THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2019-000918
Horry County Case No. 2019-CP-26-00946

Lauren Egan, and Lauren K. Egan 2017 Irrevocable Trust, Appellants,

v.

Dockstreet at the Market Common, Inc.; Dock Street Homes and Communities, Inc.; Sands Building Group, Inc.; Sterling Homes; Real Estate Modo Inc.; Ocean Front Guru Real Estate Sales & Development, Inc.; and Brian Piercy, Defendants,

Of which Ocean Front Guru Real Estate Sales & Development, Inc.; and Brian Piercy are Respondents.

RESPONDENTS' INITIAL BRIEF

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November 4, 2019

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STATEMENT OF THE CASE

Appellants Lauren Egan ("Egan") and Lauren K. Egan 2017 Irrevocable Trust (the "Trust") initiated this action by filing a complaint on February 16, 2019, in the Horry County Court of Common Pleas, alleging construction defects with a house Egan purchased – a transaction in which she was represented by her buyer's agents, Respondents Brian Piercy ("Piercy") and Ocean Front Guru Real Estate Sales & Development, Inc. ("Ocean Front"). (Compl. 1; Piercy Answer ¶ 11; Ocean Front Answer ¶ 11; Piercy Aff. ¶¶ 3–4, 7). In their complaint, Appellants alleged that all Defendants, including Respondents, sold Appellants a house with construction defects. (Compl. 1).

Respondents filed Answers on March 20, 2019, as well as Motions to Dismiss pursuant to SCRCP 12(b)(6). Respondent Piercy's Answer included the following responses:

1. Piercy admits that he acted for Plaintiff Lauren Egan as buyer's agent and that he exercised all duties owed to her under South Carolina law with regard to the transaction which is the subject of Plaintiffs' Complaint. (Piercy Answer ¶ 11).
2. Piercy admits that he acted for Plaintiff Lauren Egan as buyer's agent in the purchase transaction which is the subject of Plaintiffs' Complaint. (Piercy Answer ¶ 16).
3. Plaintiff Lauren K. Egan 2017 Irrevocable Trust was not involved in the purchase transaction and was not ever represented by Piercy. (Piercy Answer ¶ 32).
4. Plaintiff Lauren Egan executed an "Exclusive Right to Buy Buyer Agency Contract" with Piercy in which she expressly agreed to a "Broker Liability Limitation" term. (Piercy Answer ¶ 33).
5. Pursuant to the "Exclusive Right to Buy Buyer Agency Contract," Plaintiff Lauren Egan expressly agreed that Piercy would not provide any other professional services including, but not limited to, attorney, tax adviser, lender, appraiser, surveyor, structural engineer, home inspector or other professional service. Additionally, Plaintiff contractually agreed that she would seek professional advice concerning the condition of the property from professionals other than Piercy. Accordingly, Plaintiffs' Complaint and claims regarding the condition of the property should be dismissed as to Piercy. (Piercy Answer ¶ 34).
6. Piercy did not have any relationship with Plaintiff Lauren K. Egan 2017 Irrevocable Trust and, therefore, the Complaint should be dismissed as to that Plaintiff's claims as a matter of law. (Piercy Answer ¶ 35).

Ocean Front's Answer included the following responses:

