THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Honorable Mikell R. Scarborough

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

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.

APPELLANT'S PETITION FOR REHEARING

TABLE OF AUTHORITIES

Cases

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Other Reference Sources

Appellant, Nordic Group, LLC, petitions this Court for a rehearing of its decision filed February 7, 2018, which was received by Appellant on February 8, 2018. This Court issued its decision based upon the briefs and Record on Appeal, without oral argument. In affirming the trial court's decision, this Court based its legal analysis on factual assertions that are not correct or supported by the record, erroneously decided that certain issues were not properly preserved for appeal, and failed to weigh the equities of the parties in rendering its opinion.

Appellant appealed the Master-in-Equity's ruling in a partition action related to heirs' property in Charleston County. A partition action is an action in equity. In an appeal from an equitable action, this court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *See Laughon v. O'Braitis*, 360 S.C. 520, 524, 602 S.E.2d 108, 110 (Ct. App. 2004). Here, this Court overlooked or misapprehended key facts before the Court and disregarded record evidence pertinent to the issues on appeal.

I. APPELLANT'S ORAL OFFER TO PURCHASE FOR $650,000.00 IS VALID AND ENFORCEABLE

This Court's review of the record is in error as to the evidence that was before the trial court for consideration during the May 3, 2016 valuation hearing. This Court's opinion inaccurately states, "Although Nordic submitted to the Master a written but unsigned offer to purchase the property for the price of $560,000 prior to the valuation hearing, the only evidence Nordic offered at the hearing was its attorney's oral offer increasing its offer price." *See* Ct. App. Opinion, p.4. This statement reflects an erroneous view of the record.

At the initial December 2015 hearing determining the ownership interests of the numerous heirs involved, the trial court was presented with a purchase agreement for the property from Appellant in the amount of $560,000.00 and a purchase agreement for the property from Respondent in the amount of $455,000.00. *See* R. 127-128. Accordingly, the trial court scheduled a hearing to obtain testimony on the value of the property for the purpose of partition and ultimately a sale based on S.C. Code Ann. § 15-61-25. *See* R. 127-128. At the May 3, 2016 valuation hearing, Appellant's executed contract for $560,000.00 along with an appraisal in support of the value were before the Court. *See* Appellant's Reply Brief p. 4. The purpose of the May 3, 2016 hearing was to take testimony and to determine the "fair market value" of the subject property as of the date of the initial hearing on December 17, 2015. "Fair Market Value" is defined as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect." VALUE, Black's Law Dictionary (10th ed. 2014); see also http://www.investopedia.com/terms/fairmarketvalue.asp. ("the price that a person reasonably interested in buying a given asset would pay to a person reasonably interested in selling it for the purchase of the asset or asset would get in the marketplace.").

At the hearing, the trial court established the value of the property at $560,000.00 based upon an appraisal presented to the Court by Appellant. Thus, the trial court, as a matter of law, determined the "fair market value" of the property to be $560,000.00. Based on the Appellant's appraisal, Respondent increased its contract amount from $455,000.00 to $560,000.00 to match Appellant's contract amount to purchase the property. At this point, the trial court had evidence of two contracts of equal value in the record. Appellant, through

a binding offer made on the record by its counsel, with authority, increased its offer during the valuation hearing to purchase the property for $650,000.00. The trial court disregarded Appellant's increased proposed contract amount of $650,000.00, despite evidence in the record that the "fair market value" of the property is what a buyer is able to pay for it. During his hearing testimony, the Respondent testified "the property is worth what I can pay for it". R 134. At the same hearing, Appellant, through its duly authorized counsel's statement on the record, agreed to amend its purchase agreement and increase the amount of consideration paid to the landowners to $650,000.00. *See* R. 127, 141. The Respondent testified he would not increase his offer above the $560,000.00 offer. R 135.

Appellant's offer to purchase the heirs' property for $650,000.00 was ruled by the trial court to be invalid because it was not in writing. In doing so, the trial court ruled as a matter of law that Appellant's oral offer of $650,000.00 was insufficient under the statutes governing Partition actions in South Carolina. South Carolina's Partition Statute, which governs this dispute, does not provide that an oral bid is insufficient, nor does it disallow memorialization of a verbal offer at a later date, as was done here by Appellant. See S.C. Code Ann. § 15-53-10.

Given that Appellant was reasonably interested in buying the property for $650,000.00 and the landowners were reasonably interested in selling the property for what the property would get in the marketplace, the "Fair Market Value" of the property was therefore established at $650,000.00 during the May 3, 2016 hearing through Appellant's binding offer to pay $650,000.00 for the property. Further, landowner Clarence Brisbane objected to the sale of the property to Respondent for the price of $560,000.00. During

questioning from Judge Scarborough, Mr. Brisbane testified that he was opposed to the sale of the property to Respondent and believed the landowners were entitled to an amount greater than the $560,000.00 offered by Respondent. R. 137. The trial court erred in ruling as a matter of law that the "fair market value" of the asset was $560,000.00 and ordering the sale of the property to the Respondent for less than a reasonably interested buyer was willing to purchase the property for.

