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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2018-000621

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.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

INTRODUCTION

In this appeal, the Master-in-Equity was asked to decide between two competing real estate contracts for the sale of certain heirs' property. Plaintiffs and Respondent Associated Developers, Inc. ("Associated") sought approval of their contract, and the Master agreed based on the evidence presented. Nordic Group, LLC ("Nordic") complains the Master should have allowed it to purchase the property instead.

At the final hearing, all parties stipulated to the value of property as $560,000. Plaintiffs and Associated presented evidence and testimony about the details of their fully executed contract for the stipulated price, as well as their desire and readiness to consummate the sale transaction with Associated. Associated also testified about its significant due diligence, which included development of concept plans; delineating wetlands; conducting boundary; topographic and tree surveys; meeting with City of Charleston engineers and consultants; and obtaining approval for annexation from the City of Charleston. Associated had invested $35,000 in the project by that time. Additionally, and most importantly to the heirs, Associated entered into written agreement to preserve the family gravesites in perpetuity for the benefit of the heirs.

On the other hand, Nordic had no representative present at the final hearing—only its trial counsel attended. Nordic did not introduce any evidence or cross-examine any witnesses. Nordic made no legal arguments. Instead, it relied entirely upon an "oral bid" for a higher amount, which was presented only by Nordic's attorney, without submitting a written offer or other competent evidence outlining all other material terms its contract would require.

Nordic's Petition for Writ of Certiorari follows the *per curium* decision of the South Carolina Court of Appeals affirming the Master's decision.

QUESTIONS PRESENTED

1. **Should this Court deny the Petition because Nordic concedes this action did not involve a judicial sale and therefore waived or otherwise failed to preserve any argument that judicial sale proceedings should apply to the instant case?**

2. **Should this Court deny the Petition because Nordic failed to timely introduce any competent evidence to demonstrate it had a real estate contract that was more favorable than Associated's real estate contract?**

3. **Should this Court deny the Petition because Associated's contract is more favorable than any oral offers made by Nordic?**

STATEMENT OF THE CASE

As lawful owners of certain heirs' property, Plaintiffs brought this action to quiet title and to seek approval of their existing contract to sell the property to Associated for $455,000. (Appx. 21, 34, 57-58). The appointed Guardian *ad Litem Nisi* answered, agreeing with Plaintiffs' requested relief. (Appx. 60-62). After being properly referred to the Master for the entry of a final decree, a final hearing was scheduled for December 17, 2015. However, Nordic unexpectedly appeared at this hearing and claimed it had an unsigned offer to purchase the property from another heir, Ernestine Brown, for $560,000. (Appx. 6-15); (Appx. 21-22, 34-35); (Appx. 132 (Trans. p. 4, lns. 11-24)). The Master elected to reschedule the final hearing to allow Associated and Nordic to intervene. (Appx. 21, 22, 77-79). Notice of the final hearing was issued on March 14, 2016, a copy of which was sent to counsel for Nordic. (Appx. 77-87).

Thereafter, Associated moved to intervene to join in Plaintiffs' request to approve its contract. (Appx. 64-69). For its part, Nordic moved to intervene on the basis that, "[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** is the more favorable and equitable for the parties." (Appx. 73) (all emphasis added). Nordic's contract was between it and heir, Ernestine Brown. (Appx. 76). Associated and Nordic were permitted to intervene so they could present

evidence and testimony on the issue of value and to assist the Master in determining which parties' contract to approve at the May 3rd hearing. (Appx. 73).

1. The May 3, 2016, Final Hearing

At the outset of the May 3rd hearing, the parties all stipulated that the value of the property was $560,000, and agreed that that the property should be partitioned and sold either to Associated or Nordic. (Appx. 34-35, 183) (Appx. p. 133 (Appx. 133 (Trans. 5, lns. 13-15 and Trans., p. 6, lines 6-22), p. 135 (Trans. 13, ln. 24 to Trans. 15, ln. 5), p. 135 (Trans. 16, ln. 16 to Trans. 19, ln. 16)). The only issue was whether to approve the sale to Associated or to Nordic.[1] Thus, "[t]he Court solicited testimony to help determine which offer was in the best interest of the Brisbane heirs and owners of the Subject Property." (Appx. 35).