1. Ocean Front admits that it acted for Plaintiff Lauren Egan as buyer's agent and that it exercised all duties owed to her under South Carolina law with regard to the transaction which is the subject of Plaintiffs' Complaint. (Ocean Front Answer ¶ 10).
2. Ocean Front admits that it acted for Plaintiff Lauren Egan as buyer's agent in the purchase transaction which is the subject of Plaintiffs' Complaint. (Ocean Front Answer ¶ 15).
3. Plaintiff Lauren K. Egan 2017 Irrevocable Trust was not involved in the purchase transaction and was not ever represented by Ocean Front. (Ocean Front Answer ¶ 31).
4. Plaintiff Lauren Egan executed an "Exclusive Right to Buy Buyer Agency Contract" with Ocean Front Guru in which she expressly agreed to a "Broker Liability Limitation" term. (Ocean Front Answer ¶ 32).
5. Pursuant to the "Exclusive Right to Buy Buyer Agency Contract," Plaintiff Lauren Egan expressly agreed that Ocean Front would not provide any other professional services including, but not limited to, attorney, tax adviser, lender, appraiser, surveyor, structural engineer, home inspector or other professional service. Additionally, Plaintiff contractually agreed that she would seek professional advice concerning the condition of the property from professionals other than Ocean Front. Accordingly, Plaintiffs' Complaint and claims regarding the condition of the property should be dismissed as to Ocean Front. (Ocean Front Answer ¶ 33).
6. Ocean Front did not have any relationship with Plaintiff Lauren K. Egan 2017 Irrevocable Trust and, therefore, the Complaint should be dismissed as to that Plaintiff's claims as a matter of law. (Ocean Front Answer ¶ 34).

Respondents' Answers were and are based on the express terms of a contract executed by Appellant Egan and Respondents and titled Exclusive Right to Buy Buyer Agency Contract (the "Contract"). (Piercy Aff., Ex. A). Pursuant to the Contract, Appellant Egan: (1) appointed Ocean Front and Piercy as her exclusive agents to use their "professional real estate knowledge and skills to represent [Egan] in a diligent and effective manner and to locate property . . . suitable to [Egan]," (Contract ¶ 3); (2) acknowledged that she retained Respondents "solely as a real estate agent and not as an attorney, . . . appraiser, surveyor, structural engineer, home inspector or other professional service provider[,]" (Contract ¶ 13); (3) agreed to hold Respondents "harmless from liability as a result of incomplete/inaccurate information provided to [them] by Buyer or Seller" and "from liability as a result of Seller's failure to provide a complete Seller's Property Condition Disclosure

statement[,]" (Contract ¶ 4); and (4) agreed to "indemnify and hold harmless and pay attorneys' fees for [Respondents] from breach of contract, any negligent or intentional acts or omissions by any Parties, Inspectors, Professionals, Service Providers, Contractors, etc." (Contract ¶ 11). The Contract contains an integration clause providing that the Contract "expresses the entire agreement and all promises, covenants, and warranties between [Egan] and [Respondents]" and "can be changed only by a subsequently written instrument signed by both parties." (Contract ¶ 16).

Concurrently with their Answers, Respondents filed Motions to Dismiss on March 20, 2019. In each of the Motions, it was specifically stated:

> More specifically, Plaintiff Lauren Egan [Ocean Front] contracted with Piercy [Ocean Front] to provide buyer's agent services pursuant to a contract and Piercy [Ocean Front] acted in that capacity for Egan with regard to the transaction that is the subject of Plaintiffs' Complaint. There are no discernable allegations and/or claims in Plaintiffs' Complaint regarding Piercy [Ocean Front] in his [its] capacity as buyer's agent. Additionally, Plaintiff Lauren K. Egan 2017 Irrevocable Trust did not have any contractual relationship, or otherwise, with Piercy [Ocean Front] at any relevant time and all claims by it against Piercy [Ocean Front] should be dismissed as a matter of law.

(Piercy Mot. to Dismiss, Ocean Front Mot. to Dismiss). The express language of Respondents' Answers and Motions readily demonstrate their position that they provided buyer's agent services to Appellant Egan only and were not, in any way, involved in the development, construction and/or sale of the house, much less involved with any construction defects in the house.[1]

On March 26, 2019, the court provided notice to the parties that Respondents' motions would be heard by the Honorable Benjamin H. Culbertson on April 25, 2019 at 1:00 p.m. at the Horry County Courthouse. At no time prior to the hearing date did Appellants raise any objection

[1] Importantly, the Complaint includes no allegations that either Respondent breached any duty acting as Appellant Egan's buyer's agent.

or complain that they did not know the exact nature of Respondents' motions or the arguments that would be submitted for the court's determination.

