Nordic's Motion for Temporary Restraining Order was heard, this list included completion of a Phase I Environmental Site Assessment, a Geotechnical Report, a Cultural Resources Identification Survey, and a Cemetery Delineation, among others. The amount invested by Associated had increased by $22,250. **(R. p. 124)**.

[5] Preservation of the graves was also a requirement of the City's approval to annex the Property. **(R. p. 132** (Trans. 21, lines 5-7)); **(R. pp. 132-133** (Trans. 24, ln. 4 to Trans. 25, ln. 3)).

its substantial due diligence, Associated desired to close within thirty days **(R. p. 131** (Trans. 19, lines 10-16)); **(R. p. 132** (Trans. 23, lines 3-12)); **(R. p. 133** (Trans. 27, ln. 16 to Trans. 28, ln. 7)). Nordic elected not to cross-examine Associated's representative. **(R. p. 135** (Trans. 33, lines 13-14)).

In contrast, Nordic offered no testimony on due diligence or any other issue. When Associated requested testimony about "who the Nordic Group is . . . ." its counsel stated, "There's no one here on their behalf, Your Honor." **(R. p. 141** (Trans. 57, ln. 25 to Trans. 58, ln. 7)). Nordic's counsel could not confirm whether Nordic had ever visited the Property. **(R. p. 142** (Trans. 61, lines 8-12)). Ernestine Brown declined to address the trial court about her contract with Nordic. Instead, her attorney revealed the "second contract" was "Just to get that figure [i.e., the $560,000] before the Court. We have no interest other than helping the Court arrive at whatever the ultimate value is." **(R. p. 135** (Trans. 36, lines 8-18)). (emphasis added).

After Associated reiterated its desire to proceed under its contract for the stipulated value of $560,000, Nordic's counsel, for the first time, orally offered to increase its price to $650,000, but he conceded Nordic did not have that offer in writing. **(R. pp. 141-142** (Trans. 59, ln. 5 to Trans. 61, ln. 4)). Nordic gave no proof this new offer had been presented to or accepted by any heir. Nordic admitted its only written contract was the one with Ms. Brown for $560,000, which her lawyer said was just to get that "figure" before the court. **(R. p. 143** (Trans. 67, lines 8-10)); **(R. p. 135** (Trans. 36, lines 8-18)).

After weighing the testimony and evidence before it, the trial court approved the sale to Associated pursuant to the terms of its amended contract placed on the record. (**R. pp. 142-143** (Trans. 63, ln. 17 to Trans. 66, ln. 12)); (**R. p. 14**).

3. Nordic's Post-Trial Efforts to Introduce New Evidence

After the trial court approved the sale to Associated, Nordic filed a Rule 59(e) Motion to Reconsider, Alter or Amend. (**R. p. 90**). Nordic's Motion specifically requested the trial court to instead find that the Property must be sold to Nordic pursuant to both its contract with Ernestine Brown[6] and its highest "bid" orally made by counsel at the final hearing. (**R. pp. 90-91**). Nordic attached an <u>unsigned</u> proposal reflecting the higher amount to its Motion. (**R. p. 96**).

Later, on June 3, 2016, Nordic submitted three affidavits. One attached a contract for $650,000 between Nordic and "Ernestine Brown, et al." (**R. p. 103**). But, Ernestine Brown did not sign this document—it is signed only by Sheneatha and Germaine Brisbane, who are not parties to Ms. Brown's contract. (**R. p. 66**); (**R. p. 83**). Neither of these individuals testified in the final hearing. Instead, a month after the trial court approved Associated's contract, they submitted affidavits asking the trial court to approve their contract, which is not the contract Nordic had with Ms. Brown. (**R. p. 112**); (**R. p. 114**). This new contract demanded a "pre-look" contingency.

Later still, in the hearing on its Motion to Reconsider, Nordic admitted, "Within that contract [signed by Sheneatha and Germaine] there were still some of the contingencies." (**R. p. 147** (Trans. 7, lines 6-11)). Nordic's counsel advised he had another new contract that removed all contingencies but the grave study contingency,

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[6] It is worth noting that Ernestine Brown did <u>not</u> request reconsideration of the approval of Associated's contract. (**R. p. 148** (Trans. 12, lines 18-23).

which Nordic still had not performed. (**R. p. 147** (Trans. 7, lines 12-25)); (**R. p. 148** (Trans. 10, ln. 25 to Trans. 11, ln. 4)). That purported document was neither offered nor accepted into evidence.