The Master heard testimony and received evidence from Plaintiffs and Associated without objection, explaining the details of Associated's contract, its substantial due diligence since contracting in August of 2014 (at a cost of approximately $35,000 to it), its desire and readiness to close, and, most notably, its written agreement to perpetually maintain and preserve the family gravesites[2] on the property and allow for heirs' visitation rights. (Appx. 134-135 (Trans. 9, ln. 15

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[1] Nordic's contention that it was unclear whether the Master intended to decide which contract to approve is unfounded. (Pet. for Cert. p. 2, fn 1). Before taking testimony, the Master informed everyone, "The details of the contract might become very important, okay?" (Appx. 134 (Trans. 9, lns. 15-18). The Master told Nordic that, "one of the reasons that I wanted to make sure that I [granted your Motion to Intervene] prior to today's hearing so you could put the [written] offer in." (Appx. 147 (Trans. 64, lns. 5-19). In filings, Nordic refers to the May 3rd hearing as "the final hearing in this matter." (Appx. 96) (emphasis added). The Master's comment cited in Nordic's footnote concerned a collateral claim that forms no part of this appeal. Comparing the contracts to one another was never in doubt. (135 (Trans. 13, ln. 17 to Trans. 14, ln. 22). "Whether the Subject Property should be sold to Associated or instead to Nordic is precisely the contested issue on appeal." (Appx. 51) (emphasis added).

[2] Preserving the graves was a requirement of the City's approval to annex the property. (Appx. 136-137 (Trans. 20, ln. 15 to Trans. 21, ln.7 and Trans. 24, ln. 4 to Trans. 25, ln. 7). Associated made this happen, not Nordic.

to Trans. 15, ln. 5) (Appx. 135-139 (Trans. 16, ln. 16 to Trans. 29, ln. 12) (Appx. 167-170). This was important, because as one heir testified, "there's nothing but our family members there." (Appx. 134 (Trans. 12, lns. 13-25)). The Record includes Associated's executed contracts and its addendum increasing the purchase price to the stipulated value of $560,000. (Appx. 135-136 (Trans. p. 16, ln. 16 to Trans. 17, ln. 25)) (Appx. 157-174). Mr. Phillips answered all of the Master's direct questions. (Appx. 136-139 (Trans. 20, ln. 4 to Trans. 29, ln. 12), Appx. 140 (Trans. 33, ln. 15 to Trans. 36, ln. 6)).

In stark contrast, Nordic called no witnesses at all, and it chose not to cross-examine any of the witnesses called by others. Nordic offered no contracts, documents, or other materials into evidence at the hearing. (Appx. 36). When Associated tried to elicit testimony about Nordic, since there was none at that point, Nordic's trial counsel stated, "There's no one here on their behalf, Your Honor." (Appx. 146 (Trans. 57, ln. 25 to Trans. 58, ln. 7) (Appx. 36).

At the hearing, even counsel for Ms. Brown downplayed her contract with Nordic. Once Associated put into evidence its contract for $560,000, Ms. Brown's attorney informed the Master that her contract with Nordic 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." (Appx. 140 (Trans. 36, lines 8-21). No heir requested approval of Nordic's contract with Ms. Brown over Associated's contract at the May 3rd hearing, not even Ms. Brown.

After all of the testimony and evidence was presented and a brief recess was taken, Nordic's counsel, for the first time, stated that Nordic had allowed him to raise its offer to $650,000. Nordic admittedly did not have that offer in writing. (Appx. 146 (Trans. 59, ln. 17 to Trans. 60, ln. 5)).

After weighing the testimony, evidence and circumstances presented, the Master approved Associated's contract and entered a Form 4 Order to that effect. (Appx. 19) (Appx. 35-36).

2. Nordic's Rule 59, Motion to Reconsider

Nordic moved the Master to reconsider, contending Nordic was entitled to receive the sale because its attorney had orally bid to pay more. (Appx. 95-99). Nordic attached a copy of an "amended contract to reflect its bid" as an exhibit to its motion to reconsider; however, this document was created after the May 3rd hearing and is not signed by anyone. (Appx. 101-107).

