

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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JUN 28 2018

S.C. SUPREME COURT

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APPEAL FROM CHARLESTON COUNTY  
Honorable Mikell R. Scarborough, Master in Equity

Appellate Case No. 2018-000621  
Opinion No. 2018-UP-062 (S.C. Court of Appeals)  
Trial Court Case No. 2015-CP-10-00939

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

v.

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

Persons who may be an heir, distribute, devisee, legatee, Widower, widow, assign, administrator, executor, Creditor, successor, personal representative, issue or Alienee of James Brisbane, James Brisbane, Jr., James Brisbane, III, Jimmy Brisbane, Emily Brown, Harvey Brisbane, Rosa Robinson, Henrietta Brisbane Geathers, Laura Geathers, Geneva Grant, Viola Heyward, Henrietta Bolds, Estelle Nelson, Swackie Brisbane, Wilhemenia Young, Roxanne Pinckney, Daniel Simmons, Horace Robinson, Elizabeth Williams, Mabel Robinson, Julian Robinson, Patricia Williams, Alberta Graham, Joseph E. Hopkins, Emily Brown, Steve Brown, Steve Brown, Jr., Roger Brown, James LeRoy Brown, Harold Brown, Theodore Heyward, Theodore Heyward, Jr., Mary E. Mitchell, James Heyward, Clarence Brisbane, Swackie Brisbane, Jr., Susan Richardson, Janie Simmons a/k/a Janie Richardson Briwbane, Ruby Mitchell, Jesse Simmons, William Nelson, Ruth Hopkins, Thomas Brown, Wilhemenia Frasier, Helen Brown Allen, Albertha Lee Richardson, Louise Heyward, Herbert Lee Heyward, Loretta Brisbane, Gail Davis, William Nelson, Jr., Edward Grant, Sr., Eartha Lee Elliott, William Albert Brisbane, Betty Manifact, 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 Petitioner.

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**REPLY OF PETITIONER  
TO RESPONDENT'S RETURN TO  
PETITION FOR WRIT OF CERTIORARI  
TO THE SOUTH CAROLINA COURT OF APPEALS**

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Petitioner Nordic Group, LLC (“Nordic”), respectfully submits this reply to the Respondent’s Return to Nordic’s petition for a writ of certiorari to the South Carolina Court of Appeals.

**ARGUMENT**

Respondent’s return exemplifies the confusion and gamesmanship that Nordic’s petition cited as compelling reasons that this Court should grant certiorari in order to bring greater clarity to the legal doctrines at issue in this appeal. Nowhere is this more apparent than in Respondent’s primary argument that “Nordic concedes this action did not involve a judicial sale and therefore waived or failed to preserve any argument that judicial sale proceedings should apply to the case.” Return at 8. This argument is nonsense, a direct reflection of the confusion and gamesmanship that is endemic in the law pertaining to partition sales and the doctrines of issue preservation.

It is an indisputable fact that the Master carried out a partition of the heirs’ property through a judicially supervised and conducted sale. This fact is noted repeatedly in the decree and orders of the Master. For example:

“It is in the best interest of all the Owners that a partition by sale of the Subject Property occur.”

(App. 34)

“Upon payment of the full purchase price of \$560,000, this Court shall issue a Master’s Deed to Associated conveying the Subject Property.”

(App. 38)

“At the May 3, 2016 hearing, and by its May 5, 2016 Order, the Court approved the sale to Associated.”

(App. 50)

Thus, it cannot be questioned that the Master conducted a judicial sale. Nordic never conceded that such was not the case, and could not do so any more than it could “concede” that the moon is made of green cheese. What Nordic recognized, and does not contest, is that there was no public judicial sale of property on the courthouse steps. *See, e.g.*, App. 98 (“Although this action does not involve a public sale, ...”)¹. However, Nordic expressly argued to the Master, “[T]here is no requirement that a higher bid presented during judicial sales or the hearing in this matter be reduced to writing under South Carolina law. ‘In the absence of a statute providing otherwise, an oral bid is sufficient,’” and cited two authorities pertaining to judicial sales. (App. 98) (quoting 68 C.J.S. Partition § 177; citing *Holliday v. McFadden*, 188 S.C. 187, 198 S.E. 392 (1938))

While the cases cited in Nordic’s petition generally deal with public judicial sales, there is absolutely no reason that their reasoning and holdings should not apply to a non-public judicial sale, such as that which occurred in this case, and Respondent does not even attempt to offer a substantive reason that these authorities are not germane. Thus, if the law dictates that bids at a public judicial sale do not need to be in writing, *Holiday v. McFadden*, 188 S.C. 181, 191-92, 198 S.E. 392, 394 (1938), why should it be any different in a non-public judicial sale? If the law requires a court holding a public judicial sale to ensure that bidding is free and competitive, *Ex Parte Keller*, 185 S.C. 283, 291, 194 S.E. 15, 19 (1937), why should it be any different in a non-public judicial sale?