On April 22, 2019, at 8:41 a.m., Lane Jefferies, one of Appellants' three attorneys of record, sent an email to Judge Culbertson about a purported conflict between the subject case and a second, unrelated case[2] on a concurrent jury trial roster, representing that:

> We have two hearings currently on the roster for Thursday, April 25, 2019 in 2019-co-26-00946, Lauren Egan v. Docstreet [sic]. Unfortunately, a Rule 601 conflict has arisen which prevents those hearings going forward. Specifically, we are #2 on the jury trial roster with Judge Hyman in 2017CP2607342 Kathie Dehoyos VS Wanda Sokol [sic]. Please let us know if your Honor has any questions.

(Apr. 22, 2019 Jefferies Email). While Appellant's counsel's email asserted a conflict, it did not include a request for a continuance of Respondents' pending motions.

Less than two (2) hours after asserting the Rule 601 conflict, Appellants' counsel received an email from the Horry County Clerk of Court's representative Cecilia Cessna stating that the case which counsel asserted as a conflict had been continued. (April 22, 2019 Cessna Email). Cessna's email was copied to Judge Culbertson and Judge Culbertson's law clerk. Accordingly, by 10:21 a.m. on April 22, 2019, Appellant's counsel had actual notice and knowledge that no conflict existed to interfere with the hearing on the Respondents' pending motions on April 25, 2019. At no time did the clerk's office or the trial court give any indication that Respondents' motions had been, or would be, continued. Importantly, at the time of the hearing on Respondents'

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[2] The case on the jury trial roster was Dehoyos v. Sokol, 2017-CP-26-07342, before the Honorable Larry B. Hyman in the Horry County Court of Common Pleas. In Dehoyos, there were three other attorneys of record from the Anastopoulo Law Firm who were not attorneys of record in this case. Lane Douglas Jefferies, Eric Marc Poulin, and Roy T. Willey, IV of the Anastopoulo Law Firm were listed as attorneys of record in this case; they were also listed as attorney of record in Dehoyos in addition to Kenneth Thomas David, Benjamin Wayne Lee, and Matthew L. Nall of the Anastopoulo Law Firm. (Dehoyos Docket).

motions on April 25, 2019, Jefferies did not have any conflicts regarding attendance at same, much less a Rule 601 conflict.

On April 23, 2019, two days before the hearing was held, Respondents filed Piercy's affidavit which included a copy of the Contract as an exhibit, and electronic notice of the filing of same was sent from the court to all counsel of record, including Appellants' three attorneys of record. Additionally, copies of the Affidavit and the Contract were sent via email from Respondents' office to Appellants' counsel on the same date. Appellants have conceded that they received these materials on April 23, 2019 but argue that the filing and service was untimely because it happened 43 hours prior to the hearing.

On April 25, 2019, the trial court held a hearing on Respondents' pending motions. Despite the fact that Appellants had been notified that no conflict existed because the unrelated case had been continued, none of Appellants' attorneys appeared at the hearing. (Tr. of Apr. 25, 2019 Hr'g 3:21–4:1). At the hearing, the trial court heard oral argument on Respondents motions to dismiss. (Tr. of Apr. 25, 2019 Hr'g 4:3–5:21). The trial court converted the motions to dismiss into motions for summary judgment and accepted Piercy's affidavit and the Contract. (Tr. of Apr. 25, 2019 Hr'g 6:14–24; 8:5–7). Based on Piercy's affidavit and the Contract, the trial court granted the converted motions for summary judgment and issued a Form 4 Order on April 25, 2019. (Tr. of Apr. 25, 2019 Hr'g at 8:5–7; Apr. 25, 2019 Form 4 Order).

