

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

Honorable Mikell R. Scarborough

RECEIVED

MAR 07 2018

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

SC Court of Appeals

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 REPLY IN SUPPORT OF
PETITION FOR REHEARING**

Appellant, Nordic Group, LLC, respectfully submits this reply to Respondent's Return to Appellant's Petition for Rehearing.

Respondent's Return is exactly what one would expect from a party that has little confidence in its position on the merits – a studied effort at procedural “gotchas” and meritless claims of waiver and issue preclusion. However, as the Supreme Court and this Court have cautioned litigants and lower courts: “[I]ssue preservation ‘is not a “gotcha” game aimed at embarrassing attorneys or harming litigants.’” *Johnson v. Roberts*, Op. No. 5535, Shearouse Adv. Sh. No. 6, at 72, 76 (S.C. Ct. App. Feb. 7, 2018) (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)).

With respect, Appellant submits that the Court's unpublished *per curiam* opinion in the instant case fails to heed its own (and the Supreme Court's) admonition, and Respondent's attempts to play “gotcha” are misplaced and unfounded. As a result, if the decision below stands, the heirs who own the property at issue will be deprived of an additional \$90,000 that they would have received but for the Master's erroneous conclusion that it was incumbent on Appellant to produce a written signed contract at the valuation hearing. There is no such requirement in the law, nor any basis for it in logic or policy. Further, it was wrong and inequitable for the Master to allow Respondent to make a higher bid and then deny Appellant the same opportunity. The grounds asserted by Appellant for error in the Master's decision are preserved and properly at issue in this appeal, as they were all presented to and addressed by the Master.

Respondent's argument concerning law of the case is misplaced, *see* Resp. Return at 2, as it is not incumbent on a party seeking reconsideration to challenge every sentence of the Court's opinion. Rather, the purpose of the petition is to identify "points ... overlooked or misapprehended." Law of the case has no application here.

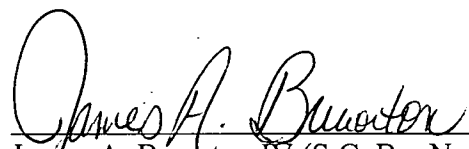
Respondent also appears to argue that Appellant's trial counsel conceded that he had no authority to make a binding offer on Appellant's behalf, *see* Resp. Return at 2-3, but the statement by trial counsel quoted by Respondent was simply a response to the Master's inquiry as to whether there was anyone present from Appellant's organization. It is axiomatic that an attorney may make a valid contractual offer on behalf of a client, and there is no reason in the law, logic, or policy that such an offer, made on the record in court, should not be considered as properly before the trial court in the context of this action. This Court erred in viewing the offer as an attempt to put in evidence through argument of counsel. However, the situation before this Court is not like that of a party claiming that its attorney's argument that the light was red, for example, is evidence that the light was red. What we are dealing with here was a contractual offer made in court, on the record, by an attorney having both actual and apparent authority to make the offer. The statement was in and of itself the offer, not an attempt to put in evidence by argument of counsel.

Respondent's contentions concerning the Rule 59(e) motion have been addressed in Appellant's Reply Brief and Petition for Rehearing, and will not be rehashed here. In short, Appellant's Rule 59(e) arguments and evidence were considered and addressed by the Master and thus are properly preserved in this appeal. In brief summary, the issues before the Court are as follows:

- The trial court misapplied the law in determining that Appellant's oral offer was insufficient under South Carolina's Partition Statute, and this Court's Opinion does not address this error of law;
- This Court overlooks landowner Clarence Brisbane's objection to the sale of the property to Respondent for \$560,000.00, indicating the landowners were entitled to the higher offer made by Appellant;
- This Court's reliance on *McManus v. Bank of Greenwood*, 171 S.C. 84 (1993), is in error;
- This Court's misapprehends principles of law in considering the executed contract presented by Appellant with Appellant's Rule 59 motion as new evidence as opposed to the memorialization of evidence already before the trial court;
- The trial court's consideration of factors that go beyond those to be considered by the trial court in determining whether to approve a contract is in error, and this Court's Opinion does not address this error of law;
- This Court's failure to address or recognize the arguments presented by Appellant at the Rule 59 hearing based on lack of preservation for appeal is in error;
- Appellant's challenge to the trial court's sale of the property at the valuation hearing is properly preserved for appeal;
- This Court erred by disregarding Appellant's arguments raised at the Rule 59(e) hearing;

- This Court's opinion overlooks 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, and makes no ruling on that appealed issue;
- This Court overlooks the material fact that Appellant had a fully executed Contract before the Court at the May 3, 2016 valuation hearing;
- The trial court's legal determination of "Fair Market Value" is in error and this Court's Opinion does not address this error of law;
- This Court's opinion overlooks Appellant's argument that the trial court's suggestion that Appellant purchase the property from Respondent after Respondent closed on the property is in complete disregard of the pecuniary interest of the landowner-heirs and applicable principles of law concerning partition actions.

For the reasons set forth above and in Appellant's briefs and Petition for Rehearing, this Court should reject Respondent's "gotcha" tactics, reconsider the Court's decision, allow for oral argument and render an opinion reversing the trial court and remanding the matter for further hearing.



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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 March 7, 2018, I have served a copy of Appellant's Reply in Support of Petition for Rehearing on all counsel by electronic transmission and/or U.S. Mail addressed as follows:

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WYCHE P.A.

By: Wallace K Lightsey
Wallace K. Lightsey

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March 7, 2018