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
Lower Court Case No. 2015-CP-10-00939

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 Petitioner.

BRIEF OF RESPONDENT

FOR THE RESPONDENT
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Of which Associated Developers, Inc. is the Respondent.

And of which Nordic Group, LLC is the Petitioner.

BRIEF OF RESPONDENT

FOR THE RESPONDENT
ASSOCIATED DEVELOPERS, INC.
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INTRODUCTION

This Court is asked to rule that the Statute of Frauds does not apply to heirs property sold by contract. This appeal is not between two "bidders" at a public auction. Rather, in this declaratory judgment action tried by consent, two intevenors joined in the case to have the Master-in-Equity determine which of them possessed the more favorable real estate purchase contact for the heirs. Having failed to present any competent evidence of its written contact terms at trial, Appellant asks this Court to find that the issuance of a deed to heirs property may be compelled by an oral offer made only though counsel, in a manner immune from cross-examination by Respondent, the heirs, or the Master. The effect of such a ruling would be that heirs in South Carolina have no rights to contract for terms important them other than price, such as the preservation of their family gravesites for perpetual visitation, which was essential in this case. In light of the one-sided evidence proving all of Respondent's contractual commitments to the heirs, especially as to its gravesite preservations, the Master was correct to approve Respondent's contract as the more favorable.

STATEMENT OF THE ISSUES

I. Did the Court of Appeals correctly find that Appellant failed to preserve its argument that auction bidding should have been allowed to immunize its contract terms from the Statute of Frauds when it failed to make that argument prior to its Rule 59 Motion to Reconsider and, further, where it failed to object at trial to the procedure followed by the Master?

II. Is the sale of partitioned heirs property sold by contract for a stipulated fair market value immune from the Statute of Frauds such that an intervenor claiming a contractual right to the deed in a declaratory judgment action can rely solely on an oral "bid" made only though counsel at trial, in a manner immune from cross-examination by any party or the court?

III. Does the record on appeal support the finding that Respondent presented the more favorable real estate contract terms, where the record on appeal does not contain Appellant's contract that it intervened to enforce, Appellant admitted to unsatisfied contingencies, Appellant offered no evidence of due diligence, and Appellant did not contract to protect the family gravesites?

STATEMENT OF THE CASE

Plaintiffs filed suit on February 13, 2015, to partition their lands by approving their purchase contract with Respondent, Associated Developers Inc. ("Associated"). (App. 21, 34, 57-58). The case was referred to the Master and proceeded uncontested until Appellant, Nordic Group, LLC., ("Nordic") appeared at the anticipated final hearing claiming a recently signed contract with another heir for a higher purchase price. (App. 6-8, 34-35, 60-62). Thereafter, both Associated and Nordic intervened to present evidence and testimony at the May 3, 2016, final hearing to prove its contract was more favorable. (App. 64-69, 71-76). At the conclusion of the trial, the Master approved Associated's contract, as requested by Plaintiff, entering a Form 4 Order dated May 5, 2016. (App. 19). Nordic moved for reconsideration, and following a hearing held June 7, 2016, the Master denied that motion on June 9, 2016. (App. 20).

Nordic appealed,[1] and the Court of Appeals affirmed in a *per curiam* decision entered February 7, 2018. (App 232-236). Nordic petitioned for reconsideration on February 22, 2018, which the Court of Appeals denied on April 4, 2018. (App. 238-251, 278-281). This Court granted further review on August 3, 2018.

STATEMENT OF THE FACTS

Plaintiffs number five of the 165 lawful heirs owning roughly 7.0 acres of land in Charleston County (the "Property"), and for years paid more than their proportionate share of the common expenses of the Property. (App. 57); (App. 148-149 (Trans. 68, ln. 6 to Trans. 70, ln. 24)). Plaintiffs covered approximately sixty-eight percent (68%) of these expenses, with Plaintiff Blake Brisbane paying $25,933.27 alone. (App. 47). Plaintiffs' discussions with Associated about

[1] Pending this appeal, Nordic requested and the Master granted a supersedeas halting the sale to Associated conditioned upon Nordic's posting of a $100,000 bond. (App. 49-53).

purchasing the Property culminated in a written contract dated August 11, 2014, for the price of $455,000. (App. 58, 89); (App. 134 (Trans. 10, ln. 3 to Trans. 11, ln. 19)).

