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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM PICKENS COUNTY COURT OF COMMON PLEAS

CHARLES B. SIMMONS, MASTER IN EQUITY

C. A. NO. 2018-CP-39-00585

APPELLATE CASE NO. 2020-000396

Terence "Terry" Carroll.....Appellant

vs.

Debra Mowery, TD Realty, Upstate RE Group, Hawk Shadow Business Services, LLC, and Debra Mowery, Realtor .....Respondents

INITIAL BRIEF OF RESPONDENT

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December 1, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE COURT PROPERLY DISMISSED PLAINTIFF'S CAUSE OF ACTION FOR CONSTRUCTIVE FRAUD.

2. WHETHER THE COURT PROPERLY DISMISSED PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF TRUST.

3. WHETHER THE COURT PROPERLY DENIED PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF CONTRACT AND INTEREST IN AND FOR REAL ESTATE.

4. THE COURT PROPERLY DENIED PLAINTIFF'S CAUSE OF ACTION FOR QUANTUM MERUIT, UNJUST ENRICHMENT, AND RESTITUTION.

STATEMENT OF THE CASE

Plaintiff initiated this case on May 16, 2018, by filing a Lis Pendens Notice of Pendency of Action, Summons and Notice with Complaint attached, and Complaint. Defendant was properly served with same. On June 15, 2018, Defendants filed an Answer and Counterclaim of Defendants. On June 18, 2018, Plaintiff filed an Amended Complaint alleging causes of action for (1) Unjust Enrichment, (2) Interest in and for Real Estate, (3) Intentional Infliction of Emotional Distress, (4) Specific Performance of Contract, (5) Breach of Contract, (6) Temporary Injunction, (7) Restitution, (8) Constructive Fraud, (9) Breach of Trust, and (10) Quantum Meruit. On June 26, 2018, Defendant filed an Answer to Amended Complaint and Counterclaim of Defendants denying Plaintiff's requests for relief, stating affirmative defenses of (1) Statute of Frauds, (2) Statute of Limitations, and (3) Laches, and alleging causes of action for (1) Interference with Contractual Relationship, (2) Abuse of Process, (3) Slander of Title, (4) Conversion, (5) Eviction, and (6) Offset.

This case was referred to the Honorable Charles B. Simmons, Master-in-Equity by an Order of Continuance and Order of Reference to Special Referee filed October 16, 2019, to act

as special referee for Pickens County for final, non-jury adjudication of the matter and related motions.

A trial on the merits was heard on December 17, 2019. An Order ("Order") deciding all claims of the parties was filed on January 6, 2020. On January 17, 2020, Plaintiff filed a Motion for Reconsideration Alteration and or Amendment pursuant to Rules 52(b) and 59(e) SCRCP. On February 18, 2020, and order denying Plaintiff's Motion to Reconsider was filed. On February 20, 2020, Plaintiff filed a notice of appeal.

SUMMARY OF FACTS

Debra Mowery ("Debra" or "Mowery") and Terry Carroll ("Terry" or "Plaintiff") met in Maryland in late 2005. (Tr. pp. 13, lines 1-20; p. 111, line 25-p. 112, line 12). Debra was in the process of getting a divorce and she and Terry quickly grew close. (Tr. p. 13; p. 112, lines 8-12). In 2006, Terry moved in with Debra in a house she was renting. (Tr. p. 138, lines 13-18).

The parties never married, (Tr. p. 47, lines 1-22; p. 110, line 19-p. 111, line 5), but mostly lived together between 2006 and 2018. (Tr. p. 25, lines 21-25; Tr. p. 138, lines 13-18). In 2016, the parties moved to South Carolina.

In 1995, Debra had started a business named Hawk Shadow Business Services (Hawk Shadow). (Tr. p. 150, line 25-p. 151, line 3). The business was organized as an LLC on January 4, 2006 before the parties started cohabitating. (Tr. p. 150, line 25-p. 151, line 9; Def Ex. 8). Debra also started two businesses in South Carolina: TD Realty, LLC ("TD Realty") on August 10, 2016 and Upstate RE Group, Inc. ("Upstate RE Group") on April 11, 2017. (Def Ex. 9; Def Ex. 20). Debra also became a licensed Realtor after moving to South Carolina. (Tr. p. 153, lines 3-4).

During the parties' relationship, Debra continued earning income from operating Hawk Shadow and from her work as a realtor. (Def. Ex. 18). Terry did not file a tax return or report any income between 2003 and 2018. (Tr. p. 66, line 23-p. 67, line 11; p. 217, lines 5-18).