In affirming the trial court, this Court relies upon the 1933 Supreme Court Opinion of *McManus v. Bank of Greenwood* to conclude that Appellant's oral offer to purchase the subject property for $650,000.00 through its counsel was a fact appearing only in argument of counsel and the trial court was not in error in disregarding the offer. *See* Ct. of App. Opinion. In *McManus*, the attorney's statement of fact was that a particular fund in question was held in trust by a bank for a special purpose, which weighed upon how the Court applied the funds for purpose of satisfying a judgement. *See McManus* 171 S.E. at 474-475. Here, Appellant's counsel's oral offer of $650,000.00 on behalf of Appellant is distinguishable from the Supreme Court's ruling in *McManus*, and this Court's application of *McManus* is flawed. The statement by counsel in the instant case was not a statement purporting to present evidence not in the record, but rather was a binding offer made by a duly authorized legal representative of the offeror. Thus, it constituted the offer *in and of itself*, and therefore is direct evidence of the same, made on and put in the record.

Per the South Carolina Supreme Court's holding in *Holliday v. McFadden*, 188, S.C. 187, 198 S.E. 392 (1938), Appellant's oral offer, made on the record through counsel, to purchase the property should have been found by the trial court and this Court as sufficient.

Further, Appellant's submission of the executed contract memorializing the $650,000.00 at the hearing on Appellant's Rule 59 motion is not submission of new evidence to the Court. Rather, the submission of the executed contract was made simply to memorialize the evidence already before the trial court.

Thus, the master-in-equity and this Court are in error by not recognizing Appellant's oral offer to purchase the subject property as sufficient, and by not accepting the subsequent memorialization of the offer in the form of an executed contract. In making its ruling, the trial court stated:

> "I'm going to approve the Associate Developer's contract as amended today. I'm using what I think is my best judgment. It's not the highest price that's coming here, but it's the highest price that's coming here pursuant to law. Mr. Lanning, we read the statute as you and Mr. McFarland was talking, and you-all were supposed to come in here, and we'll have a fight over valuation. That's what this hearing was today. Both parties agree the value of the property is $560,000. Now, your offering over and above that. I have a problem with how it was done . . . [i]f you-all were willing to come in here ten days ago and put your 650 on the table I would do it, and I would say that was clearly pursuant to Statute 15-61-25, which is one of the reasons that I wanted to make sure that I got you in this case prior to today's hearing so you could put the offer in. I don't have anything in writing to that effect. I understand what you're telling me. I understand the benefit of an additional $90,000. I can tell you, at this stage of the proceeding, because of where we are and because of the due diligence that's been done by the party that's under contract with the Plaintiffs in this case, I think that they're prepared and ready to close. . . . So I find that they've acted in good faith. I think its in their best interest."

R. 142 (emphasis added). This was an effort of law, and it is properly before this Court on appeal.

The trial court's initial ruling, based on the premise that it disfavored the manner in which Appellant had gone about the process, is purely subjective and goes outside of the factors that should be considered by the trial court in determining whether to approve a contract; it has no bearing on the legitimacy of any contract presented. Under South Carolina law, a property partition procedure must be fair and equitable to ***all parties*** to the action. *Campbell v. Jordan*, 382 S.C. 445, 675 S.E.2d 801 (2009). Here, the trial court's ruling, and this Court's subsequent affirmation of it, are not fair and equitable to any party and promote only the interest of Respondent. In fact, the trial court in its ruling refers to the ruling as being in the best interest of the Respondent. *See* R. 142. The result is inequitable and tainted by the trial court's errors of law presented through this appeal.

II. 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 issues on appeal in this case are whether the Master-in-Equity erred by approving Respondent's contract to purchase the property and whether the Master-in-Equity erred by not giving consideration to Appellants' oral offer to purchase the subject property when directing the sale of certain heirs property. These issues are preserved and are properly before the appellate court.

This Court held that Appellant raised three (3) arguments on appeal that were not properly preserved at the trial court level. First, that Appellant failed to object to the procedure taken by the Master-in-Equity during the valuation hearing. Second, Appellant's argument that the valuation hearing was in-kind to a judicial sale was not raised until Appellant's Rule 59(e) motion. Third, Appellant's argument that the Master-in-Equity did not have to award a contract at the valuation hearing was not raised until this appeal. Appellant respectfully submits that this Court is in error by excluding these arguments, as all arguments were in fact ruled on by the trial court.

Appellant does not raise in this appeal any argument opposing the procedure followed by the Master-in-Equity at the valuation hearing. Instead, Appellant has raised issues with the trial court's substantive failure to accept Appellant's oral offer during the valuation hearing in establishing the fair market value of the property. The trial court's decree finds that, because Appellant's (Nordic) increased offer of $650,000.00 was not presented to the court at the valuation hearing in writing, it is therefore non-binding. The court's ruling is in error and the issue is preserved for appeal.