Subsequently, Associated undertook extensive due diligence, including wetland, tree, topographic and boundary surveys; commissioning a jurisdictional wetland survey; and developing and completing a revised plan for annexation in to the City of Charleston. Additional efforts involved coordinating with various agencies and departments along with preliminary land planning and engineering studies. (App. 89-91); (App. 136-139 (Trans. 19, ln. 10 to Trans. 29, ln. 12)). As part of its commitment to the heirs, on October 14, 2015, Associated executed a contract to perpetually preserve and maintain the family gravesites on the Property—an issue that was significant to Plaintiffs and the heirs. (App. 167-170); (App. 135 (Trans. 14, lines 5-20)); (App. 138 (Trans. 28, ln. 13 to Trans. 29, ln. 10)); (App. 139 (Trans. 31, ln. 24 to Trans. 32, ln. 12)). Associated expended significant sums through this process (App. 91); (App. 129-131).

In contemplation of closing, Plaintiffs commenced this action to partition the Property by approving Associated's contract. (Appx. 21, 34, 57-58).[2] The Guardian *ad Litem Nisi* answered, agreeing with Plaintiffs' requested relief, including the sale to Associated. (App. 60-62). While Associated continued its due diligence, the uncontested action was set for a final hearing on December 17, 2015.

At this final hearing in December, Nordic first appeared asserting it recently contracted with heir Ernestine Brown ("Ernestine") to purchase the Property for $560,000.[3] (App. 21-22, 34-

[2] Plaintiffs also sought reimbursement from the sale for the disproportionate expenses they covered.

[3] The contract between Ernestine Brown and Nordic is not found in the Record, so its date of execution is unknown. What is known is that in its March 4, 2016, Motion to Intervene, Nordic states "it recently received an executed contract to purchase the property . . . signed by . . . Ernestine Brown." (App. 72) (emphasis added).

35); (App. 132 (Trans. p. 4, lines 12-24)); (App. 148 (Trans. 67, lines 8-10)). Ernestine, who was in default at the time, owns a 0.0021465% interest in the Property, but unlike Plaintiffs she paid none of the common expenses. (App. 11-15); (App. 47). Wanting to be assured of the Property's fair market value, the Master rescheduled the final hearing for May 3, 2016, with notice to all parties, including Nordic. (App. 21, 22, 77-79); (App. 77-87).

At this time, Associated was not a party because Plaintiffs' request to approve its contract was uncontested; however, after Nordic asserted a competing contract, Associated moved to intervene. (App. 64-69). Intervention was granted, and through its Amended Answer Associated sought approval of its contract. By way of counterclaims and cross-claims, Associated sought to recover the significant investments it made for the benefit of the Property as an alternative remedy if Nordic was the approved purchaser. (App. 88-94).

Nordic also intervened, asserting 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." (App. 71-74) (emphasis added). Nordic's Answer asked the Master to find its contract with "Ernestine Brown" was preferable and that it should receive the deed to the Property. (App. 75-76). It is important that the specific purpose for which Nordic intervened was to present evidence of its contract, because now on appeal it asserts it was unaware it would have to submit evidence in order to prove its case.

1. The May 3, 2016, Final Hearing.

The May 3rd Hearing was on two issues: (i) the value of the Property, and (ii) whether Associated or Nordic presented the more favorable contract. (App. 71-74). At the outset Plaintiffs,

Nordic and Associated stipulated the fair market value of the property was $560,000.[4] (Nordic Brief, p. 2). The Master accepted the stipulation and no one appealed this finding. Both Nordic and Ernestine declined to offer further evidence about value. (App. 136 (Trans. 18, ln. 6 to Trans. 19, ln. 9)).

This left only the receipt of evidence and testimony to help the Master decide whether Associated's or Nordic's contract was more favorable. Because Nordic intervened for precisely this purpose, it cannot claim it was unaware this issue would be decided. (App. 73) (where Nordic requested "to participate in the hearing scheduled on May 3, 2016 to present evidence and testimony regarding [] why its contract is the more favorable and equitable") (emphasis added). (Compare Nordic Brief, p. 2). Moreover, before taking testimony the Master stated: "The details of the contract might become very important, okay?" (App. 134 (Trans. 9, lines 15-18)). Nordic made no objection to the Master proceeding to hear evidence and testimony about Associated's contracts, satisfied contingencies, due diligence, gravesite protections and other material considerations.