STANDARD OF REVIEW

Declaratory judgment actions are neither legal nor equitable; thus, the standard of review depends on the nature of the underlying issues. *S.C. Elec. & Gas Co. v. Hartough*, 375 S.C. 541, 546-547, 654 S.E.2d 87 (Ct. App. 2007) *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). Two core issues arise from the trial court's approval of Associated's ratified contract over the "bid" orally announced by Nordic at the May 3rd Hearing. The first issue is whether Nordic presented a valid and enforceable contract for the purchase price of $650,000.[7] If Nordic establishes the timely existence of an enforceable contract for $650,000, the second issue is whether the trial court properly approved Associated's contract over Nordic's. Analysis of these issues involves more than one standard of review.

On the first issue, when the existence of a contract is questioned and the evidence conflicts or gives rise to more than one inference, the contract's existence is a question for the finder of fact. *Sherman v. W & B Enters.*, 357 S.C. 243, 250, 592 S.E.2d 307, 310 (Ct. App. 2003). *See also Small v. Springs Indus., Inc.*, 292 S.C. 481, 483, 357 S.E.2d 452, 454 (1987) (a jury should decide the existence of a contract when its existence is questioned and the evidence is susceptible of more than one inference). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the

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[7] Nordic cannot prevail on appeal unless it proves it had a valid contract for $650,000.

judge's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). "The judge's findings are equivalent to a jury's findings in a law action." *Id.*

An exception to the general rule above exists where the undisputed facts show <u>no</u> contract existed, in which case the question becomes a matter of law. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014).

If this Court reaches the issue of whether the trial court properly approved Associated's ratified contract, Associated submits the trial judge's selection of one contract over the other is a question arising in equity. In an action in equity referred to a master for final judgment with direct appeal to the Court of Appeals, this Court may determine facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the master. *Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n*, 317 S.C. 452, 454 S.E.2d 901 (Ct. App. 1995).

ARGUMENT AND CITATION OF AUTHORITY

It is helpful to first note what is <u>not</u> in dispute. No party challenged the quieting of the title or the decision to partition the Property by sale. All parties stipulated that the value of the Property was $560,000. **(App. Br., p. 3)**. **(R. p. 128** (Trans. 6, lines 6-22)); **(R. p. 130** (Trans. 13, ln. 24 to Trans. 14, ln. 4)); **(R. p. 131** (Trans. 18, ln. 3 to Trans. 19, ln. 9)); **(R. p. 142** (Trans. 63, ln. 22 to Trans. 64, ln. 4)). Finally, all parties agreed for the trial court to decide whether the Property should be sold to either Associated or Nordic. None of these issues was opposed at trial or appealed by any party.

Nordic's appeal is rooted solely in its disappointment with the trial court's decision to approve Associated's fully executed contract over its own oral "bid" in light of the contract terms and due diligence presented at trial. This Court should affirm.

I. NONE OF NORDIC'S ARGUMENTS ARE PRESERVED FOR REVIEW.

A review of the transcript from the May 3rd Hearing proves that none of the arguments relied upon by Nordic in this appeal was ever made to the trial court prior to its final ruling in favor of Associated. All of Nordic's current arguments, and all of its proffered "evidence," were first raised, if at all, in connection with its post-trial Rule 59(e) Motion to Reconsider. This is not proper, and Associated timely objected to the consideration of new evidence. (**R. p. 148** (Trans. 11, lines 7-17)).

Rules of issue preservation are "meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000). It was incumbent upon Nordic to introduce competent evidence of whatever contract it wished for the trial court to consider <u>during</u> the final hearing, not afterward. "A party cannot use Rule 59(e), SCRCP, to present to the trial court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman,* 301 S.C. 455, 392 S.E.2d 481 (1990). *Accord Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994); *Commercial Credit Loans, Inc., v. Riddle*, 334 S.C. 176, 512 S.E.2d 123 (Ct. App. 1999). This includes a bar against offering new evidence after the close of the proceedings. *See, e.g., Mozingo v. Ford Motor Co.*, 2009 S.C. App. Unpub. LEXIS 285, *2 (Ct. App. 2009) (noting that "a party cannot use Rule 59(e) to present new evidence to the court").

