THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

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)

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.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ii

Argument 1

I. The Court of Appeals Erred in Affirming the Master's Ruling that an Oral Bid by the Bidder's Attorney in a Partition Sale Is Legally Insufficient Unless a Written Contract Sufficient To Satisfy the Statute of Frauds Is Simultaneously Put in Evidence 3

II. The Court of Appeals Erred in Finding that Nordic Did Not Preserve the Issue of the Master's Error for Appeal 7

Conclusion 9

TABLE OF AUTHORITIES

Cases Page

Atl. Coast Builders & Contractors, LLC v. Lewis,
398 S.C. 323, 730 S.E.2d 282 (2012) 8

Buist v. Buist,
399 S.C. 110, 730 S.E.2d 879 (Ct. App. 2012),
aff'd as modified, 410 S.C. 569, 766 S.E.2d 381 (2014) 7

Ex Parte Keller,
185 S.C. 283, 194 S.E. 15 (1937) 4-5

Holiday v. McFadden,
188 S.C. 181, 198 S.E. 392 (1938) 5

In re Michael H.,
360 S.C. 540, 602 S.E.2d 729 (2004) 7

Jarrot v. Kuker,
78 S.C. 510, 59 S.E. 533 (1907) 3

Statutes & Rules

S.C. Code § 32-3-10(4) 3

Appellant Nordic Group, LLC ("Nordic"), respectfully submits this reply to the Brief of Respondent.

ARGUMENT

Respondent's brief exemplifies the confusion and gamesmanship that Nordic has cited as compelling reasons that this Court should reverse the Court of Appeals. Throughout its brief, Respondent asks this Court to make believe that this is a declaratory judgment action over a contract for the sale of land between two private parties, rather than what it actually is: a judicially supervised and conducted sale of heirs' property pursuant to the partition statute, with two competing bidders vying for the purchase of the property. In this context, the Statute of Frauds has no bearing, and the Master committed clear error of law by holding that he was bound by it to reject Nordic's offer of a higher price, solely because of the inability of Nordic's counsel to produce a signed written contract embodying that offer on the spot.

The May 3, 2016, hearing at which the Master first announced and then imposed this requirement had been set as a hearing on the value of the property to be sold, with no prior notice that Nordic would be required to present a written contract or live testimony to substantiate its offer. The fact that valuation was the sole purpose of the hearing was stated and repeated by the Master at the beginning of the hearing, but at some later point the Master changed course and decided, again without any prior notice, that he would decide then and there which offer to accept. Nordic's counsel, taken by surprise at the turn of events, nevertheless clearly objected to the Master's requirement of a written contract at that hearing. In its motion for reconsideration, Nordic explicitly raised the argument that the partition statute does not require submission of a signed written contract

in order for a bidder to make a valid offer. The Master did not hold that this argument was untimely raised, nor did he refuse to address it on that ground. Rather, the Master addressed and rejected the argument, both at the hearing on the motion for reconsideration and again in the formal written decree entered a week later. Accordingly, the error in the Master's decision is fully preserved for appeal.

The Court of Appeals compounded that error by viewing Nordic's reliance on its attorney's oral bid at the May 3 hearing as an attempt to put in evidence through argument of counsel (a basis of decision never expressed by the Master himself). The statements by Nordic's counsel at the hearing did not purport to present evidence not in the record, but rather constitute a binding offer in and of itself, made on the court record by a duly authorized legal representative of the offeror. Respondent 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 stipulations or admissions made by counsel." Brief of Respondent at 15 (emphasis omitted). The point is that Nordic was fully bound by its attorney's representations on the record, and therefore those representations constituted a binding offer and, under the partition statute, possessed as much legal validity as Respondent's written contract.

For these reasons, and those set forth in Nordic's primary brief, the Court should reverse the Court of Appeals.

I. The Court of Appeals Erred in Affirming the Master's Ruling that an Oral Bid by the Bidder's Attorney in a Partition Sale Is Legally Insufficient Unless a Written Contract Sufficient To Satisfy the Statute of Frauds Is Simultaneously Put in Evidence.

