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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

JUN 15 2020

SC Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Samuel M. Price, Jr., Special Referee

Appellate Case No.: 2017-001678

Robert G. ShireyRespondent,

v.

Gwen G. Bishop,
Cassandra Robinson,
and T.D. Bank, N.A.....Defendants,

of whom
Gwen G. Bishop
and Cassandra Robinson are..... Appellants.

APPELLANTS' REPLY
TO RESPONDENT'S RETURN
TO APPELLANTS' PETITION FOR REHEARING AND/OR REHEARING *EN BANC*

Appellants submit the following argument in reply:

1. The Respondent does not address Rule 15(b); SCRCP: "When issues not raised in the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." See also Cheap-Os Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 608, 567 S.E.2d 514, 520 (Ct.App. 2002) (describing this concept as a "cardinal rule of law in South Carolina"). The Appellants unequivocally asserted during trial that no contract existed on August 13 and specifically cited the Statute of Frauds. (R 204-205). The Special Referee ruled the *Statute of Frauds* did not apply in

this action. (R 10). This issue is preserved. See S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 302, 641 S.E.2d 903, __ (2007) (issue is preserved when it was (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.). Even if the Special Referee's Statute of Frauds holding in its order was not a ruling, that defect was cured by the Appellants' timely Rule 59, SCRCP motion. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (A party must file a Rule 59(e) motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.).

2. Respondent's second argument asserts that an action for specific performance is an action at law, subject to an abuse of discretion standard. This is incorrect. "An action for specific performance is one in equity." Campbell v. Carr, 361 S.C. 258, 262, 603 S.E.2d 625, 627 (Ct. App. 2004). "It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the lower court in such cases when the appellant satisfies this court that the finding is against the preponderance of the evidence." Id. (quoting Crowder v. Crowder, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965)). This Court has plenary authority to review the record in this matter and issue a decision consistent with its own view of the evidence; Respondent's preservation arguments would only be arguably applicable to an action under law.

3. To the extent the Respondent wishes to re-argue the equities of specific performance (an implicit concession paragraph two is correct), Appellants would direct this Court to pages 11-12 of Appellants' Brief and pages 1-5 of Appellants' Reply Brief.

Dated: 06/11/2020



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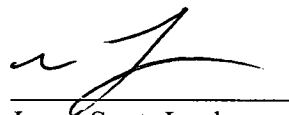
of whom
Gwen G. Bishop
and Cassandra Robinson are Appellants.

CERTIFICATE OF SERVICE

I certify that I served the Appellants' Reply to Respondent's Return to Petition for Rehearing and/or Rehearing *en banc* on the persons set forth below by depositing a copy of it in the United States Mail, postage prepaid, on the date set forth below:

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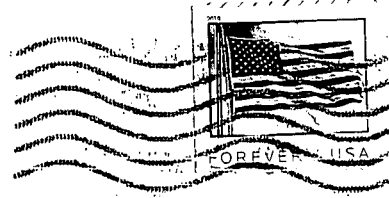


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