Despite receiving notice of the Form 4 order granting summary judgment, Appellants did not file a motion for reconsideration and did not raise any concerns about their absence at the hearing. However, on May 7, 2019, twelve (12) days after entry and service of the Order granting summary judgment, Appellants filed a motion to vacate, alter, or amend the Form 4 order. (Mot.

to Vacate). On May 20, 2019, Appellants filed a notice of appeal,[3] which the parties received electronic notice of on the same date. Appellants' Motion to Vacate came for hearing before Judge Culbertson on June 10, 2019. Due to the fact that Appellants' had filed their Notice of Appeal on May 20, 2019, the trial court issued a Form 4 order staying Appellants' motion to vacate because the issues addressed in the motion were appealed, divesting the trial court of jurisdiction to decide the motion. (June 10, 2019 Form 4 Order). Appellants did not appeal the June 10, 2019 Order of Judge Culbertson.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, an appellate court applies the same standard applied by the trial court. Knight v. Austin, 396 S.C. 518, 521, 722 S.E.2d 802, 804 (2012) (citation omitted). "Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Id. (citing S.C.R.C.P. 56(c)). When "the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Mulherin-Howell v. Cobb, 362 S.C. 588, 596, 608 S.E.2d 587, 592 (Ct. App. 2005) (citation omitted). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. (citations omitted).

[3] On June 5, 2019, the South Carolina Court of Appeals sent a letter to Appellants, noting various deficiencies with their Notice of Appeal, and requiring correction within ten days. (June 5, 2019 Letter). On June 13, 2019, Appellants filed an Amended Notice of Appeal and served the same on Respondents. (Am. Notice of Appeal).

ARGUMENT

While Appellants argue multiple alleged procedural deficiencies in their Brief, the one thing that they do not argue is even a scintilla of evidence to overcome the grant of summary judgment to Respondents. Instead, Appellants seek to have this Court perpetuate the false narrative contrived in Appellants' Complaint. To wit, despite representing the individual who entered into a buyer's agency agreement with Respondents, and despite having actual knowledge of Respondents' role as buyer's agent for Appellant Lauren Egan in the relevant purchase transaction, Appellants' attorneys erroneously alleged in the Complaint that Respondents were agents/representatives of the sellers.[4] This falsity is at the core of Respondents' Motions and the basis for the trial court's grant of relief to Respondents. Indeed, at no time have Appellants offered any evidence to refute Respondents' substantive legal defense. Consequentially, there is no basis for Appellants' claims against Respondents, and the trial court properly granted summary judgment to Respondents.

I. With the exception of the challenge to the trial court's decision to grant summary judgment, none of Appellants' stated issues were preserved for appellate review and, therefore, the trial court's decision should be affirmed.

The record in the subject case is exceptionally clear. Appellants did not appear for the hearing to contest Respondents' motions on April 25, 2019 and, therefore, no objections and/or arguments were made for the trial court to consider. Thereafter, Appellants did not file any motions pursuant to SCRCP 59 within the requisite ten (10) days. In fact, Appellants cannot point

[4] In the Complaint, it is specifically alleged that "Defendants, individually and collectively, are the developers, builders, and sellers of the development known as "The Market Common", located in Myrtle Beach, including the Plaintiff's residence ("Home"), which is situated at 852 Curtis Brown Lane." (Complaint, ¶ 11). Similar allegations are found throughout the Complaint. These allegations have no basis in fact, at all, to Respondents.

to one issue that was actually brought to the trial court and ruled upon, thereby preserving the issue for this Court's review.

It is axiomatic that issue preservation is the foundation for appellate review. The supreme court has summarized the minimum requirements of issue preservation:

> "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful review." Queens Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 386 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Wilder Corp. v. Wile, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is "axiomatic that an issue cannot be raised for the first time on appeal." Id. Imposing such a requirement on the appellants "is meant to enable the lower court to rule properly after it has considered all relevant facts, law and arguments." I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Here, the trial court record consists of 1) the transcript from the motions hearing on April 25, 2019 (which Appellants did not attend); 2) the Form 4 Order dated April 25, 2019 granting Respondents' motions for summary judgment; and 3) the Form 4 Order dated June 10, 2019 in which the trial court stayed Appellants' Motion to Vacate, Alter or Amend Form 4 Order Dated April 25, 2019.[5] None of Appellants' stated issues before this Court were addressed and/or ruled upon in either of the two Orders issued by the trial judge. As a result, Appellant's issues have not been preserved for review and, therefore, should not be considered by this Court for the first time on appeal.