Further to the point, none of Nordic's post-trial evidence can be considered unless Nordic first proves that it was timely submitted. On this issue alone, Nordic has made no supporting argument whatsoever. It simply concludes, without explanation in its Initial Brief, that its post-trial affidavits are "timely" and should be considered. **(App. Br., p. 5)**. This conclusory, unsupported assertion has been abandoned. *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.");*accord First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). This Court should refuse to consider any arguments and materials proffered by Nordic after the May 3rd Hearing, which is fatal to its appeal. Even if the Court considers Nordic's arguments, they have no merit.

II. NORDIC CANNOT COMPLAIN OF THE TRIAL COURT'S REFUSAL TO ACCEPT ITS ORAL BID TO PURCHASE THE PROPERTY FOR $650,000 WHERE IT FAILED TO ESTABLISH PROOF AT TRIAL OF A VALID AND ENFORCEABLE AGREEMENT.

In order for the trial court to weigh two competing contracts against one another, logic demands that each contract must be legally enforceable and properly admitted into evidence to deserve consideration. Nordic's attempts fail in both respects.

A. Nordic's oral "bid" of $650,000 violates the Statute of Frauds

Nordic moved to intervene for the purpose of showing proof "why its contract is the more favorable and equitable for the parties." **(R. p. 66)**. However, Nordic failed to present an enforceable offer for the price of $650,000.

S.C. Code Ann. § 31-3-10 requires agreements for the sale of real property to be in writing and signed. *Fici v. Koon*, 372 S.C. 341, 346, 642 S.E.2d 602 (2007) ("To satisfy the Statute of Frauds, every essential element of the contract must be expressed in

a writing signed by the party to be compelled."). At the May 3rd Hearing, Nordic conceded it had no written agreement to purchase the Property for $650,000. **(R. p. 141** (Trans. 59, ln. 25 to Trans. 60, ln. 5)). This undisputed fact is fatal to its case, because the burden of proof was on Nordic to satisfy the Statute of Frauds. *Id.* (noting the party seeking to enforce the contract has the burden of proof). Counsel's verbal statement as to what Nordic might have been willing to offer in terms of price, terms and contingencies does not satisfy Nordic's burden of proof. *See Sessions v. Withers*, 327 S.C. 409, 414, 488 S.E.2d 888 (Ct. App. 1997)(noting statements of fact appearing only in arguments of counsel will not be considered); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986) (observing the trial court properly disregarded statements of counsel about testimony appearing in depositions not otherwise entered into evidence).

In an attempt to escape this flaw, Nordic attached a "copy of its amended contract to reflect its bid made during the hearing" to its Motion to Reconsider. **(R. p. 90)**. In addition to being untimely, this copy was signed by no one, not even Nordic. It cannot be enforced by anyone and has no evidentiary value. Nordic's oral "bid" cannot possibly amend the price in its contract with Ernestine Brown. *See Windham v. Honeycutt*, 279 S.C. 109, 302 S.E. (2d) 856 (1983) (evidence of oral modification of the real estate contract violates the Statute of Frauds). Thus, Nordic failed to present a valid and enforceable contract to purchase the Property for $650,000. *Stevens & Wilkinson*, 409 S.C. at 578, 762 S.E.2d at 701 ("where the undisputed facts do not establish a contract, the question becomes one of law").[8]

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[8] Whether Nordic presented a valid contract increasing the purchase price to $650,000 was questioned below. **(R. p. 148** (Trans. 9, ln. 4 to Trans. 10, ln. 10)). The trial court found that Nordic failed to present a valid, written contract for $650,000 as required by

Nordic also argues the May 3rd Hearing should have been handled like a public auction with oral bids. However, no party requested a public sale or an auction of any kind, and Nordic concedes this was not a public auction. (**App. Br., p. 8**). The trial court was certain, stating, "What it was not, was not bidding day in the courthouse." (**R. p. 150**, (Trans. 17, lines 2-5)). The question before the trial court was simply a choice of "Contract A" versus "Contract B." That is how the issue was presented to the trial court without objection from anyone, and no one appealed that process. Thus, it is the law of this case there was no auction bidding. *Accord Charleston Lumber Co., Inc. v. Miller Hous. Corp.,* 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000); *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling becomes the law of the case).