Debra purchased three properties in South Carolina after Terry submitted bids on the properties at auctions. (Tr. p. 26, lines 22-24; Def Ex. 1; Def Ex 2; Def Ex 3). The first property, located at 109 Linda Lane in Pickens, ("Linda Lane Property") was purchased on January 26, 2015. (Def. Ex. 1). The second property, located at 204 South Ninth Street in Easley ("Ninth Street Property"), was purchased on June 17, 2016. (Def. Ex. 2). The third property, located at 539 Pope Field Road in Easley, ("Pope Field Property") was purchased on July 21, 2016. (Def. Ex. 3). All of the properties were deeded in Debra's name with Terry's full knowledge and consent. (Tr. p. 33, lines 17-21; Tr. p. 49, lines 18-25).

Debra broke up with Terry in early 2018. (Tr. p. 25, lines 21-25). On May 16, 2018, Terry filed this case. (Complaint).

ARGUMENT

I. THE COURT PROPERLY DISMISSED PLAINTIFF'S CAUSE OF ACTION FOR CONSTRUCTIVE FRAUD WHERE PLAINTIFF DID NOT PRESENT EVIDENCE OF FRAUD BY DEFENDANTS.

Standard of Review

"After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Rule 41(b), SCRCP. Rule 41(b) "allows the judge as the trier of facts to weigh the evidence, determine the facts and render a judgment against the plaintiff at the close of his case if justified." *Johnson v. J.P. Stevens & Co.*, 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992). In reviewing the rulings of a trial judge on

motions for involuntary nonsuit, the appellate court must review the evidence and all inferences in the light most favorable to the nonmoving party. *Rewis v. Grand Strand Gen. Hosp.*, 290 S.C. 40, 41–2, 348 S.E.2d 173, 174 (1986). If more than one reasonable inference can be drawn from the evidence, the motion for nonsuit should be denied. *Id.*

Discussion

To establish constructive fraud all elements of actual fraud except the element of intent must be established. *Woods v. State*, 314 S.C. 501, 506, 431 S.E.2d 260, 263 (Ct. App. 1993) (citing *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734 (1978)). As such, a plaintiff must prove the following elements to recover in an action for constructive fraud: (1) a representation; (2) its falsity; (3) the speaker ought to have known its falsity; (4) materiality; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely theron; and (9) the hearer's consequent and proximate injury. *Id.*; *see also M. B. Kahn Construction Co., Inc. v. S.C. Nat'l Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980).

Constructive fraud could not exist in this case because Plaintiff explicitly knew and agreed to title the properties in Mowery's name. Plaintiff testified that it was the parties' conscious and deliberate decision to title the property in Mowery's name. (Tr. p. 33, lines 17-21; Tr. p. 49, lines 18-25). In response to the question, "So you knew about [the properties being titled in Mowery's name]," Plaintiff responded, "All the settlements I was there at every one of them." (Tr. p. 49, line 18-p. 50, line 2).

Further, even if Plaintiff did not actually know that the deeds were in Mowery's name, he would still have had constructive notice of this fact because the deeds are public record. (Def. Ex. 1, 2, 3). The properties were purchased between almost two and more than three years

before the parties broke up and Plaintiff filed this action. So, Plaintiff had ample time to insist that the properties be deeded to TD Realty, LLC if that was actually the agreement of the parties. As such, Plaintiff did not have a right to reasonably rely upon any representation contrary to the public record.

Finally, Plaintiff's testimony that he believed the properties would eventually be titled in the name of TD Realty, LLC is irrelevant because Plaintiff did not submit any evidence that he was an owner of TD Realty. Further, Plaintiff admitted that he is not an owner of the business. (Tr. p. 34, lines 11-17).

Therefore, Defendants respectfully request that this Court affirm the trial court's dismissal of Plaintiff's cause of action for constructive fraud.

II. THE COURT PROPERLY DISMISSED PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF TRUST WHERE PLAINTIFF DID NOT PRESENT EVIDENCE OF A FIDUCIARY RELATIONSHIP BETWEEN THE PARTIES.

Standard of Review

"After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Rule 41(b), SCRCP. Rule 41(b) "allows the judge as the trier of facts to weigh the evidence, determine the facts and render a judgment against the plaintiff at the close of his case if justified." *Johnson v. J.P. Stevens & Co.*, 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992). In reviewing the rulings of a trial judge on motions for involuntary nonsuit, the appellate court must review the evidence and all inferences in the light most favorable to the nonmoving party. *Rewis v. Grand Strand Gen. Hosp.*, 290 S.C. 40, 41–2, 348 S.E.2d 173, 174 (1986). If more than one reasonable inference can be drawn from the evidence, the motion for nonsuit should be denied. *Id.*

Discussion

One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from breach of duty imposed by the relation. Restatement (Second) of Torts § 874 (1979). A fiduciary relationship exists when one reposes special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence. *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 794 (1990) (citing *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987)).