II. There was no violation of the Supreme Court's Civil Motions Pilot Program Order and, therefore, the trial court did not err in hearing Respondents' motions.[6]

[5] Appellants have not appealed the trial court's Order dated June 10, 2019.

[6] This issue was not preserved for review and, therefore, should not be considered by the Court. See Section I herein. The argument that follows is offered in the event that the issue has somehow been preserved for review.

Appellants' argument regarding the Supreme Court's Civil Motions Pilot Program Order is meritless. Respondents' motions were filed pursuant to SCRCP 12(b)(6) and the bases for same were explicitly set forth within the motions. Accordingly, a memorandum was not required to be filed contemporaneously with the motions. See Supreme Court Civil Motions Practice Pilot Program Order, September 10, 2015 ("A supporting memorandum of law is not required if a full explanation of the motion is contained within the motion and a memorandum would serve no useful purpose.").

The hearing record readily confirms that Respondents' arguments were based on the core issues explicitly stated in the motions; that Respondents acted as buyer's agent for Appellant Egan in the purchase transaction and that Respondents did not have any relationship, at all, to Appellant Trust. There was no surprise and there were no new arguments. Instead, the hearing arguments closely tracked what Respondents have maintained in every pleading, motion and court hearing – that they had nothing to do with the development, construction and/or sale of Appellants' house, which are the only allegations of the complaint. There was no violation of the Supreme Court's Civil Motions Pilot Program Order and, therefore, the decision of the trial court should be affirmed.

III. Appellants' waived any objection to the trial court's decision to convert Respondents' motions to dismiss to motions for summary judgment and, therefore, the trial court's decision should be affirmed.[7]

Appellants' counsel did not attend the hearing on April 25, 2019 and, therefore, no objections were registered by Appellants when the trial court converted Respondents' motions to

[7] This issue was not preserved for review and, therefore, should not be considered by the Court. See Section I herein. The argument that follows is offered in the event that the issue has somehow been preserved for review.

dismiss to motions for summary judgment.[8] Additionally, Appellants did not file a motion for reconsideration within the time period prescribed by SCRCP 59, for the Court to revisit and/or address any objection to the trial court's conversion of the motions to dismiss to motions for summary judgment.[9] As a result, Appellants waived any objection to the trial court's decision to convert Respondents' motions to dismiss to motions for summary judgment and, therefore, the trial court's decision in this regard must be affirmed.

IV. Appellants have failed to produce even a scintilla of evidence to overcome Respondents' motions for summary judgment and, therefore, the trial court's order granting summary judgment should be affirmed

Respondents were not, in any way, associated with the design, construction and/or sale of the house which is the subject of Appellant's construction defects case. These facts have been established in the record through the sworn affidavit testimony of Respondent Piercy and the express terms of the Exclusive Right to Buy Buyer Agency Contract. Remarkably, Appellants have never, at any time, disavowed Piercy's sworn statements or the validity of the Contract. In fact, Appellants cannot point to a single piece of evidence in the record to support the allegations of the Complaint as to Respondents. As the parties resisting the motions for summary judgment, Appellants "cannot simply rest on mere allegations or denials contained in the pleadings" but, instead, have an affirmative responsibility to "come forward with specific facts showing there is a

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[8] Appellants' counsel has never offered any justifiable reason for failing to attend the hearing on April 25, 2019. More importantly, Appellants' counsel never timely requested the trial court to excuse Appellants' non-appearance and reconsider the decision to convert the motions to dismiss to motions for summary judgment.