Besides, bidding was unnecessary once the parties stipulated to the value of the Property at $560,000. Nordic concedes in its Brief that all parties agreed to partition the Property by sale to either Associated or Nordic. (**App. Br., pp. 7-8**). Considering it was not an auction, but instead a selection between two contracts for the sale of real property, all material terms offered by Nordic must satisfy the Statute of Frauds. They do not, just as the trial court found. (**R. p. 150** (Trans. 17, lines 6-20)).

Nordic knew the May 3rd Hearing was for the purpose of making findings of fact and conclusions of law regarding the value of the Property and which contract, Associated's or Nordic's, would be approved. (**R. p. 66**). Procedures reserved for judicial auctions simply do not apply here. Besides, Nordic ignores the fact that its "oral bid" was not the sole reason for the trial court's ruling. Matters of due diligence, long-

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the Statute of Frauds. (**R. p. 142** (Trans. 63, lines 17-21)); (**R. p. 150** (Trans. 17, lines 2-20)).

term commitment, and other factors also influenced the result. **(R. pp. 142-143** (Trans. 64, ln. 14 to Trans. 66, ln. 12)); **(R. p. 150** (Trans. 17, ln. 6 to Trans. 18, ln. 3)).

B. Nordic cannot rely on untimely evidence, and this Court should disregard the materials Nordic offered for the first time post-trial

At the May 3rd Hearing Nordic called no witnesses, introduced no evidence, conducted no cross-examinations, and made no objections. No one attended the hearing on its behalf other than trial counsel. **(R. pp. 142-143** (Trans 63, ln. 17 to Trans. 66, ln. 12)). Only after the trial court approved Associated's contract did Nordic try to develop a record. It first filed an unsigned version of a proposal for $650,000. **(R. p. 72)**. Later, a month after the final hearing, Nordic submitted three affidavits in support of its post-trial Motion to Reconsider. **(R. pp. 112-14)**; **(R. p. 103)**. Then, at the June 7th hearing, Nordic announced it had yet another version of the contract that removed certain, but not all, contingencies. **(R. p. 147** (Trans. 7, lines 6-22)).

In addition to running afoul of issue preservation rules and the proper use of Rule 59(e), Nordic's use of post-trial affidavits filed after the May 3rd Hearing ended deprives other parties of the "opportunity for cross examination with the respect to the proffered, additional evidence." *Goolsby v. Goolsby,* 229 S.C. 101, 92 S.E.2d 57 (1956) (citing *Dempsey v. Huskey,* 224 S.C. 536, 80 S.E.2d 119 (1954) (where additional evidence submitted after the reference was closed and the referee made his report was not considered because there was no opportunity for cross examination)).

> It behooved appellant to produce the affiants as witnesses if she wanted the benefit of their testimony, and let them be subject to cross-examination. The latter is a most valuable right. It is the law of evidence that when a witness has been examined in chief, the other party has a right to cross-examine him. The power of cross-examination has been justly said to be one of the principal, as it

> certainly is one of the most efficacious, tests which the law has devised for the discovery of truth.

Goolsby, 229 S.C. at 111-12, 92 S.E.2d at 62. (internal quotations and citations omitted).

If Nordic wished to rely upon a new contract accepted by Sheneatha and Germaine Brisbane, Nordic should have introduced that agreement at the May 3rd Hearing and called them as witnesses (which would have been hard considering their agreement did not exist on that date). If Mr. and Ms. Brisbane desired a different result, they should have timely pled for relief, appeared and testified, and subjected themselves to cross-examination.[9] By failing to present these witnesses, Nordic deprives the Court, the remaining heirs, and Associated the essential right to cross-examine them[10] about their untimely "evidence." This is not allowed. *See, generally, Zaman v. S.C. State Bd. of Med. Exam'rs*, 305 S.C. 281, 408 S.E.2d 213 (1991) (finding it was error to allow a party to submit evidence by affidavits because it denied the right of cross-examination); *State ex rel. Medlock v. Nest Egg Soc. Today, Inc.*, 290 S.C. 124, 130-131, 348 S.E.2d 381 (Ct. App. 1986) ("The introduction of evidence by affidavit rather than live testimony accordingly deprived the defendants of the due process right to confrontation and cross examination."); *S.C. Dep't of Soc. Servs. v. Beeks*, 325 S.C. 243, 481 S.E.2d 703 (1997) (civil due process affords a party the right to cross-examine the writer of a