Plaintiffs submitted their August 14, 2014, contract with Associated, as amended; their October 14, 2015, contract to preserve the family gravesites;[5] and their amended contract matching the $560,000 stipulated value, without objection. (App. 157-174); (App. 134-136 (Trans. 9, ln. 15

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[4] It was also agreed that the Property should be partitioned and sold either to Associated or Nordic pursuant to the terms of their respective purchase agreements. (Appx. 34-35, 183) (App. 133 (Trans. 5, ln. 13 to Trans. 6, ln. 5) (Appx. 96, where Nordic stated, "The parties and the Court agreed to a sale of the Property during the [May 3rd] hearing.").

[5] The graves had significant importance to the heirs. (App. 35-37) (App. 139 (Trans. 32, lines 6-12) (Ernestine's counsel stating to Associated that "[Protecting the graves] is an important aspect of this contract."). The bulk of the testimony presented by the heirs focused on the graves, and as Blake Brisbane testified, "there's nothing but our family members there." (App. 134 (Trans. 12, lns. 13-25)).

to Trans. 17, ln. 14)); (App. 136-139 (Trans. 19, ln. 10 to Trans. 29, ln. 12)). These materials represent the only executed contracts provided to the Master at the trial. Associated gave in-depth testimony about its substantial due diligence and answered the Master's questions. (App. 136-139 (Trans. 20, ln. 4 to Trans. 29, ln. 12)); (App. 140 (Trans. 33, ln. 16 to Trans. 36, ln. 3)).

Nordic, on the other hand, presented no evidence or testimony of any due diligence, and its trial counsel could not confirm whether Nordic had ever visited the property. (App. 61 (Trans. 61, lines 8-15)). When Associated tried to elicit testimony at trial about Nordic and its contract, its 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).

After the testimony had ended without Nordic offering any evidence at trial, Nordic's trial counsel stated he was authorized to increase Nordic's price to $650,000. No testimony supports this offer, and Nordic admitted it did not have written proof of the offer. (App. 146 (Trans. 59, ln. 17 to Trans. 60, ln. 5)). There was no evidence at trial that this oral offer had been accepted by any heir. Nordic's executed contract with Ernestine, which this "offer" purported to amend, was not placed into the record at trial.

Notably, although present at trial though counsel, Ernestine declined to request approval of her contract with Nordic. Once Associated entered its amended contract for the stipulated value of $560,000 into evidence, Ernestine's attorney informed the Master her contract with Nordic was "[j]ust 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." (App. 140 (Trans. 36, lines 8-18)) (emphasis added).

After weighing the testimony and evidence before it, the Master approved the sale to Associated pursuant to the terms of its amended contract. (App. 19); (App. 35-36) (App. 147-148 Trans. 63, ln. 17 to Trans. 66, ln. 12)).

2. Nordic's Rule 59 Motion to Reconsider.

Nordic moved for reconsideration pursuant to Rule 59, arguing the Property "should be sold to Nordic pursuant to Nordic's executed contract to purchase the property and Nordic's highest bid for the property in the amount of $650,000.00, which was presented to the Court during the final hearing in this matter on May 3, 2016." (App. 95-99) (emphasis added) (App. 183, stating Nordic "agreed to amend its purchase agreement to increase the amount"). Its Rule 59 motion attached a new, unsigned contract dated May 11, 2016. (App. 101-107).

Via an affidavit submitted a month after the trial, Nordic submitted yet another new contract with a $650,000 purchase price. (App. 108-116). This document, executed June 2, 2016, is between Nordic and two new heirs, Sheneatha Brisbane and Germaine Brisbane. (App. 110-116). Neither of these individuals testified at trial. This newest contract still contained a free-look contingency allowing Nordic to terminate and walk away for any reason, in its "sole discretion[.]" (App. 116, Addendum 1, Par. 1). Nordic acknowledged these contingencies persisted and made reference to yet another written agreement that purportedly removed this contingency, but which still contained a grave survey contingency. (App. 152 (Trans. 7, ln. 6-15)). That purported agreement, like Ernestine's contract, was not put into evidence and appears nowhere in this record.