[9] Arguably, this is a more egregious failure than the failure to attend the hearing. After all, assuming counsel's non-attendance was explainable, Appellants had ten (10) days in which to move the trial court to reconsider, an effort that could have conceivably included affidavits and/or other materials to explain counsel's absence from the hearing. However, Appellants failed to file any motion within the time prescribed by SCRCP 59 and, therefore, failed to afford the trial court the opportunity to reconsider the decision to convert the motions to dismiss to motions for summary judgment.

genuine issue for trial." Mulherin-Howell v. Cobb, 362 S.C. 588, 596, 608 S.E.2d 587, 592 (Ct. App. 2005) (Internal citations omitted). Respectfully, there is not even a scintilla of evidence in this record to oppose Respondents' motions and, therefore, the trial court's decision to grant Respondents' summary judgment should be affirmed.

V. The trial court did not err in receiving and/or considering the Piercy affidavit in support of Respondents' motions for summary judgment.[10]

Respondents' argument here is the same as that set forth in Section III hereinabove. Appellants never objected to the introduction of the Percy affidavit or the trial court's consideration of same, either at the hearing on April 25, 2019 or thereafter in the form of a timely motion for reconsideration pursuant to SCRCP 59. As a result, Appellants waived any objection to the trial court's decision to accept and consider the Piercy affidavit and, therefore, the trial court's decision in this regard must be affirmed.

Assuming *arguendo* that Appellants did not waive their objection and that this issue is preserved for review, it is clear that the Piercy affidavit was timely and was properly considered by the trial court as support for Respondents' motions for summary judgment.

A. No affidavits were required to be filed when Respondents' motions were filed.

Respondents filed motions to dismiss pursuant to SCRCP 12(b)(6) which, by their very nature, do not involve, much less require, consideration of materials outside of plaintiffs' pleadings. Accordingly, an affidavit was not required to be filed with Respondents' Rule 12(b)(6) motions and the failure to do so cannot be a basis for granting Appellants any relief.

[10] This issue was not preserved for review and, therefore, should not be considered by the Court. See Section I herein. The argument that follows is offered in the event that the issue has somehow been preserved for review.

While Respondents' initial motions were not filed pursuant to Rule 56, even if they were, Rule 56 does not require the filing of contemporaneous affidavits. Rule 56(b) clearly, and unequivocally, states that a party "may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." See SCRCP 56(b)(emphasis added). The short of the matter is that no affidavits were required to be filed in support of either a Rule 12(b)(6) or a Rule 56 motion, at the time of the filing of Respondents' motions.

B. The affidavit of Brian Piercy was filed and served in a timely manner.

Appellants argue that the affidavit of Brian Piercy was untimely because it was filed less than 48 hours prior to the time of the hearing.[11] However, Appellants have completely misstated time calculation under SCRCP 6. As a refresher, the affidavit was filed and served April 23, 2019, two business days prior to the hearing on April 25, 2019. Accordingly, the affidavit was filed and served in accordance with Rules 6(a) and (d). See SCRCP 6(a) and (d).[12] The trial court's decision to accept and consider the affidavit of Appellant Piercy in support of Respondents' motions should be affirmed.

VI. Appellants received proper notice of the hearing on Respondents' motions and Rule 601 did not excuse Appellants' counsel when no actual conflict among tribunals existed.[13]

A. Respondents motions were properly noticed and scheduled for hearing.

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[11] In their Brief, Appellants concede service of the affidavit was accomplished 43 hours prior to the actual hearing time. In doing so, they concede that service occurred more than one day prior to the hearing (24 hours) so it must have occurred on the second day prior to the hearing.

[12] Not to state the obvious but the South Carolina Rules of Civil Procedure long pre-date e-filing. While e-filing provides the to-the-minute, if not to-the-second, time of filing of any material, it is not the hour, minute or second of filing that counts. It is simply the day. Here, the filing and service of Piercy's affidavit was in full compliance with the two-day rule, if such is even applicable here.

[13] This issue was not preserved for review and, therefore, should not be considered by the Court. See Section I herein. The argument that follows is offered in the event that the issue has somehow been preserved for review.