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[9] Sheneatha and Germaine Brisbane each acknowledged service of process, but neither of them filed an answer objecting to Plaintiffs' prayer for relief. **(R. pp. 112-114)**. They each received ample notice of the May 3, 2016 hearing. **(R. p. 72)**. Neither of them chose to testify, if they were present.

[10] Nordic may complain of citations herein to the Affidavit of Christopher Phillips, filed in opposition to Nordic's post-trial Motion for Temporary Restraining Order. This Court should refuse to consider <u>any</u> evidence that was not presented to the trial court during the May 3rd Hearing. But, if Nordic's post-trial evidence is considered, so, too, should the Affidavit of Christopher Phillips. Nordic cannot have it both ways.

report entered into evidence as well as any witness whose statements formed the basis for the report). "Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Zaman*, 305 S.C. at 284, 408 S.E.2d 215.

Here, the record fails to establish that Nordic had a valid contract to buy the Property for $650,000. Whether this Court finds Nordic's oral "bid" was barred by the Statute of Frauds or that the factual record is not sufficient to meet Nordic's burden of proof during the May 3rd Hearing to establish a contract in that amount, the result is the same. Either way, the trial court should be affirmed.

III. THE TRIAL COURT PROPERLY APPROVED ASSOCIATED'S FULLY RATIFIED CONTRACT OVER THE ORAL BID SUBMITTED BY NORDIC'S COUNSEL DURING THE MAY 3RD FINAL HEARING.

Citing to S.C. Code Ann. § 15-61-25, Nordic complains, for the first time, that the trial court should not have gone beyond determining the value of the Property in the May 3rd Hearing to then award "one contract over another." **(App. Br., pp. 7-8)**. Nordic never objected to this process; rather, it intervened before the May 3rd Hearing to prove why its contract was preferable. **(R. p. 68)**. Having voiced no objection, and having requested approval of its own "bid" at the hearing, Nordic consented to this process and cannot question it on appeal. *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 23, 698 S.E.2d 612, 624 (2010) ("[A] contemporaneous objection is required to preserve an issue for appellate review."); *Gissel v. Hart*, 382 S.C. 235, 243, 676 S.E.2d 320, 324 (2009) (a party may not complain on appeal of an error that his conduct induced).[11] To

[11] Nordic asks this Court to direct the sale of the property to it rather than Associated. **(App. Br., p. 13)**. Nordic cannot complain of the trial court's selection between the two potential buyers when that is the same result Nordic also seeks.

the extent Nordic's assignment of error focuses on the basis for the trial court's decision to approve Associated's contract, its argument is equally flawed.

A. The trial court properly approved Associated's contract, because Nordic's proposal is materially different, and less favorable

Nordic represented to the trial court, and continues to claim on appeal, that its $650,000 proposal removed all contingencies (except the grave site contingency) and is on an "equal playing field" with Associated's ratified contract. **(App. Br., pp. 9-10)**; **(R. pp. 141-142** (Trans. 59, ln. 5 to Trans. 61, ln. 4)); **(R. p. 147** (Trans. 6, ln. 25 to Trans. 7, ln. 22)). Associated pointed out this was not true during the May 3rd Hearing. **(R. p. 141-142** (Trans. 60, ln. 23 – Trans. 61, ln. 4)). In any event, the terms of Nordic's untimely agreement with Sheneatha and Germaine Brisbane prove this to be patently false.

The agreement executed by Sheneatha and Germaine Brisbane a month after the final hearing is fully contingent upon Nordic's satisfaction with the Property. Specifically, Nordic kept the right to terminate "If [Nordic] is not satisfied with [Nordic's] inspections … in [Nordic's] sole discretion." **(R. p. 111)**. During the June 7th hearing on its Motion to Reconsider, Nordic admitted: "Within that contract there still some of the contingencies." **(R. p. 147** (Trans. 7, lines 6-11)). In contrast, Associated had no such "pre-look" contingency. Presumably seeing this as a problem, counsel for Nordic informed the trial court that he had with him at the June 7th hearing yet another version of the agreement that removed all but the grave site contingency. This document was neither offered nor accepted into evidence. **(R. p. 147** (Trans. 7, lines 12-22)).