Associated opposed Nordic's attempt to re-try the case with newly submitted agreements that did not exist on the date of trial. (App. 121-126) (App. 153 (Trans. 9, ln. 4 to Trans. 12, ln. 17)). Associated also informed the Master that it had completed its grave survey (unlike Nordic, which had not), removed every contingency, and was ready to close. (App. 153 (Trans. 9, ln. 23

to Trans. 11, ln. 4)); (App. 129-131). The Master denied Nordic's motion to reconsider,[6] and no heir appealed this ruling. (App. 20).

STANDARD OF REVIEW[7]

Declaratory judgment actions are neither legal nor equitable; thus, the standard of review depends on the nature of the underlying issues. *S.C. Elec. & Gas Co. v. Hartough*, 375 S.C. 541, 546-547, 654 S.E.2d 87 (Ct. App. 2007); *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). Analysis of whether Nordic presented a valid and enforceable contract for the purchase price of $650,000, and, if so, whether the Master properly approved Associated's contract over Nordic's in light of all material terms considered involves more than one standard of review.

A declaratory judgment action to interpret or enforce a contract, is an action at law. *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 274, 705 S.E.2d 73, 77 (Ct. App. 2010) (*citing Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000). When the existence of a contract is questioned and the evidence conflicts or gives rise

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[6] The Master stated the pendency of Associated's claims was a factor in its decision:

> 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.

(App. 155 (Trans. 17, ln. 21 to Trans. 18, ln. 3)) (emphasis added). The repayment of these sums would reduce the net value of any increase in purchase price Nordic purported to offer. Nordic did not challenge this independent basis for the Master's decision.

[7] Respectfully, the standard of review is not driven by the fact that this action involves a partition of the heirs' interests. Associated and Nordic are not co-tenants, and no one has appealed the grant of partition. The issues before this Court relate only to the selection between the competing contracts presented by Associated and Nordic.

to more than one inference, the contract's existence is a question for the finder of fact. *Sherman v. W & B Enters.*, 357 S.C. 243, 250, 592 S.E.2d 307, 310 (Ct. App. 2003). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Here, before the trial court could reach the question of which contract is in the best interest of the heirs, it must first interpret the enforceability and effect—if any—of the "oral" offer made at trial on the terms of the Ernestine Brown contract on which Nordic intervened and sought relief. The trial court's factual finds in this regard must be affirmed unless without evidentiary support. *Id.*

If this Court reaches the issue of whether the Master properly approved Associated's ratified contract, the trial judge's selection of one contract over the other is a question arising in equity, and this Court may determine facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the master. *Friarsgate, Inc. v. First Fed. Sav. & Loan Ass'n*, 317 S.C. 452, 454 S.E.2d 901 (Ct. App. 1995).

ARGUMENT AND CITATION OF AUTHORITY

Nordic's contention that this case calls out for guidance to resolve confusion over "the conduct of partition sales" is misplaced, considering "[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). Regardless, after entry of the final order in this case, the Legislature adopted the *Clementa C. Pickney Uniform Partition of Heirs' Property Act.* S.C. Code Ann. § 15-61-310, *et. seq.* If the partition statutes have any relevance to the Master's selection between two contracts, the current state of the law does not apply here, limiting the reach of this Court's decision to the particular facts of this case.

Associated also notes that Nordic frames its Statement of the Issues around its perception of injury to the heirs caused by the Master's ruling. No heir appealed the approval of Associated's contract—not even Ernestine Brown. Nordic lacks standing to rely upon what it feels is an adverse result affecting other parties. *Bivens v. Knight*, 254 S.C. 10, 12-13, 173 S.E.2d 150, 152 (1970). There are essential benefits in Associated's contracts that Nordic never committed to, and that makes all the difference.

I. The Court of Appeals correctly found that Nordic did not preserve its argument that the Master erred by refusing to conduct the May 3rd Hearing like an auction so that unaccepted oral "bids" were controlling in a manner immune from the Statute of Frauds.

The controlling inquiry is whether at the time of trial Nordic contemporaneously raised the argument that it now presents on appeal. Nordic cites page 146 of the Appendix (Trans. 60, lines 1-5) of the May 3rd Hearing as proof that it timely challenged the Master's requirement of a written contract. (Brief, p. 11). The entire exchange 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?

This does not preserve the argument the Master should have applied bidding procedures applicable to public sales or that Nordic was otherwise immune from the Statue of Frauds. *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."). *See also 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.") (citations omitted). *Cf. State*

v. Ivey, 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997) (barring consideration of an issue where the objection lacked sufficient specificity).