It is uncontested that the court provided notice to all parties of the date and time of the hearing on Respondents' motions via email notification dated March 22, 2019. The hearing occurred on the exact date, time and location contained in the notice, *i.e.* April 25, 2019 at 1 p.m. at the Horry County Courthouse. It is also uncontested that Appellants never filed a formal request and/or motion for a continuance of the hearing. It is also uncontested that Appellants' counsel was never provided notice and/or confirmation from any judge that the hearing would not go forward as scheduled. Consequentially, Appellants simply have no basis for complaining about a hearing that took place on the exact date and at the exact time set forth in the notice that they received over one month prior.

B. If a Rule 601 conflict ever existed, it was extinguished less than two hours after it was asserted by Appellants and over two days in advance of the actual hearing date and time.

While Appellants' counsel asserted a purported Rule 601 conflict via email on April 22, it is exceptionally clear that, in very short order (*i.e.* within two hours), the conflict was cleared by the Horry County Clerk of Court's office.[14] Appellants' counsel did not initiate any further communications with the court. Since the only stated issue regarding the hearing was a trial conflict, which was immediately resolved, neither the court nor Respondents' counsel had any reason to believe that the hearing would not proceed as scheduled three days later. In fact, the hearing and court records from April 25 readily reflect that Respondents' motions were still listed on Judge Culbertson's hearing roster and that they were not marked continued or resolved.[15]

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[14] Appellants' counsel argues that once the trial conflict cleared, no notice was given to him that the hearing would go forward. The problem with counsel's reasoning is that the hearing was never continued in the first instance; it was always going forward absent an Order or directive of the trial court to the contrary. The original hearing notice from the court in March remained effective, at all times.

[15] Appellants' counsel refers to an on-line roster purportedly showing that Respondents' Motions would not be going forward as previously scheduled. However, the "Notes" section of the roster did not indicate that the motions

Neither the court nor Respondents' attorneys are responsible for double-checking with Appellants' counsel to be sure that he knows that a non-continued hearing will still proceed as scheduled. If anything, Appellants' counsel should have inquired with either the court and/or Respondents' counsel if he had any doubt, especially given the fact that the pending motions were filed by the Respondents. In the end, Appellants' counsel's mistaken assumptions do not equate to legally cognizant, deficient notice and, therefore, the order granting summary judgment should be affirmed.[16]

VII. Appellants' counsel's absence from the properly noticed hearing cannot be attributed, in any manner, to Respondents' attorneys.[17]

Appellant's fifth assignment of error is essentially directed to Respondents' counsel and suggests that Respondents' counsel had some obligation to locate Appellants' counsel when he did not show for the hearing on April 25, 2019. Given the failure to cite to any rule, statute or case law that would require Respondents' counsel to act as suggested, this issue is meritless. While pitched as a due process argument (more directed to the fact that the hearing was held in Appellants' counsel's absence), it is clear that Appellants never raised any constitutional challenges to the trial court and, therefore, the argument was waived and is not subject to review by this Court. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011)("Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues

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had been *continued*, but that they were "Completed." The record is exceptionally clear that Respondents' motions had not been resolved and/or withdrawn and could not, by any reasonable interpretation, have been "completed" prior to the hearing date.

[16] Remarkably, this is yet another example of Appellants' inexplicable failure to ask for timely reconsideration in accordance with SCRCP 59. On April 25, 2019, Appellants knew an Order had been entered against Appellants yet did nothing until twelve (12) days later. Whatever excuses Appellants' counsel had for the non-appearance on April 25, 2019 were never brought to the trial court's decision and certainly never ruled upon by the trial court.

[17] This issue was not preserved for review and, therefore, should not be considered by the Court. See Section I herein. The argument that follows is offered in the event that the issue has somehow been preserved for review.

are deemed waived on appeal."); see also Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388)(holding that a due process claim raised for the first time on appeal was not preserved).

Respondents' counsel should have known, like any reasonable attorney would, that when the Rule 601 conflict was cleared within two hours of the asserted conflict, and three full days prior to a hearing, that the hearing on the motions would move forward as scheduled in the absence of any order or other directive from the hearing judge or chief administrative judge. As described herein, no such order or directive was issued by any judge continuing, or otherwise disposing of, Respondents' motions and/or the scheduled hearing. As a result, Respondents' counsel appeared at the appointed time to prosecute the pending motions.