The fact that Nordic still required a grave survey contingency on June 7, 2016, further separates the two deals. Contrary to Nordic's contention during the June 7th

hearing, Associated had, by then, already completed its grave site survey, doing so within days of the May 3rd Hearing. **(R. p. 147** (Trans. 6, lines 17-24)). Associated informed the trial court it had removed its final contingency and was ready to close. **(R. p. 141** (Trans. 58, ln. 15 to Trans. 59, ln. 4)); **(R. pp. 141-142** (Trans. 60, ln. 19 to Trans. 61, ln. 4)); **(R. p. 148** (Trans. 10, ln. 11 to Trans. 11, ln. 7)); **(R. p. 124)**. There is more.

Indisputably, preserving the family grave sites was of paramount importance. But, Nordic's post-trial contract with Sheneatha and Germaine Brisbane merely provides that "*At closing*, Buyer and Seller *shall enter into a written agreement* regarding the perpetual maintenance of all such grave sites and the right of Sellers and respective Heirs to visit such grave sites." **(R. p. 111)**. (all emphasis added). Here, Nordic has offered nothing more than an unenforceable "agreement to agree," which is void under South Carolina law. *N. Am. Rescue Prods. v. Richardson*, 411 S.C. 371, 769 S.E.2d 237 (2015) ("Provisions which are essentially agreements to agree in the future have no legal effect.") (citing *Ellis v. Taylor*, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1994) (where a contract provided that "as each child begins college, the parties shall agree to an amount for support of the home while said child is in college," it was void because it left material terms open for future agreement)); a*ccord Stevens & Wilkinson*, 409 S.C. at 578, 762 S.E.2d at 701*; McLaurin v. Hamer*, 165 S.C. 411, 164 S.E. 2 (1932). Nordic has made no commitment to the heirs on this crucial issue because its promise to enter into an agreement at a future closing is unenforceable.

Fortunately for the heirs, Plaintiffs provided proof of the fully ratified agreement whereby Associated committed to preserve the heirs' family grave sites. **(R. p. 162)**; **(R.**

p. 129 (Trans. 12, lines 5-25)); (**R. p. 131** (Trans. 17, lines 17-25)). Nordic has nothing to compare.

B. The record supports the trial court's determination that Associated's ratified contract was in the best interest of the parties

"A partition should be fair and equitable to all parties." *Campbell v. Jordan*, 382 S.C. 445, 451, 675 S.E.2d 801 (Ct. App. 2009). By approving the sale to Associated, the trial court entered a ruling it found was in the best interest of the parties. (**R. p. 142** (Trans. 63, lines 17-21)); (**R. pp. 142-143** (Trans. 64, ln. 14 to Trans. 66, ln. 12)); (**R. pp. 149-150** (Trans. 16, ln. 14 to Trans. 18, ln. 23)). Associated testified about its due diligence and expenses incurred, and it placed its fully ratified purchase contract into evidence, along with its agreement to preserve the family grave sites. (**R. pp. 152, 159, 162**); (**R. pp. 129-131** (Trans. 11, ln. 1 to Trans. 17, ln. 25)). All of this influenced the trial court's reasoned decision. (**R. pp. 142-143** (Trans. 63, ln. 17 to Trans. 66, ln. 12)). Associated promptly completed its grave study and stands ready to close, contingency-free, at the stipulated value. Nordic has done none of this, and the trial court had no meaningful opportunity to evaluate Nordic's claims.