Plaintiff did not present any evidence of a fiduciary relationship between Plaintiff and Defendants. The parties are adults without any legal incapacity who have no legal relationship. Plaintiff's witness testified, "Terry has proven that he can take care of himself and others very well." (Tr. p. 96, lines 12-18). The parties were never married and Plaintiff did not seek a determination that they were married. (Tr. p. 47, lines 14-18). Further, Mowery running a tax service or having a real estate license does not create a fiduciary duty between Mowery and Plaintiff because Mowery was not Plaintiff's accountant or realtor.

First, Mowery's tax service, Hawk Shadow, could not have filed taxes on behalf of Plaintiff because Plaintiff did not file taxes between 2003 and the 2018. (Tr. p. 66, line 23-p. 67, line 11; p. 217, lines 5-18). Further, Plaintiff's decision not to file taxes was made in 2003 before he met Mowery in 2005.

Second, it is clear from the record that Mowery did not act as Plaintiff's realtor in any real estate transaction. This is primarily because Plaintiff did not purchase any real estate. Further, Mowery was not the realtor when she sold the Maryland Property -- Plaintiff testified that the Realtor and Mowery came to look at the house together. (Tr. p. 25, lines 17-20). She

was not a Realtor for the Linda Lane and Ninth Street Properties because those were purchased before Mowery earned her license. (Tr. p. 26, line 22-p. 27, line 15). The Linda Lane Property was purchased before the Ninth Street Property and at the time the Ninth Street Property was purchased, Plaintiff testified that "Gary" was his Realtor because Mowery did not yet have a license. (Tr. p. 27, lines 4-17).

Although the record does not directly confirm that Mowery did not have her license before the Pope Field Property was purchased approximately a month after the Ninth Street Property purchase, Plaintiff's testimony does not mention her acting as his Realtor in that transaction. (Tr. p. 33, line 4-21). Plaintiff testified that he found the house a week after the parties purchased the Ninth Street Property. (Tr. p. 33, lines 6-9). Plaintiff then registered and bid on the Pope Field Property at auction, and deliberately titled it in Mowery's name. (Tr. p. 33, lines 6-21).

Finally, even if Mowery has gained her license in the intervening weeks between the Ninth Street Property purchase and the Pope Field Property purchase, she could not have been a broker prior to this case being filed. Plaintiff testified that a Realtor must work for a broker for two years before she can be a broker. (Tr. p. 12, lines 14-18). As such, the earliest Mowery could have been a broker is June 17, 2018 (two years after the Ninth Street Property was purchased) and this case was filed on May 16, 2018.

Therefore, Defendants respectfully request that this Court affirm the trial court's dismissal of Plaintiff's cause of action for breach of trust.

III. THE COURT PROPERLY DENIED PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF CONTRACT AND INTEREST IN AND FOR REAL ESTATE WHERE NO WRITTEN CONTRACT EXISTED BETWEEN THE PARTIES AND PLAINTIFF FAILED TO PRESENT CLEAR TERMS OF ANY ALLEGED CONTRACT.

Standard of Review

"In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *Temple v. Tec–Fab, Inc.*, 381 S.C. 597, 599–600, 675 S.E.2d 414, 415 (2009). The appellate court will not disturb the trial court's factual findings unless they are without evidence reasonably supporting those findings. *Id.*

Discussion

> No action shall be brought whereby: . . . (4) To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them . . . Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

S.C. Code Ann. § 32-3-10 (Statute of Frauds).

To recover for breach of contract, the plaintiff must prove:

(1) A binding contract entered into by the parties;

(2) Breach or unjustifiable failure to perform the contract; and

(3) Damage suffered by the plaintiff as a direct and proximate result of the breach.

Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).

Plaintiff admitted that the parties did not enter into any written agreement regarding ownership of the real property titled in Mowery's name. (Tr. p. 50, line 16-p. 51, line 13). As such, any alleged contract between the parties for an interest in the real property is barred by the Statute of Frauds.

Further, Plaintiff failed to present any evidence of the terms of any alleged contract between the parties. For example, Plaintiff did not testify as to:

1. when the alleged contract became effective or when it would terminate;
2. whether there was one global contract or each property had its own contract;
3. what the parties agreed would happen if one died;
4. what the parties agreed would happen if one party wanted to sell a property and the other party objected; or
5. what the parties agreed would happen if one party wanted to terminate the contract and the other did not.