Even later, Nordic submitted three affidavits, all post-dating the May 3rd hearing, to support its motion. One affidavit attached a contract for $650,000 that on its face purports to be between Nordic and "Ernestine Brown, et al.," but Ms. Brown did not sign it. (Appx. 108-116). Instead, the new contract, which is dated nearly a month after the May 3rd hearing, was signed by two different heirs. (Appx. 115-116). Even still, Nordic admits its post-hearing contract was fully contingent upon Nordic's satisfaction with its inspections. (Appx. 116) (Appx. 152 (Trans. 7, lns. 6-11)). Nordic submitted the post-trial affidavits of Sheneatha and Germaine Brisbane to support its newest contract; however, neither of them testified previously. (Appx. 117-120).

At the hearing on its motion to reconsider, Nordic referenced yet another post-trial contract—a different one that reportedly removed the contingencies contained in its post-trial contract with Sheneatha and Germaine. (Appx. 152 (Trans. 7, ln. 6-15)). But, that document was never offered into evidence. Associated opposed Nordic's attempts to introduce new evidence through its Rule 59 motion and offered a number of reasons why the Master's approval of Associated's contract was correct. (Appx. 153 (Trans. 9, ln. 4 to Trans. 12, ln. 17)). (Appx. 121-126). Tellingly, counsel for Ernestine Brown announced he did not request reconsideration of the Master's approval of Associated's contract. (Appx. 153 (Trans. 12, lns. 18-23)). Plaintiffs'

counsel also approved of the Master's decision. The Master denied Nordic's motion, and Nordic appealed.[3] (Appx. 20, 127).

The Court of Appeals affirmed the Master a *per curium* opinion filed February 7, 2018. The Court of Appeals noted that Associated submitted into evidence a written contract for the stipulated price of $560,000, and, specifically, entered into a written agreement to perpetually preserve the family gravesites. The Court of Appeals ruled that Nordic offered no timely evidence that it would waive contingencies or preserve the family graves. Nordic timely petitioned the Court of Appeals to rehear the matter, which was denied on April 4, 2018. (Appx. 238-251) (Appx. 280-281). Nordic now seeks further review.

STANDARD OF REVIEW

A writ of certiorari is not a matter of right, and will be granted only in the event of special and important reasons such as: (1) a novel question of law; (2) a dissent from the Court of Appeals; (3) where the decision of the Court of Appeals conflicts with a prior decision of this Court; (4) where a substantial constitutional right is implicated; (4) where the decision on a federal question conflicts with a decision of the United State Supreme Court. Rule 242(b), SCACR.

None of these considerations exists here. Rather, this matter, arising from the Court of Equity, should be affirmed. Although this Court is permitted "a broad scope of review, we do not disregard the findings of the Master, who saw and heard the witnesses and was in a better position to evaluate their credibility." *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989); *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 232, 662 S.E.2d 452, 455 (Ct. App. 2008); *Plott v. Justin Enters.*, 374 S.C. 504, 510-11, 649 S.E.2d 92, 95 (Ct. App. 2007).

[3] To prevent the issue from becoming moot, the Master entered a *supersedeas* preventing the transfer of the property during the pendency of the appeal and requiring Nordic to post a $100,000 bond. (Appx. 49-53).

ARGUMENT AND CITATION OF AUTHORITY

Nordic asks this Court to declare it as the prevailing party in a contested proceeding without it calling a single witness to satisfy its burden of proof; without it cross-examining any witness to cast doubt on the unopposed proof offered by other parties; and without it timely offering any exhibits to support its case at the final hearing on the merits. Nordic never raised below the legal arguments it now relies upon. Because of this, neither Associated, any of the heirs, nor the Master ever had the opportunity to cross-examine any portion of Nordic's case.

Nordic would have this Court ignore its handling of the May 3rd hearing and, in a manner immune from cross-examination and meaningful opposition, allow it to construct the entirety of its evidentiary record through statements of its trial counsel and belated affidavits accompanying its post-trial Rule 59 motion. A litigant simply cannot sustain its case in chief through unexamined affidavits and documents created a month after the trial and through statements of fact offered only by its trial counsel, rather than through competent witnesses called to the stand. This Court must not condone Nordic's approach and should deny its Petition.