Furthermore, regardless of whether one characterizes the Master’s judicially conducted sale as a “judicial sale,” Respondent does not challenge the over-arching principle governing partition actions that “[t]he partition procedure must be fair and equitable to all parties of the action,”

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¹ Shorthand references by Nordic’s counsel to “judicial sales” were made in this context. *See, e.g.*, App. 52, transcript p.8 line 2.

*Zimmerman v. Marsh*, 365 S.C. 383, 386, 618 S.E.2d 898, 900 (2005), the objective of which is to obtain “the most equitable result.” *Id.* at 388, 730 S.E.2d at 901. That did not occur here. To the contrary, competitive bidding was stifled, one bidder was unfairly prejudiced without any prior notice that a signed contract would be required, and the heirs did not receive the highest price offered for the property. All because of the Master’s error of law in holding that he was “bound by the Statute of Frauds.” (App. 36)

Consequently, while Respondent asserts that “nothing in the partition statute bars the Master from requiring the submission of a written contract,” Return at 15, and speculates that other factors may have led the Master to favor Respondent’s offer over Nordic’s, *id.* at 16-19, these arguments miss the point.<sup>2</sup> In response to Nordic’s argument that the partition statute does not require offers to be in writing, the Master erroneously held that he was bound by the Statute of Frauds, and that is the basis of his decree. That error is preserved for appeal.

Similarly, Respondent spends considerable space criticizing Nordic for not coming to the May 3, 2015, hearing with witnesses and evidence, but overlooks the fact that the ostensible reason for that hearing was to determine the value of the property, which the parties had stipulated prior to the hearing. Thus, the Master stated early in the hearing, “Let’s stick to value for today and get to that. I know we have more to do at some subsequent time I’m afraid.” (App. 135, transcript p.13 lines 20-22) (emphasis added) It was unclear until the end of the hearing whether or not the Master intended to decide which bid to approve at that time, and when this became clear he refused to

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<sup>2</sup> In addition, Respondent’s assertion that its contract was better for the heirs in other respects besides the purchase price, Return at 16-18, is factually inaccurate. As to the contingencies and non-monetary terms, the offers were identical in all material respects. *See* App. 152, transcript p.7 lines 12-18.

consider Nordic's higher bid because of his erroneous view of the law: "I'm going to approve the [Respondent's] contract as amended today. ... It's not the highest price that's coming here, but it's the highest price that's coming here pursuant to law." (App. 147, transcript p.63 lines 17-21) (emphasis added)

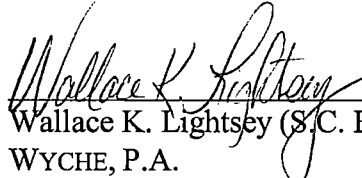
Furthermore, as argued in Nordic's petition, both Respondent and the Court of Appeals are fundamentally mistaken in portraying Nordic's reliance on its attorney's oral bid at the May 3 hearing as an attempt to put in evidence through an argument of counsel. The statements by counsel at the hearing did not purport to present evidence not in the record, but rather constitute a binding offer made by a duly authorized legal representative of the offeror. Thus, it was the offer in and of itself, and therefore is direct evidence of the same, made on and put in the record, with both actual and apparent authority from Nordic to make the offer. Respondent again misses the point in arguing that the law binding Nordic to its counsel's offer applies only when "a party is trying to avoid the consequences of admissions made by its counsel." Return at 12 (emphasis in original). The point is that Nordic was fully bound by its attorney's offer, and therefore it was a binding offer and, under the partition statute, possessed as much legal validity as Respondent's written contract.

### CONCLUSION

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 Nordic to produce a fully executed written contract, on the spot at the valuation hearing, in order to validate a higher bid. There is no such requirement in the law, nor any basis for it in logic or policy. Further, it was inequitable for the Master to allow Respondent to increase its bid

and then deny Nordic the same opportunity. Nordic's assertion of error in the Master's decision is preserved and properly at issue in this appeal, as it was presented to and addressed by the Master in his rulings.

The Court should grant certiorari to review and reverse the decision of the Court of Appeals.



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June 28, 2018

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**PROOF OF SERVICE**

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I hereby certify that on June 28, 2018, I have served a copy of Reply of Petitioner to Respondent's Return to Petition for Writ of Certiorari to the South Carolina Court of Appeals on Respondent's counsel by U.S. Mail first-class postage prepaid, addressed as follows:

Michael A. Timbes, Esquire  
Thomas J. Rode, Esquire  
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By: 

Wallace K. Lightsey

June 29, 2018

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