Certainly, "the pecuniary interests of all of the parties is the determining factor in deciding *whether* to require a judicial sale or to allow a partition by allotment." *Campbell*, 382 S.C. at 451, 675 S.E.2d 801 (emphasis added). *Whether* to require a judicial sale was not questioned. All parties stipulated the Property was worth $560,000, and all parties agreed the Property would be sold to either Associated or Nordic. Even if we ignore the Statute of Frauds, the particular details of each competing "contract" were relevant, and price alone was not the sole consideration. (**R. p. 128** (Trans. 9, lines 15-18)). The fact that Nordic's offer was contingent and Associated's contract is a "sure

thing" and ready to close is evidence supporting the trial court's determination that Associated's contract is in the best interest of the parties. **(R. p. 142** (Trans. 63, ln. 17 to Trans. 66, ln. 12)); **(R. p. 148** (Trans 10, ln. 25 to Trans. 11, ln. 7)); **(R. pp. 148-149** (Trans. 12, ln. 25 to Trans. 14, ln. 10)); **(R. p. 149** (Trans. 15, ln. 23 to Trans. 16, ln. 5)); **(R. pp. 149-150** (Trans. 16, ln. 14 to Trans. 18, ln. 23)); **(R. p. 124)**.

Price is important, but it is not the penultimate factor where other essential collateral matters must be considered, such as the preservation of grave sites, unsatisfied contingencies (on Nordic's part), and abundant due diligence efforts performed by Associated.[12] The trial court carefully considered these issues and the evidence presented and made the correct ruling. *See* Rule 71(f)(4), SCRCP ("But if it shall appear to the court that it would be more for the interest of the parties interested in the estate or property that it should be sold and the proceeds of sale be divided among them, then the court shall direct a sale to be made upon such terms as the court shall deem right.") (emphasis added). Considering Nordic failed to even introduce a signed, written agreement for the higher price of $650,000,[13] the trial court made the right decision.

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[12] Price is not the end-all-be-all factor, even in judicial sales. In *Holliday v. McFadden*, 188 S.C. 187, 198 S.E. 392 (1938), the trial court refused to accept an oral bid that was entered just moments after bidding closed, even though it was higher. If pecuniary interests were the only consideration that mattered, *Holliday* necessarily would have been decided the other way. Nordic's higher, unwritten offer, cannot overcome its failure to otherwise prove that its contract is the more favorable.

[13] Even if Associated and Nordic *did* have identical contracts in every respect (which they do not), there was no error in selecting Associated's because it appeared and testified, whereas Nordic did not. *Cf. Crewe v. Blackmon*, 289 S.C. 229, 233-34, 345 S.E.2d 754, 757 (Ct. App. 1986) (citing *Evatt v. Campbell*, 234 S.C. 1, 9, 106 S.E. (2d) 447, 451 (1959) (noting the master's conclusion has "peculiar value in arriving at a correct result. . . ." because the master observed the demeanor and appearance of the witnesses who testified).

IV. As an Additional Sustaining Ground, Nordic Cannot Rely on Its Contracts with Ernestine Brown, Sheneatha Brisbane and Germaine Brisbane.

Plaintiffs prayed for approval of their contract with Associated, as did Associated in its pleadings. **(R. p. 53)**. The court-appointed Guardian *ad Litem Nisi* agreed with Plaintiff's requested remedy. **(R. p. 55)**.

The picture looks much different on the other side of things. Ernestine Brown was in default when Nordic contracted with her. **(R. p. 6)**. When Nordic later moved to intervene, it requested approval of the specific contract it made with Ms. Brown. **(R. pp. 67, 70)**. Ms. Brown's attorney admitted that her "second contact" with Nordic was simply to get the higher price before the trial court and that she had no other interest aside from that point.[14] The record is devoid of any signed, revised agreement for $650,000 being entered into between Nordic and Ms. Brown, despite both parties having representation at the May 3rd Hearing.

Sheneatha and Germaine Brisbane acknowledged service and consented to the order of reference, but never filed an answer or other pleading requesting any remedy or relief. They did not participate in the May 3rd Hearing despite receiving notice. In fact, they had no contract at all until well after the trial court ruled. Sheneatha and Germaine are not parties to Nordic's contract with Ms. Brown. Likewise, the document they submitted a month after the May 3rd Hearing is not an "amendment" to Nordic's contract

[14] Nordic's contract with Ms. Brown was relevant only to value. Even though a party in default maintains a right of first refusal to purchase the Property pursuant to S.C. Code Ann. § 15-61-25(A), nothing in Section 15-61-25 affords a party an equivalent right to contract to sell the Property while in default of a pending declaratory judgment action seeking approval of another ratified contract. Ms. Brown never made any prayer for relief.

with Ms. Brown. It cannot be such because Ms. Brown did not sign it as required by the Statute of Frauds. S.C. Code Ann. § 31-3-10; *Fici v. Koon*, 372 S.C. at 346, 642 S.E.2d 602 (agreement must be signed by the party to be compelled). Having declined to participate in the proceedings despite receiving notice, neither Sheneatha nor Germaine have the ability to request relief at this point. Neither of them appealed the trial court's findings—thus, they have abandoned their untimely, post-trial request to have their contract preferred.