Regardless, the preponderance of the evidence in the Record proves that the collective terms under Associated's contract were in the best interest of the heirs, especially considering Associated contracted to preserve the gravesites and it conducted lengthy and substantial due diligence. Nordic did none of these things. These considerations call out for Associated to prevail even if, for sake of argument only, Nordic's oral bid is considered. It is important to not lose sight of this point, because Nordic's argument has somewhat shifted in this action, lending to confusion over what issues Associated must confront.

In the present Petition, Nordic argues the Court of Appeals and Master erred because the law does not require Nordic to produce a written contract to purchase real estate at the final hearing

and the procedure for judicial sales should apply. Essentially, Nordic contends its oral bid was sufficient to carry the day. The problem is that Nordic concedes this was not a judicial sale and it had no actual real estate contract for the higher amount. Prior to that, Nordic had argued to the Court of Appeals that its $650,000 oral bid was binding because that figure should have represented the fair market value of the property.[4] (Appx. 192) ("The 'Fair Market Value' in this matter was the $650,000 [Nordic] offered to purchase the Property for at the May 3rd hearing."). The problem there was that Nordic stipulated the value was $560,000 and has not raised that argument since. Earlier still, Nordic argued its new post-trial contract with Sheneatha and Germaine simply memorialized its May 3rd oral bid. (Appx. 189); (Appx 152 (Trans. 7, ln. 6 to Trans. 8, ln. 5)). But, before that new contract existed, Nordic argued its oral bid should be considered in conjunction with its different contract with Ernestine Brown. (Appx. 95-97). Preservation issues aside, none of these varying positions cures Nordic's failure to put forth its evidence at the May 3rd hearing, and none of them justify further review, considering the other important contract terms, those going beyond price, unquestionably favor Associated.

I. Nordic concedes this action did not involve a judicial sale and therefore waived or otherwise failed to preserve any argument that judicial sale proceedings should apply to the case.

The entirety of Nordic's present contention that the Master was bound by its oral bid is premised upon its argument that the proceedings should have involved competitive bidding in the nature of a judicial sale. (Petition, 7-8) (Appx. 98). But, Nordic admits, "[It] does not raise in this appeal any argument opposing the procedure followed by the Master-in-Equity at the [May 3rd] hearing." (Appx. 247). It is the law of this case there was no judicial sale involving competitive

[4] Nordic also argued the Master was not required to choose one particular contract over another, despite asking the Court of Appeals in its prayer for relief to do just that. (Appx. 187-188, 194).

bidding. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (unappealed ruling becomes the law of the case). There is more—much more.

In its Motion for Reconsideration before the Master, Nordic admitted, "this action does not involve a public sale[,]" which Nordic reiterated in its brief to the Court of Appeals. (Appx. 98, 188). Nordic's counsel argued to the Master, "I know it wasn't a judicial sale, but you have two competing bidders for the same property." (Appx. 152 (Trans. 8, lns. 2-3) (emphasis added). In its Petition for Rehearing, Nordic again conceded, "Appellant does not argue that the trial court should have held a judicial sale." (Appx. 247) (emphasis added). The Master understood this was not a judicial sale, stating, "What it was not, was not bidding day in the courthouse." (Appx. 155, Trans., p. 17, ln. 2-5). Nordic cannot draw support from a line of cases[5] involving publicly advertised judicial sales when this case did not involve one.

As Nordic admits, this case involved "the selection of one contract over another" as between itself and Associated, as the intervening parties. (Appx. 98) (emphasis added). This matches squarely with the grounds upon which Nordic moved to intervene, so that it could "present evidence and testimony regarding . . . why its contract is the more favorable and equitable for the parties" at the May 3rd hearing. (Appx. 73).

Additionally, and contrary to Nordic's contention otherwise, Nordic's argument that the Master was not permitted to require written offers was not raised at trial. The transcript from the May 3rd hearing contains no legal argument on this issue. *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.").

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[5] *Zimmerman v. Marsh*, 365 S.C. 383, 618 S.E.2d 898 (2005), *Holiday v. McFadden*, 188 S.C. 187, 198 S.E.2d 392 (1938), and *Ex Parte Keller*, 185 S.C. 283, 194 S.E.2d 15 (1937), all involved traditional judicial sales advertised to the public where competitive bidding is a must.