The Statute of Frauds, S.C. Code § 32-3-10(4), is designed to protect private parties from fraudulent claims of an agreement to transfer an interest in land. This concern has no relevance in the context of a judicial sale. Thus, contrary to the Master's ruling and the arguments of Respondent, the Statute of Frauds is not applicable to a judicial sale of property at which a purchaser has made a binding oral offer. This Court recognized as much in *Jarrot v. Kuker*, 78 S.C. 510, 59 S.E. 533 (1907). In that case, the defendant was the successful bidder via an oral offer at a judicial sale of property owned by the plaintiff. When the defendant attempted to back out of an alleged oral agreement concerning the land purchased, the plaintiff sued, and the defendant asserted the Statute of Frauds as a defense. The Court expressly held that the Statute did not prevent recovery by the plaintiff, because the action was not based on a mere repudiation of an oral agreement concerning land, but rather upon the defendant's conduct at the judicial sale.

That precedent applies with even greater force here, where there was not merely a bid made by a party at a judicial sale, but also a binding offer made in court, on the record, by an attorney with authority to make the offer from the party to be bound by it. If Nordic had later attempted to walk away from its offer, it would have been held bound by the words and actions of its attorney. This is why the Court of Appeals was fundamentally wrong in characterizing Nordic's attorney's offer as an attempt to introduce evidence through argument of counsel. The attorney's representations on the record constituted Nordic's offer and made it binding.

Respondent asserts that "the parties consented to try this case ... through a declaratory judgment action to determine the enforceable rights of the parties under their respective competing

contracts for the purchase [of] real property, versus a public auction where anyone can appear, oral bids are allowed and written contracts are not used." Brief of Respondent at 16 (emphasis omitted). Respondent has manufactured this "consent" of whole cloth – there is no such consent or stipulation in the record. What Nordic recognized, and does not contest, is that none of the parties requested a public judicial sale of property on the courthouse steps. *See, e.g.*, App. 98 ("Although this action does not involve a public sale, ..."). However, 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. In these circumstances, the Master's obligation under the law was clear:

> Since it is in the interest of justice that a judicial sale should be so conducted as to yield to the owner the best price that can fairly be had, free, fair and competitive bidding is contemplated at such a judicial sale, and the law does not tolerate any influence likely to prevent competition; ... any conduct on the part of those actively engaged in the selling or bidding that tends to prevent a fair, free, open sale, or stifle or suppress free competition among bidders, is contrary to public policy, vitiates the sale, and constitutes ground for setting it aside upon the complaint of the injured party.

Ex Parte Keller, 185 S.C. 283, 291, 194 S.E. 15, 19 (1937).

Nordic's primary brief discusses the case law supporting this principle and rejecting the notion that bids at a judicial sale must be in writing, and those cases will not be rehashed here. While Respondent tries to distinguish them on the ground that they dealt with public auctions, *see* Brief of Respondent at 17, Respondent fails to provide any reason that the logic and policy of those decisions should not apply in the context of a non-public judicial sale in a partition action. 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? There is no reason for any such difference.

Respondent also expends considerable effort in its brief criticizing Nordic's lawyer for not coming to the May 3, 2016, hearing with witnesses and evidence, but overlooks the fact that the ostensible reason for that hearing was to determine the value of the property. At the outset of the hearing, the following exchange occurred:

> THE COURT: All right. Very good. I have it down today for a hearing on valuation; is that correct, Mr. Dodds [plaintiffs' counsel]?
>
> MR. DODDS: Yes, your honor.