The Court of Appeals correctly found that Nordic did not raise its argument that public auction bidding procedures required the Master to consider its oral "offer" until it filed its Rule 59 motion. (Appx. 98, 236). In fact, Nordic quotes from its Rule 59 motion as proof it preserved the issue. (App, Brief, 11); (App. 98). "An issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.,* 381 S.C. 172, 672 S.E.2d 567 (2009) (finding unpreserved an argument first appearing in the appellant's motion to reconsider). All of the arguments, affidavits, and exhibits now relied upon by Nordic were first presented in, or after, its Rule 59 motion. (Appx. 95-120). This is fatal. *Accord Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (1990); *Commercial Credit Loans, Inc., v. Riddle*, 334 S.C. 176, 512 S.E.2d 123 (Ct. App. 1999).

Nordic's newest argument that it lacked notice the Master would receive evidence at the May 3rd Hearing to determine whether Associated or Nordic should be approved as the purchaser also is not preserved. (Brief, p. 2). Forgetting that Nordic moved to intervene precisely for that purpose (per its motion), Nordic neither objected to the Master taking such evidence nor requested a continuance if it had evidence it wished to present. *Hill*, 389 S.C. at 23, 698 S.E.2d at 624 (contemporaneous objection required to preserve an issue). Nordic also did not raise this contention in its Petition for Rehearing to the Court of Appeals. (App. 238-251). Rule 242(d)(2), SCACR, requires that an issue must be raised in the petition for rehearing to be considered by this Court. Finally, and to the extent Nordic argues in this appeal that it's alleged oral modification of a written contract for the sale of real property was immune from the Statue of Frauds, Nordic likewise failed to raise this argument. *Id.; see also Mellette v. Atlantic Coast Line R.R. Co.,* 181

S.C. 62, 64, 186 S.E. 545, 547 (1936) ("general rule [is] that the theory pursued in the trial court with respect to the relief sought and grounds therefor must be adhered to in the [a]ppellate [c]ourt."); *Rushing v. Intex Products, Inc.*, 285 S.C. 595, 599, 330 S.E.2d 555, 557 (Ct. App. 1985) (finding in a declaratory judgment action, the trial court erred in grating relief upon a contract that was not alleged in the pleadings and was not presented until the day of trial)

II. The Court of Appeals was correct to affirm the Master's decision that it was not bound by Nordic's unaccepted oral bid.

When Nordic appeared late and claimed an interest, both Nordic and Associated intervened, not as co-tenants[8] but as parties asserting rights under their respective written purchase contracts. Thus, Nordic's and Associated's involvement in this action is governed by the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. § 15-53-10 *et. seq.*, which provides, "Any person interested under a . . . written contract or other writings constituting a contract" may have their rights thereunder determined. S.C. Code Ann. § 15-53-30. (App. 64-69, 71-76).

Neither Associated nor Nordic could intervene without an enforceable real estate contract. "Intervention of right requires a direct, substantial, [and] legally protectable interest in the proceedings." *Dep't of Health & Envtl. Control v. Columbia Organic Chem. Co. (ex Parte Reichlyn)*, 310 S.C. 495, 499, 427 S.E.2d 661, 664 (1993) (citing *State of Arizona v. Motorola, Inc.*, 139 F.R.D. 141, 144 (D. Ariz (1991) (emphasis added); Rule 24(a), SCRCP (requiring "an interest relating to the property [] which is subject to the action"). Without a "real, actual, material, or substantial interest in the subject matter of the action" a party lacks standing to intervene. *Ex parte Gov't Emples. Ins. Co. v. Goethe*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007). Nordic

[8] Partition is compellable only between those parties that hold a tenancy or estate in the land. *See* S.C. Code Ann. § 15-61-10.

relied upon its "executed contract" signed by Ernestine Brown to intervene, seeking through its answer to enforce its rights under that contract. (App. 72, 75-76).

For Nordic to have a legally protectable interest sufficient to compel the conveyance of a deed, its purchase contract must be in writing. S.C. Code Ann. § 31-3-10. *See also 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."). Nordic had the burden of proof at trial to demonstrate the enforceability of its contract. *Fici*, 372 S.C. at 346, 642 S.E.2d at 602. Nordic knew this was necessary. (App. 71-76) (asserting the "right to participate in the hearing scheduled on May 3, 2016 to present evidence and testimony regarding [] why its contract is the more favorable"). It was reasonable for the Master, who approved Nordic's intervention, to expect Nordic to stick to this approach.