Nordic points to page 146[6] of the Appendix, citing page 60, lines 1-5 of the May 3rd hearing as evidence that Nordic disputed the Master's requirement of a written contract. (Pet. for Cert., 11). That entire colloquy reads:

THE COURT

. . . Have you got a written offer to that effect or not?
MR. LANNING: No, Your Honor, I don't have a written offer, but is anybody here willing to agree to 650?

(Appx. 146 (Trans. 60, lns. 1-5)).

This does not raise the issue now appealed, because it is neither an objection nor an argument. It is a rhetorical question posited to the gallery in attendance and an admission that Nordic had no written offer or contract in that amount for the Master to consider. The question is not whether counsel attempted here to make an oral bid. Instead, the question is whether Nordic presented any legal argument or objection sufficient to preserve an argument that the Master should have treated the proceedings as the equivalent of a judicial sale with competitive bidding. It did not. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." (internal citation omitted). *Cf. State v. Ivey*, 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997) (barring consideration of an issue where the counsel's objection was not made with sufficient specificity). The Court of Appeals correctly recognized this argument was never made until Nordic's Rule 59 motion, after new counsel appeared for Nordic. (Appx. 98, 236).

[6] The Appendix cite is page 146. The underlying Record cite is page 141, as cited by Nordic.

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). Nordic was required to introduce whatever competent evidence and arguments it wished for the Master to consider during the May 3rd 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). Nordic has cited no authority holding otherwise.

The record demonstrates that none of the arguments, affidavits, or exhibits now relied upon by Nordic appears in the Record prior to the submission of its Rule 59 motion. (Appx. 95-120). Accordingly, these issues are not preserved. Nordic could have presented whatever arguments and evidence it wished to present at the May 3rd hearing on the merits, just like it represented to the Court and other parties it would do in its motion to intervene. Although Nordic complains the result makes it a victim of "gotcha" tactics in this litigation, if there is any attempt at gamesmanship occurring here, Nordic is its architect.

II. Nordic failed to timely introduce any competent evidence to demonstrate it had a contract that was more favorable than Associated's contract.

Even under this Court's broad standard of review, Nordic cannot prevail because it offered no competent evidence on the most essential contract terms at the May 3rd hearing.

A. Nordic cannot rely on statements of fact offered through its trial counsel

Nordic confuses the settled rule barring consideration of statements of fact appearing only in the argument of counsel with the separate and distinct doctrine that binds clients to stipulations of fact made by their counsel. In actuality, both rules applied during the May 3rd hearing.

Associated sought to elicit testimony about Nordic at the May 3rd hearing, but Nordic's attorney admitted, "There's no one here on their behalf, Your Honor." (Appx. 146 (Trans. 57, ln. 25 to Trans. 58, ln. 7)). Because Nordic neither called nor cross-examined any witnesses, the only source of evidence Nordic attempted to offer came in the form of a statement of its trial counsel. This Court has long-since held that statements of counsel are not evidence. *Accord Sessions v. Withers*, 327 S.C. 409, 414, 488 S.E.2d 888 (Ct. App. 1997); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986) (noting statements of fact appearing only in arguments of counsel will not be considered).

Nordic's argument that actions of attorneys are binding on their clients misses the mark. Authorities Nordic cites lend no support, because they turn on circumstances where a party is trying to avoid the consequences of admissions made by its counsel.[7] These cases apply here only in the context of the stipulation by Nordic's trial counsel to the $560,000 property value—Nordic