Last, the trial court lacked authority to consider Nordic's contract with Sheneatha and Germaine. When Nordic moved to intervene, it requested approval of the specific contract it made <u>with Ms. Brown</u>. Its pleadings contain the same prayer for relief regarding, its contract with Ernestine Brown. Nordic never amended its pleadings to request approval of a different contract with Sheneatha and Germaine, to which Ms. Brown is not a party. In *Rushing v. Intex Products, Inc.*, 285 S.C. 595, 599, 330 S.E.2d 555, 557 (Ct. App. 1985), the Court held:

> In the instant case, the only issue tendered by the parties was whether the 1971 Patent Agreement was still valid or whether it had been cancelled by the 1976 Agreement. Rushing did not allege that the 1978 letters either modified the Patent Agreement or superseded it. In fact, the pleadings contain no reference to the letters. The court therefore erred in considering them and in granting Rushing relief based on them.

Id. Neither this Court nor the trial court can approve Nordic's contract with Sheneatha and Germaine because its pleadings contain no facts or claims pertaining to it. Associated opposed Nordic's attempt to rely upon a new contract post-trial. **(R. p. 148** (Trans. 9, ln. 4 to Trans. 10, ln. 10)). *Cf. Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 77, 488 S.E.2d 335, 338 (1997) (holding absent an amendment of the pleadings or

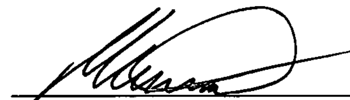
implied consent to consider relief not requested in the pleadings, the panel could only consider the issues contained within the pleadings and could only award the relief requested within the pleadings).

CONCLUSION

For the reasons set forth herein, Respondent Associated Developers, Inc. respectfully requests this Court to affirm the judgment below.[15]

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



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[15] In the alternative, if this Court decides to reverse, it must remand the matter for further proceedings rather than award the sale to Nordic. Associated's claim for unjust enrichment to recover the significant fees, costs, and expenses it incurred in good faith to the benefit of the Property while conducting its due diligence was not reached below because the trial court approved Associated's contract. **(R. pp. 83-89)**. If this Court reverses, this claim must be heard before a decision is made to award the contract to Nordic, because this claim affects the resulting pecuniary interests of the heirs by reducing the net value of Nordic's offer. Both Associated and the heirs have a right to be heard on that issue before choosing between Associated and Nordic. The trial court already signaled that Associated would be entitled to recover on this claim, finding: "[Associated] expended a considerable amount of money in the meanwhile, and somebody's going to have to pay that money. If the property doesn't go to [Associated]." **(R. p. 150** (Trans. 17, ln. 21 to Trans. 18, ln. 3)).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-In-Equity

Case No. 2016-001298

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 od The United States of America, being fictitious names designating as a class any unknown person or persons who may be an heir, distributee, 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, Roxanna Pinckney, Daniel Simmons, Horace Robinson, Elizabeth Williams, Mabel Robinson, Julian Robinson, Patricia Williams, Albertha 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. Mithcell, James Heyward, Clarence Brisbane, Swackie Brisbane, Jr., Susan Richardson, Janie Simmons a/k/a Janie Richardson Brisbane, 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 Manigault, 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,

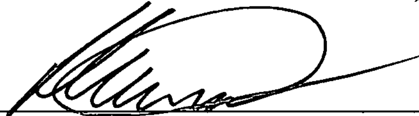
And of which Nordic Group, LLC is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned attorneys hereby certify that the Final Brief of Respondents complies with Rule 211(b), SCACR.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



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Sworn to and subscribed before me
This 14th day of November, 2016.

Notary Public for South Carolina
My Commission Expires 11/16/2020