It has to be emphasized that no member of the Bench and no member of the BAR made any representations and/or communicated with Appellants' counsel, in any manner, that could even remotely be considered misleading or misdirected. Of course, neither the trial court nor opposing counsel have a duty or obligation to remind an attorney that a duly noticed hearing, that has not been continued by any judge, will proceed as scheduled. Neither the trial court nor opposing counsel have any duty to correct opposing counsel's mistaken assumptions.[18] Accordingly, the trial court's decision to grant summary judgment should be affirmed.

CONCLUSION

For the foregoing reasons, there is no factual or legal basis for Appellants' claims against Respondents, and the trial court properly dismissed Respondents from the case by granting

[18] In all candor, Respondent' counsel assumed that he would hear from Appellants' counsel once the Order granting summary judgment was issued and notice provided of the entry of same on April 25, 2019. However, nothing happened. After the passage of the ten (10) days for filing a motion for reconsideration pursuant to SCRCP 59, Respondents' counsel assumed that Appellants had accepted that no construction defects claim existed against Respondents Piercy and Ocean Front and that Appellants had decided to move on against the other defendants.

summary judgment in their favor. Respectfully, this Court should affirm the trial court's order granting summary judgment to Respondents.

Respectfully Submitted,

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November 4, 2019
Mount Pleasant, South Carolina

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Lauren Egan, and Lauren K. Egan 2017 Irrevocable Trust, Appellants,

v.

Dockstreet at the Market Common, Inc.; Dock Street Homes and Communities, Inc.; Sands Building Group, Inc.; Sterling Homes; Real Estate Modo Inc.; Ocean Front Guru Real Estate Sales & Development, Inc.; and Brian Piercy, Defendants,

Of which Ocean Front Guru Real Estate Sales & Development, Inc.; and Brian Piercy are Respondents.

PROOF OF SERVICE

I hereby certify that I have served Respondents' Initial Brief upon the Appellants by way of U.S. Mail, stamped First Class delivery, on November 4, 2019 addressed to Appellants' attorneys of record as follows:

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Eric M. Poulin, Esquire
Roy T. Willey, IV, Esquire
32 Ann Street
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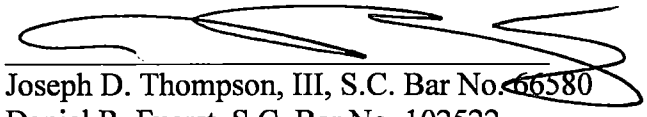
(Signature appears on succeeding page)

HALL BOOTH SMITH, PC



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Attorneys for Respondents Ocean Front Guru Real Estate Sales & Development, Inc. and Brian Piercy

November 4, 2019
Mount Pleasant, South Carolina

H|B|S HALL BOOTH SMITH, P.C.
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November 4, 2019

VIA FEDERAL EXPRESS OVERNIGHT DELIVERY

South Carolina Court of Appeals
The Honorable Jenny Abbott Kitchings
Clerk of Court Office
1220 Senate Street
Columbia, South Carolina 29201

RE: ***Egan v. Dockstreet at the Market Common, Inc., et al.***
Lower Court Case No. 2019-CP-26-00946
Appellate Case No. 2019-000918
HBS File No.: 6740.0017

Dear Ms. Kitchings:

Enclosed please find the original and two copies each of Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal, as well as a Proof of Service for each, with regard to the above-referenced matter. Please file the originals and return clocked copies to our office in the enclosed self-addressed, stamped envelope. By copy of this letter we are serving counsel of record with the same.

Thank you for your assistance in this matter. If you have any questions or concerns, please do not hesitate to contact our office.

Very truly yours,

Joseph D. Thompson, III

JDT,III/vrb

Enclosures
cc: Lane D. Jefferies, Esq.
Eric M. Poulin, Esq.
Roy T. Willey, IV, Esq.
Kenneth Thomas David, Esq.

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