Instead, Nordic came with no representatives, no proof of its contract terms, no proof it had an agreement to preserve the graves, and no evidence of due diligence. *See Chanko v. Chanko*, 327 S.C. 636, 643 490 S.E.2d 630, 634 (Ct. App.1997) ("A litigant who fails to offer proof on an issue may not be heard to complain about the court's resolution of that issue"). Its executed contract with Ernestine does not appear in this record, and this can give no weight to Nordic's "oral amendment" when the record affords no meaningful review of the contract to which the amendment relates. *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). *See also Harkins v. Greenville Cty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000); *McCall v. IKON*, 380 S.C. 649, 663, 670 S.E.2d 695, 703 (Ct. App. 2008) (holding the appellant has the burden of presenting an adequate record on appeal). This is significant, because Ernestine's contract

provided Nordic its standing to intervene in this declaratory judgment action in the first pace. *See* S.C. Code Ann. § 15-53-30 (right of a party to seek declaration of rights under a "written agreement"); Rule 24(a), SCRCP (standing to intervene is based upon a "legally protectable interest"); S.C. Code Ann. § 31-3-10 (requiring agreements for the sale of real estate to be in writing).

Standing alone, the oral bid has no evidentiary value—its just an "offer."[9] Nordic admits it was trying to amend Ernestine's written contract through this oral bid at trial. (App 183) ("At the hearing, Appellant, through its counsel, agreed to amend its purchase agreement . . . .") (emphasis added). The Statute of Frauds does not allow this. *Windham v. Honeycutt*, 279 S.C. 109, 302 S.E.2d 856 (1983) (evidence of oral modification of the real estate contract violates the Statute of Frauds). Because the law does not allow evidence of an orally modified real estate contract, Nordic cannot rest on its defective and inadmissible higher "offer." *Cf. Ray v. South Carolina Nat'l Bank, Inc.*, 281 S.C. 170, 174, 314 S.E.2d 359, 360 (Ct. App. 1984) (finding a plaintiff in a declaratory judgment action cannot rely on inadmissible parole evidence to avoid liability established by the written terms of the instruments). *Cf. Aniballi v. Aniballi*, 255 Mont. 384, 387 (Mont. 1992) (affirming the denial of a motion to intervene where intervenor failed to provide evidence of a written contract to satisfy the statute of frauds).

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[9] Moreover, counsel's oral offer was simply that, an offer. An "offer" is not a contract in the absence of acceptance. *See e.g., Hodge v. National Fidelity Ins. Co., 221 S.C. 33, 41, 68 S.E.2d 636, 638-39* (1952) ("As in the case of contracts [] it is essential to the creation of a contract of insurance that there be an offer or proposal by one party and an acceptance by the other."). Nordic cannot unilaterally amend its bi-lateral contract with Ernestine, and the record supports the conclusion that Ernestine was not interested in countersigning any further agreements with Nordic, considering she did not ask the Master to approve her contract with Nordic, she did not seek reconsideration of the Master's ruling, and perhaps most tellingly, Nordic relied upon two entirely different heirs to sign its new, belated contract submitted after the trial. (App. 140 (Trans. 36, lines 12-21)) (App. 153 (Trans. 12, lines 18-23)); (App 110-120).

Beyond the dispositive points made above, there is another problem with the "bid."[10] Statements of counsel are not evidence. *Accord McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933); *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 its trial counsel was an authorized agent with authority to bind it to an oral bid fails because there is no evidence in the record of that authority aside from counsel's own statements. Doubt arises considering Nordic's counsel stated he lacked authority to bind Nordic to a fallback position, when asked. (App. 148 (Trans. 67, ln. 25 to Trans. 68, ln. 3). Associated tried to elicit testimony at trial about Nordic, but was told, "There's no one here on their behalf, Your Honor." (Appx. 146 (Trans. 57, ln. 25 to Trans. 58, ln. 7)). It is patently unfair to deny Associated the right to cross-examine Nordic[11] and at the same time allow Nordic's trial counsel, who did not take the stand, be the sole source of the penultimate evidence on which Nordic relies in a manner totally insulated from cross examination.