(App. 132, transcript p.4, lines 7-10)

Because the parties were able to stipulate to the value of the property prior to the hearing, and because valuation was the sole purpose of the May 3 hearing, there was no reason for Nordic's counsel to expect to be required to produce live testimony and a signed written agreement on the

spot at the hearing.[1] Indeed, 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) Thus, the Master clearly indicated at the outset that the matter of which bid to accept would be addressed "at some subsequent time." It was not until near the end of the hearing that the Master indicated that he was going to decide then and there which bid to approve, and when this became clear he refused to 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)

This was the basis of the Master's decision – not, as Respondent suggests, because Respondent's contract included more favorable non-monetary terms in comparison with Nordic's oral offer at the hearing. *See* Brief of Respondent at 19-21. No such finding of fact was made by the Master or by the Court of Appeals,[2] and the record is clear that, as to the contingencies and non-monetary terms, the competing offers were identical in all material respects. (App. 152, transcript p.7 lines 15-18, p.8 lines 9-10 ("We're on an equal playing field with Associated Developers [with

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[1] The fact that Nordic's motion to intervene asserted that it wished to do so in order to present evidence, *see* Brief of Respondent at 4-5, obviously does not mean that counsel should have anticipated that the Master would require evidence at the May 3 hearing, when that hearing was set to determine value and when the parties had stipulated to the value prior to the hearing.

[2] The Court of Appeals simply noted that Nordic's trial counsel did not "submit a signed, written commitment that Nordic would waive the contingencies in its current offer or provide for the family gravesites." (App. 235) (emphasis added) Respondent's assertion that "[t]he Court of Appeals ... found that Associated's contract is more favorable," Brief of Respondent at 19, misstates the record.

respect to contingencies and gravesite protection] as it stands for the interest of the owners. We're offering them the same thing. ... the contingencies are the same."); *see also* App. 146, transcript p.59, lines 8-17)

The Master's erroneous view of the law led further to the unfair situation in which Respondent was allowed to increase its bid to match Nordic's, but then Nordic was not allowed to raise its bid even higher. The higher bid made by Nordic's attorney at the May 3 hearing constituted a valid and binding offer. The Master committed reversible error in ruling that a written contract was required by the Statute of Frauds, and the Court of Appeals compounded that error by viewing the attorney's statements as an attempt to introduce evidence outside of the record. The decisions below are wrong as a matter of law, and the result is one that is neither fair nor equitable nor in the pecuniary interest of the heirs.

II. The Court of Appeals Erred in Finding that Nordic Did Not Preserve the Issue of the Master's Error for Appeal.

Respondent asserts that "[t]he controlling inquiry is whether at the time of trial Nordic contemporaneously raised the argument that it now presents on appeal." Brief of Respondent at 10 (emphasis in original). This is not a correct statement of the law. "In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.'" *Buist v. Buist*, 399 S.C. 110, 124, 730 S.E.2d 879, 886 (Ct. App. 2012) (emphasis added), *aff'd as modified*, 410 S.C. 569, 766 S.E.2d 381 (2014) (quoting *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004)). "In other words, the trial court must be given an opportunity to resolve the issue before it is presented to the appellate court." *Michael H.*, 360 S.C. at 546, 602 S.E.2d at 732.

Here, Nordic's objection to the Master's requirement of a written contract was raised to and ruled upon by the Master. At the valuation hearing itself, Nordic's counsel objected to the Master's requirement of a written contract, and in its motion for reconsideration Nordic expressly argued that "there 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.'" (App. 98)

This case might be different if the Master had refused to consider that argument on the ground that it had not been timely asserted. Instead, he squarely addressed the argument, ruling at the June 7, 2016, hearing and in his post-hearing formal decree that he was bound by the Statute of Frauds as a matter of law. (App. 36 ("This court is conscious of and bound by the Statute of Frauds."); App. 155, transcript p.17 lines 16-19 ("I fall back on some of those little basic rules of real estate law like the Statute of Frauds and if it involves land it needs to be in writing.")) That is the basis of his decision, and the error underlying it is therefore preserved for appeal. The Court of Appeals was wrong in side-stepping the issue through a "gotcha" approach to issue preservation that this Court has expressly eschewed. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants.").

The Master had a fair opportunity to address Nordic's argument, and did so. His error is properly at issue on appeal.

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 reverse the decision of the Court of Appeals.

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