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[7] In *Hillman v. Pinion*, 347 S.C. 253, 554 S.E.2d 427 (Ct. App. 2001), a husband sought relief under Rule 60(b) because his attorney consented to dismissing with prejudice a suit for equitable apportionment under the mistaken belief that his wife's death abated the action. On appeal, the Court of Appeals affirmed the denial of relief, holding the husband's attorney had initiated the mistaken dismissal, and the attorney's neglect was binding on the husband unless it would have been excusable if the husband had made the mistake himself. *Id.* at 257, 554 S.E.2d at 430. The husband was trying to avoid the consequences of his attorney's actions, not use them to meet his evidentiary burden of proof in a contested proceeding. In *Collins v. Bisson Moving & Storage*, 332 S.C. 290, 303, 504 S.E.2d 347, 354 (Ct. App. 1998), the defendant trucking company was not entitled to directed verdict after its trial counsel conceded in opening statements that the accident involving the truck caused some injury to the plaintiff. *Collins* did not involve the introduction of evidence on which it had the burden of proof through statements its trial counsel. In *Smith v. Pearson*, 210 S.C. 524, 43 S.E.2d 479 (1947), the appellant was bound by counsel's statement at the beginning of the hearing that the suit involved only one cause of action, which does not involve an attempt to introduce evidence through statements of counsel. In *Crowley v. Harvey & Battey, P.A*, 327 S.C. 68, 488 S.E.2d 334 (1997), this Court reversed the grant of summary judgment in favor of an attorney sued by his client for malpractice after it was alleged he negligently advised accepting a settlement. The issue in *Crowley* "is not one of agency but of negligence" and does not apply to any issue in this appeal. *Id.* at 71, 488 S.E.2d at 335. *Hall v. Benefit Ass'n of R. Emps.*, 164 S.C. 80, 161 S.E. 867 (1932), is no different, holding that clients are bound by their attorney's admissions in Court.

is bound by its attorney's stipulation to that value. But, it is a much different question whether a party can rely upon statements of fact appearing only in the arguments of counsel to satisfy its burden of proof on a contested matter. It cannot, and Nordic has not cited a single holding otherwise, because for more than 100 years that has not been the law of this State. *See McGee v. Jones*, 34 S.C. 146, 13 S.E. 326 (1891) ("But we must again take the occasion to call the attention of the bar to the importance of this matter, and urge the necessity, imperatively required, that every fact deemed material shall appear in the '*Case,*' as otherwise it cannot be considered, unless admitted [by the other party] in the argument here.") (italics in original, underline added).

Whether Associated or Nordic presented the more favorable contract terms was precisely the contested issue. (Appx. 51). Nordic cannot rely on statements from its counsel to satisfy its burden of proof; regardless of how many times Nordic's counsel "states" he had authority to make an offer. (*Contra* Pet. for Cert. p. 9) (arguing Nordic's counsel "stated twice that he was authorized to make a binding offer[,]"). That argument is hoisted by its own petard, because there is no testimony or other evidence (aside from counsel's own statements), that he possessed any actual or apparent authority to create a contract or make a binding offer for the amount stated. *See Harkins v. Greenville County*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (noting it is Appellant's requirement to develop a record sufficient for this Court to review the alleged errors).

B. Rule 59 is not a vehicle to submit new evidence and arguments

Nordic moved to intervene so it could convince the Master at the May 3rd hearing that its contract with Ernestine Brown was more favorable. (Appx. 71-76). Although its existence is not disputed, this written contract is not included in the Record and cannot be considered. *See Morris v. Donahue,* 212 S.C. 122, 124, 46 S.E.2d 664, 665 (1948) (Supreme Court can act only on such matters as are contained in the record); Rule 210(h), SCACR (appellate court will not consider any

fact which does not appear in the Record on Appeal); *contra* (Pet. for Cert. n.2) (Appx. 76). The only written contract documents Nordic put in the Record cannot be considered because they were first offered post-trial. The first accompanied Nordic's Rule 59 motion, but it was unsigned and has no evidentiary value even it had been timely offered. (Appx. 101-107). The other document on which Nordic relies is a totally different contract between new parties that was created a month after the May 3rd hearing occurred and also after Nordic filed its Rule 59 motion.[8]

In *Goolsby v. Goolsby*, 229 S.C. 101, 92 S.E.2d 57 (1956), this Court observed:

> 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.

Id. at 111-12, 92 S.E.2d at 62 (internal quotations and citations omitted) (emphasis added). Nordic's trial and post-trial tactics deprive other parties of the right to cross-examine the offered material. This is not allowed. *See Zaman v. S.C. State Bd. of Med. Exam'rs*, 305 S.C. 281, 408 S.E.2d 213 (1991) (error to allow a party to submit evidence by affidavits because it denies 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) (introduction of evidence by affidavit rather than live testimony deprived the defendants of the 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 non-testifying writer of a report that was entered into evidence as well as any witness whose statements formed the basis for the report). This is particularly true in light

[8] Nordic's repeated effort to get these written agreements before the Master post-trial is a tacit admission that a written agreement is required.

of this Court's standard of review, because the Master had no opportunity to observe these non-testifying witnesses (*i.e.*, Sheneatha and Germaine Brisbane). *See Tiger, Inc.*, 301 S.C. at 237, 391 S.E.2d at 543 (nothing that on review, this Court does "not disregard the findings of the Master, who saw and heard the witnesses and was in a better position to evaluate their credibility"). The Court heard and found credible Associated's witness, Christopher Phillips. (Appx. 35-36); (Appx. 148 (Trans. 65, ln. 18 to Trans. 66, ln. 12).