Nordic's argument that actions of attorneys are binding on their clients is off message. Authorities it cites turn on circumstances where a party is trying to avoid the consequences of stipulations or admissions made by counsel.[12] These cases apply here only in the context of the

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[10] Nordic argues that nothing in the partition statutes requires a "bid" in a partition sale to be writing. This does not correctly state the issue. What is true is that nothing in the partition statutes bars the Master from requiring the submission of a written contract, especially considering that both parties intervened under the Declaratory Judgment Act to present evidence of why its "written contract" is more favorable, and Nordic based its standing to intervene on its "executed contract" with Ernestine. S.C. Code Ann. § 15-53-30; Rule 24(a). *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").

[11] Throughout the trial, Nordic was given the opportunity to cross-examine witnesses, but it declined.

[12] 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. The husband was

stipulation by Nordic's counsel to the $560,000 property value—Nordic is bound by that stipulation. But, that does not mean a party can rely on statements of fact appearing only in the arguments of counsel to furnish the only evidence of a matter on which it carries burden of proof. Nordic has cited no case 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).

All of this highlights the difference between the manner in which the parties consented to try this case, *i.e.*, through a declaratory judgment action to determine the enforceable rights of the parties under their respective competing contracts for the purchase or real property, versus a public auction where anyone can appear, oral bids are allowed, and written contracts are not used. They are apples to oranges. Through its appeal, Nordic seeks to avoid its evidentiary shortfall by turning the case into something it was not. As the Master said, "What it was not, was not bidding day in

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trying to avoid the consequences of his attorney's actions, not use them to meet his evidentiary burden of proof. 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 because 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.

the courthouse. That was this morning. I do those at 11:00 the first Tuesday of every month." (App. 155 (Trans. 17, lines 2-4). Nordic admits, "this action does not involve a public sale[.]" (App. 98, 188). Cases involving publicly advertised judicial sales[13] lend no support to Nordic, and none of the authorities it relies on involve determining the rights between two competing real estate purchase and sale contracts held by intervenors.

Although Nordic has abandoned reliance upon these materials by not raising them before this Court, it is worth noting that only after the May 3rd Hearing did Nordic offer any written contact into evidence. It attached an unsigned contract dated May 11, 2016, to its Rule 59 motion, and a month after trial submitted a new contract with Sheneatha and Germaine and three affidavits executed June 2, 2011. (App. 101-107, 108-120) Associated objected on the grounds that these post-trial materials were improper, and the Court of Appeals agreed. (App. 121-126) (App 236). Parties are not allowed to build an evidentiary record this way.

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). *See also 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*

[13] *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.

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 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); *Dempsy v. Husky*, 224 S.C. 536, 544, 80 S.E.2d 119, 122 (1954) (stating additional evidence submitted after the trial could not be considered because there was no opportunity for cross-examination). Simply put, it is improper to consider any of the materials offered by Nordic after the May 3rd Hearing.

Recall that Ernestine informed the Court through counsel that she did not request reconsideration of the approval the Master's decision. (App. 153 (Trans. 12, lines 18-23)). Yet, the affidavit accompanying Nordic's new June 2, 2016, contract describes it as an agreement with "Ernestine Brown." (App. 108-109). That assertion is clearly false. Two new heirs signed that document—not Ernestine. (App. 115, 116). There is more.

The signers of the new contract, Sheneatha and Germaine Brisbane, did not testify previously, but their affidavits claim they "are now aware that both contracts considered at the time of the [May 3rd] hearing were in the amount of $560,000, with the same representations and contingencies . . . ." (App. 118, 120). It is not revealed how or when they became "aware" of these facts, but what is undeniable is that these statements are false. We can be certain, because days later at the Rule 59 hearing, Nordic's counsel admitted, "Within that contract there were still some of the contingencies." (App. 152 (Trans. 7, lines 6-11)). The contract also has no protections for the graves. Plainly, Sheneatha and Germaine were wrong to claim the competing contracts contained the same representations and contingencies. This is why cross-examination is essential.

III. The Court of Appeals correctly found that Associated's contract is more favorable and the Master did not err in approving it.