Further, Appellant argues the Master-in-Equity's basis for ordering the sale of the property to Respondent is in error. Appellant's initial brief, referenced the ruling by the trial court, through partition, making a selection of one contract by competing buyers over another is similar to a judicial sale. (Appellant's Initial Brief pg. 8). Appellant does not argue that the trial court should have held a judicial sale. Instead, the trial court failed to take all offers to purchase the property into consideration when making its determination to order the sale of the property to Respondent, over the Appellant. 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 the case differently. However, nothing within South Carolina's Partition Statute prevents an oral offer from being submitted. The trial court's erroneous ruling to the contrary is properly at issue in this appeal.

Finally, nothing within the South Carolina Partition Statute requires the trial court to order and/or approve the sale of the property at the valuation hearing. All these arguments were presented by Appellant to the trial court and ruled on by the trial court. 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. The trial court's refusal to consider Appellant's offer increasing its price was inequitable, legally erroneous, and properly before this Court.

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

This Court's affirmation of the trial court's initial ruling and disregard for Appellant's arguments raised at the Rule 59(e) hearing disregards the intent of the South Carolina Rules of Civil Procedure. 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 basis of the arguments presented by the Appellant in its Rule 59(e) motion was to call to the court's attention to an error in its failure to give consideration to Appellant's oral offer of $650,000.00. *See* Motion to Reconsider (R. 90). The documents submitted by affidavit at the Rule 59(e) motion hearing were a memorialization of the oral offer submitted by Appellant at the May 3, 2016 hearing. *See* Affidavits of James A. Bruorton IV (R. 103); Sheneatha Brisbane (R. p. 112); and Germaine Brisbane (R. 114). Appellant did not submit new evidence to the Court at the Rule 59(e) hearing. 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. 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.

IV. TRIAL COURT ABUSED ITS DISCRETION IN PLACING RESPONDENTS' INTEREST AHEAD OF THE OTHER PARTIES.

This Court's opinion does not address the Appellant's argument that the trial court abused its discretion in placing the Respondent's interest ahead of the other parties, including the landowner-heirs. The trial court's application of factors outside of the parameters of a

partition action represent an error of law and abuse of discretion, and the Appellate Court should make an independent review of this issue. This Court has not done such an exercise in this case and should reconsider its opinion.

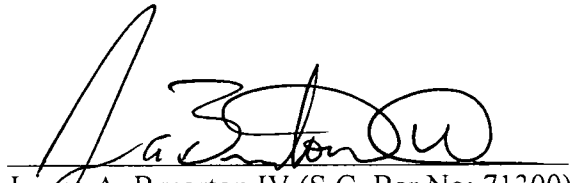
After hearing the arguments of counsel at the June 7, 2016 Motion to Reconsider hearing, the trial court chose to follow its initial ruling based on the premise that it disfavored the manner in which Appellant had gone about the whole process. R. 142. Its subjective basis in approving Respondent's purchase agreement rather Appellant's agreement goes outside of the factors that should be considered by the trial court in determining whether to approve a contract and has no bearing on the legitimacy of any contract presented.

The trial court went as far as to say that if Appellant wanted to purchase the property from Respondent for the offered $650,000.00 it certainly could. "Appellant's got a solution ... They can go to Associated and buy their contract if that's what they want to do. That's what the market does. That's what happens all the time." R. 149-150.

Suggesting Appellant pursue a purchase of the Property from Respondent after Respondent has purchased the Property from the landowner-heirs for a lesser price, is in complete disregard of the pecuniary interest of the landowner-heirs and applicable principles of law concerning partition actions. The trial court recognized that Respondent had already incurred development costs in the Property and took that into consideration when choosing the contract to approve. Failing to approve the purchase contract which presented $90,000.00 in additional value to the landowners disregards the pecuniary interest of the parties and is in error. The trial court placed the interest of Respondent ahead of the other parties, including the landowners. In doing so, the trial court abused its discretion.

CONCLUSION

For the reasons set forth herein, this Court should reconsider its decision, allow for oral arguments and render an opinion reversing the trial court and remanding the matter for further hearing.



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February 21, 2018

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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.

PROOF OF SERVICE

I hereby certify that on February 21, 2018, I have served a copy of Appellant's Petition for Rehearing on all counsel by electronic transmission and/or U.S. Mail addressed as follows:

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February 21, 2018

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February 21, 2018

VIA FED EX
Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
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Re: Vivian Cromwell, et al. v. Alberta Brisbane, et al.
Case No.: 2015-CP-10-000939
Appellate Case No.: 2016-001298

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Appellant's Petition for Rehearing and Proof of Service in connection with the above matter.

By copy of this letter, I am serving a copy of the same on all counsel of record.

With kind regards, I am

Sincerely yours,

James A. Bruorton IV

CAB/see
Enclosures
cc: Wallace K. Lightsey, Esquire
Michael A. Timbes, Esquire
Thomas J. Rode, Esquire