Nordic cries foul over the Master's decision, but nothing in the partition statutes bars the Master from requiring the submission of a written contract, especially considering that both parties intervened to present evidence of why its contract is more favorable. *Cf.* Rule 71(f)(4) and (5), SCRCP (allowing the Master to conduct a partition sale "upon such terms as the court shall deem right"). The Master had to decide whether to order the sale of the property in accordance with the terms of Associated's contract or Nordic's contract, and S.C. Code Ann. § 32-3-10 requires all 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 contract to purchase the Property for $650,000. (Appx. 146 (Trans. 60, ln. 1-5). It does not matter whether Nordic meant to orally increase the price contained in its earlier written contract with Ms. Brown, because a party cannot orally modify a real estate contract. *Windham v. Honeycutt*, 279 S.C. 109, 302 S.E. (2d) 856 (1983).

Having consented to have its contract evaluated against the contract submitted by Associated, Nordic cannot now be heard to complain when the defects in its case are the product of its own failure to introduce competent evidence of all the material and binding terms it wished for the Master to consider. *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). Nordic has now presented and referred to several different "contracts," each with differing material terms, such that its "offer" has been a moving target. The Master was correct to rely upon the written and signed contract terms before him at the May 3rd hearing, rather than an unsigned, unaccepted, oral bid.

III. Associated's contract is more favorable than any terms offered by Nordic.

The question before the Master was simply a choice of "Contract A" versus "Contract B." That is how the issue was presented without objection from anyone, and no one appealed that process. Purely for sake of argument, even if Nordic's oral bid is considered, the evidence in the record still easily supports the Master's approval of Associated's contract. Nordic's disappointment with that result is not a ground upon which to appeal.

It is worth reiterating that all parties, including Nordic, stipulated the fair market value of the property was $560,000. (Appx. 183) (Appx. 133, Trans., p. 6, ln. 6-22) (Appx. 147; pp. 63, ln. 22 – 64, ln. 4). Because Associated's executed contract amendment satisfies the stipulated value,[9] the additional material terms of Associated's contract were of paramount importance. To assist the Master, Associated provided unopposed testimony on its lengthy and expensive due diligence, its annexation efforts, and its readiness to close. Nordic has failed to address these matters and presented no competent evidence on these topics when it had the chance. Even Nordic's post-trial contract was still fully contingent, whereas Associated's was not—it was ready, willing and able to close. (Appx. 116; 152 (Trans. 7, lns. 6-11)). Most importantly, Associated put into evidence

[9] Having stipulated, Nordic cannot complain on appeal that the value of the property should be something different. *Thompson v. S.C. Steel Erectors*, 369 S.C. 606, 614, 632 S.E.2d 874, 879 (Ct. App. 2006) (noting that a party that stipulates to a matter may not complain about it on appeal) (citing *Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 496 S.E.2d 624 (1998)).

its perpetual agreement to maintain and preserve the gravesites so that they could be visited by the family now and for future generations. (Appx. 167-168). Nordic never made this commitment.

Even if Nordic's untimely, post-trial agreement with Sheneatha and Germaine is considered (which it should not be), its way of handling the gravesites was to state 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." (Appx. 116) (Appx. 146) (emphasis added). This provision is nothing more than an unenforceable "agreement to agree," which is void under South Carolina law. *See 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).

In light of the abundant evidence presented by Associated (and by Plaintiffs, who also sought approval of Associated's contract) versus lack of any real evidence put forth by Nordic, the clear preponderance of the evidence supports the Master's decision. Nordic's lingering contingencies and lack of protection for the gravesites is fatal, even if Nordic's oral bid of $650,000 is considered. Both the Master and the Court of Appeals found Associated's executed agreement to preserve the gravesites was important to its selection as the prevailing party.[10] (Appx. 147-148 (Trans. 64, ln. 14 to Trans. 66, ln. 12) (Appx. 235-236).