Nordic misses the mark in arguing the "pecuniary interests" of the parties is the determining factor in a partition action, because it fails to quote the entire rule. The full text reads: "[T]he 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) (all emphasis added). Whether to partition by sale or allotment was not in question—everyone agreed to a sale. Plus, the fair market value was stipulated as $560,000 based on Nordic's appraisal.[14] (App. 183); (App. 133 (Trans., 6, lines 6-22); (App. 147 (Trans. 63, ln. 22 to Trans. 64, ln. 4)). The non-monetary contract terms, amount of due diligence performed, contingencies to be satisfied, and gravesite protections were essential to weigh, because question before the Master was a choice of "Contract A" versus "Contract B." (App. 64-69, 71-76) (App. 147-148 (Trans. 64, ln. 14 to Trans 66, ln. 12)).

1. Due Diligence.

Associated's due diligence lasted nearly two years, at great expense, and resulted in the successful annexation of the Property. (App. 136-139 (Trans. 20, ln. 4 to Trans. 29, ln. 12)), App. 140 (Trans. 33, ln. 16 to Trans. 36, ln. 3)). This record proves Associated's commitment to the project and readiness to close. The Master found: "I can tell you, at this state of the proceeding, because of where we are and because of the due diligence that's been preformed [by Associated], I think they're prepared and ready to close." (App. 147 (Trans. 64, lines 14-19)). The Master added,

[14] Having stipulated, Nordic cannot complain that Associated has not offered a fair market price. *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)).

"[Associated] has been diligent. He's stuck with his guns. He still wants to close on the deal. He thinks he can make this work." (App. 148 (Trans. 65 lines 18-20)).

By comparison, Nordic's counsel could not confirm whether Nordic had ever visited the Property, and the Record is devoid of any evidence of its due diligence.

2. Contingencies

Associated removed all contingencies at the trial, aside from conducting a gravesite study, the need for which arose during trial when there was disagreement among heirs about the number and location of graves. (App. 146 (Trans. 58, ln. 15 to Trans 59, ln. 4)). Associated completed that study immediately, and by the time Nordic's Rule 59 motion was heard, Associated removed this final contingency and was fully ready to close. (App. 153 (Trans. 10, ln. 24 to Trans. 11, ln. 4));(App. 129-131).

The only written agreement in Nordic's record is its improper post-trial contract with Sheneatha and Germaine, which Nordic admitted is fully contingent. (App. 116) (App. 152 (Trans. 7, lines 6-11)). Even the later contract that Nordic referred to but did not place into evidence, still required a gravesite contingency—which Associated had by then waived. (App. 116; 152 (Trans. 7, lines 6-11)); (App. 129-131). Nordic was never on equal footing with Associated in terms of satisfying contingencies.

3. Gravesite Preservation

Associated reached an agreement with the heirs on this essential issue nearly seven (7) months prior to trial. (App. 167-168). Neither the heirs nor the Master need wonder about the terms of Associated's gravesite agreement—it is in the record.

Nordic never entered into a contract to preserve the graves. The closest it came was an unenforceable offer in its post-trial contract with Sheneatha and Germine stating, "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." (App. 116) (App. 146) (emphasis added). This 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) ("A contract provision leaving material terms open for future agreement is void for indefiniteness.")).

On this critical issue, it boils down to this: Associated gave a contract to preserve the graves, and Nordic did not. Both the Master and the Court of Appeals found Associated's agreement to preserve the graves was important to its selection as the prevailing party.[15] (App. 147-148 (Trans. 64, ln. 14 to Trans. 66, ln. 12)); (App. 235-236). Nordic did not appeal this finding or challenge it in its petition for rehearing to the Court of Appeals. Considering the importance of this issue, the analysis should end there.

In light of the heirs' special interest in ensuring the preservation of their family gravesites, and further in light of the stipulated property value, price alone is not controlling. Even assuming (for the sake of argument) that it was error not to consider Nordic's oral bid, the record demonstrates that, all things considered, Associated put forth the most favorable terms for the heirs, rendering any such error harmless.

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[15] Nordic's Petition for Writ of Certiorari made 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. (App. 236) (App. 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).

CONCLUSION

For the reasons set forth herein, Respondent Associated Developers, Inc. respectfully requests this Court to affirm the judgment below.

Respectfully submitted,

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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
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 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 Petitioner.

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 Respondent's Brief via US Mail to the following counselors of record:

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October 22, 2018
Charleston, South Carolina