Plaintiff also did not testify about what term Defendants were alleged to have breached. Finally, Plaintiff testified that it was impossible for the parties to have a written contract because their agreement changed every day. (Tr. p. 50, line 16-p. 51, line 13). The only term Plaintiff testified to was that Mowery allegedly agreed to give him half of her property if they ever broke up. (Tr. p. 41, lines 22-25).

On the other hand, Debra testified clearly and unequivocally that there was no agreement between the parties. (Tr. p. 162, lines 13-20).

Here, the trial judge was well within his right as fact-finder to determine that Plaintiff's lack of clarity about the terms of the alleged oral contract along with his testimony that the contract changed day-to-day meant that no oral contract actually existed. The trial judge properly weighed the testimony of the parties and found that Plaintiff had not met his burden of proving that an oral contract existed between the parties.

Therefore, Defendants respectfully request that this Court affirm the trial court's denial of Plaintiff's causes of action for breach of contract and interest in and for real estate.

IV. THE COURT PROPERLY DENIED PLAINTIFF'S CAUSE OF ACTION FOR QUANTUM MERUIT, UNJUST ENRICHMENT, AND RESTITUTION WHERE DEFENDANTS DID NOT RECEIVE BENEFITS AND BOTH PARTIES BESTOWED GIFTS ON THE OTHER.

Standard of Review

In equitable actions, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). However, the appellate court is not required to disregard the findings made by the trial court. *Goldman v. RBC, Inc.*, 369 S.C. 462, 465, 632 S.E.2d 850, 851 (2006). Although not bound by the trial judge's findings, the appellate court may give deference to his conclusions because he could judge the credibility and candor of the witnesses firsthand. *Malpass v. Hodson*, 309 S.C. 397, 400, 424 S.E.2d 470, 472 (1992).

Discussion

The equitable doctrine of quantum meruit may allow recovery for unjust enrichment. *See Columbia Wholesale Co., Inc. v. Scudder May N.V.*, 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) (citing *Player v. Chandler*, 299 S.C. 101, 107, 382 S.E.2d 891, 895 (1989)).

> Absent an express contract, recovery under quantum meruit is based on quasi-contract, the elements of which are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value.

Id. (citing *Webb v. First Federal Savings and Loan Ass'n.*, 300 S.C. 507, 388 S.E.2d 823 (Ct. App. 1989); *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 366 S.E.2d 12 (Ct. App. 1988)).

Another remedy for unjust enrichment is restitution. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003). To recover restitution in the context of

unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. *Campbell v. Robinson*, 398 S.C. 12, 24, 726 S.E.2d 221, 228 (Ct. App. 2012); *Niggel Assocs., Inc. v. Polo's of N. Myrtle Beach, Inc.*, 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1988).

A. Defendants Did Not Receive a Benefit from Plaintiff

Plaintiff is not entitled to recovery under his equitable claims because Defendants have not received a benefit from Plaintiff or his work. Plaintiff asserts that "[t]he record shows an increase of no less than $127,000 in the South Carolina properties . . . ." Br. of App. 16. Plaintiff also asserts that he in entitled to recover for rental value added to the Ninth Street Property as well as $30,000 he "injected into the parties' equity process." Br. of App. 16.

However, any value added to the Ninth Street Property and any value created from the $30,000 allegedly injected into the properties would be included in the value of the South Carolina properties. As such, assuming Plaintiff's assertions were proven by a preponderance of the evidence, which Defendants deny, the value he has added to Mowery's properties is $127,000.

Plaintiff requested that the trial court, and is now requesting that this Court, accept the additions he made to the properties but ignore the costs Defendants were paying towards the properties and Plaintiff's expenses. Plaintiff reported no income between 2003 and 2018. (Tr. p. 66, line 23-p. 67, line 11; p. 217, lines 5-18). When asked whether he checked to make sure his income was being reported, Plaintiff testified: "The only income that I actually had to show were the few jobs that I did between friends. So, no, there was no tax return filed in my name." (Tr. p. 218, lines 10-16).

While Plaintiff worked on her properties, Mowery was the only individual in the parties' relationship earning actual monetary income. (Def. Ex. 18). As such, all materials for the houses, living expenses, gifts, etc. had to be paid from Mowery's funds. (Tr. p. 140, line 21-p. 143, line 1; Def Ex. 21). Plaintiff's 50% share of just the parties' living expenses was approximately $201,000. (Tr. p. 141, line 24-p. 142, line 3). Without accounting for materials purchased using Mowery's funds, the amount paid for Plaintiff's living expenses is greater than any value his work may have added to the properties.