[10] Nordic's Petition for Writ of Certiorari makes no mention of the gravesites, and its Petition for Rehearing failed to challenge the Court of Appeals' finding that the Master did not err in approving Associated's contract in part because Associated had agreed to perpetually care for the gravesites. (Appx. 236) (Appx. 167-170). *See* Rule 242(d)(2), SCACR (only issues raised in the petition for rehearing may be included in the petition for writ of certiorari). *See also Southerland v. State*, 337 S.C. 610, 612, n.2, 524 S.E.2d 833, 834 (1999); *McCray v. State*, 317 S.C. 557, 559, n.1, 445 S.E.2d 686, 687 (1995) (an issue not raised in a petition for writ of certiorari is not preserved for appellate review).

In arguing that the "pecuniary interests" of the parties is the determining factor, Nordic curiously fails to quote the rest of that rule, and this omission matters. The full text reads: "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 v. Jordan*, 382 S.C. 445, 451, 675 S.E.2d 801, 804 (Ct. App. 2009) (emphasis added). Whether to partition by allotment or by sale is not a question that was before the Master. What mattered most was comparing all the individual terms of Associated's contract against whatever terms Nordic put forth. Price is only one term in a contract, and here, in light of the heirs' special interest in ensuring the preservation of their family gravesites and their right to visit and pay their respects, price is certainly not king.

IV. Nordic failed to address a key, independent reason the Master approved Associated's contract.

Associated had a fallback position if its contract was not approved. Associated had at that point spent $35,000 in due diligence while under contract for two years with Plaintiffs, and it was responsible for critical advances such as getting the property annexed into the city. Thus, to protect itself, Associated filed a counterclaim and cross-claim seeking repayment for its significant investments if the Master awarded the contract to Nordic. (Appx. 88-94). At the hearing on Nordic's Rule 59 motion, Nordic's counsel had not realized these claims were pending. (Appx. 154 (Trans. 15, lns. 10-20)). This matters, because the Master made clear that the pendency of this claim for repayment was a difference maker. The Master stated:

> It is and was a concern for me, of course, because I was well aware from the testimony from Mr. Phillips that [Associated] did have – they had 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]. So really that was my motivation for deciding to do what I did.

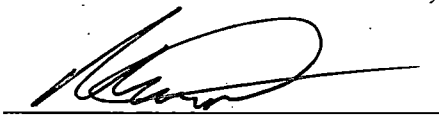
(Appx. 155 (Trans. 17, ln. 21 to Trans. 18, ln. 3). As an additional sustaining ground, Nordic has failed at every level of this appeal to challenge this independent basis for the Master's decision, making it the law of this case. *ML-Lee Acquisition Fund*, 327 S.C. at 241, 489 S.E.2d at 472.

CONCLUSION

"A partition should be fair and equitable to all parties." *Id.* at 451, 675 S.E.2d at 804. In this case, the preponderance of the evidence in the Record demonstrates it would be fundamentally unfair to Associated, the Plaintiffs, and the other heirs to take further review of Masters' sound decision to approve Associated's contract. The Court of Appeals found no error, and this Court should, too. For the reasons stated herein, Associated respectfully requests that Nordic's Petition for Writ of Certiorari be denied.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2018-000621

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 maybe 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.

AFFIDAVIT OF SERVICE

I, Moira K. McIntire, an employee of Thurmond Kirchner & Timbes, P.A., attorneys for the Respondents, do hereby certify that I have on this date, served a true and correct copy of the Respondent's Return to Petition for a Writ of Certiorari via US Mail and electronic mail to the following counselors of record:

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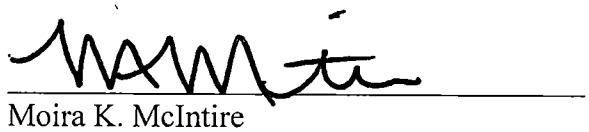

Moira K. McIntire
Paralegal to Michael A. Timbes

June 21, 2018
Charleston, South Carolina