Plaintiff's testimony confuses this issue because he believes that funds deposited into a joint account automatically become equally owned by all parties to the account.[1] (Tr. p. 63, lines 16-18). Mowery's testimony was that the parties never held a joint account and Plaintiff simply had signing privileged on her account. (Tr. p. 141, lines 5-19). However, even assuming that a joint account existed, the funds deposited into that account from Mowery's income would still be Mowery's property. S.C. Code Ann. § 62-6-201(A) ("During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent."). As such, when Plaintiff testified that he purchased property, (Tr. p. 20, lines 7-9; p. 30, lines 20-25; p. 35, lines 17-19; p. 63, lines 16-22), paid expenses, (Tr. p. 219, lines 15-24), or bought materials, (Tr. p. 29, lines 13-15), using joint funds, he was actually using Mowery's funds with her permission.

As such, there was no benefit conferred by Plaintiff upon Defendants because Plaintiff was actually a drain on the finances of Defendants.

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[1] Plaintiff's misconception is exemplified by his testimony regarding the purchase of Pope Field Property where he stated: "I paid for – I paid – the purchase price came out of the joint account so I paid for half of it. . . . Your Honor, the purchase price from our joint account. It was my name on it and her name on it. The money came out of there." (Tr. p. 63, lines 16-21).

B. Any Funds or Monies Exchanged Between the Parties were Gifts

> In every gift, like in well-nigh every human act, there exists two elements. One of these involves the intent of the donor's mind; the other of these involves the act of the donor's hand. If a donor intends to confer on another ownership of his property, and if he proceeds so far as to do it, then the gift is complete.

Barnwell v. Barnwell, 323 S.C. 548, 556, 476 S.E.2d 492, 497 (Ct. App. 1996) (quoting *Meyerson v. Malinow*, 231 S.C. 14, 25–26, 97 S.E.2d 88, 94 (1957)).

Although Plaintiff does not contend that the parties were married, (Tr. p. 47, lines 14-18), Plaintiff's causes of action attempt to recreate a marital contract and request equitable division of a quasi-marital estate where none exists. Plaintiff testified that he wanted his "fair share" and "a fair and equal split." (Tr. p. 80, line 5-p. 81, line 5). However, equitable division is not an available cause of action to unmarried parties; otherwise, every cohabitant would have a cause of action for equitable distribution.

Instead, Plaintiff's equitable causes of action would require the court to perform an accounting of every transaction that occurred between two individuals in a romantic relationship to determine which party came out ahead financially. This is both impossible and unnecessary here because it is clear from Plaintiff's testimony that his intent was to give his property and efforts to Defendants. Only after Mowery broke up with Plaintiff was his intent regarding these gifts retroactively changed.

Plaintiff testified that he "gave [Mowery] money all the time because she didn't have any money," (Tr. p. 205, lines 14-19), and "was always giving her money." (Tr. p. 207, lines 19-21). Two witnesses testified that Plaintiff gave Mowery jewelry. (Tr. p. 96, line 19-p. 97, line 1; p. 113, lines 8-18). Plaintiff also gave Mowery's daughter a horse. (Tr. p. 97, lines 2-9). There was no testimony or evidence presented that these gifts from Plaintiff were loans or that Plaintiff

expected Mowery to pay him back. That is because the present intent of Plaintiff when he gave the property to Mowery was that they were gifts and he did not intend any repayment of said gifts.

Therefore, Defendants respectfully request that this Court affirm the trial court's denial of Plaintiff's causes of action for quantum meruit, unjust enrichment, and restitution.

CONCLUSION

For the reasons stated above, Respondents respectfully request that this Court affirm the order of the master-in-equity acting as special referee.

Respectfully submitted,

December 1, 2020

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Charles B. Simmons, Master in Equity

C. A. NO. 2018-CP-39-00585
Appellate Case No. 2020-000396

Terrance "Terry" Carrol, ...Appellant,

vs.

Debra Mowery, TD Realty, Upstate RE Group,
Hawk Shadow Business Service, LLC, and Debra Mower Realtor, ...Respondents.

PROOF OF SERVICE

The undersigned certifies that a true copy of the foregoing:

RESPONDENTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

INITIAL BRIEF OF RESPONDENT

was this 1ST day of December, e-mailed to counsel of records via the AIS e-mail on file:

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