

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J. C. Nicholson., Circuit Court Judge

S.C. SUPREME COURT

Opinion No.: 28126
Case No. 2015-CP-10-03038
Appellate Tracking No.: 2017-001371

Barry Clarke.....Petitioner;

vs.

Fine Housing, Inc. and RRJR, L.L.C.Defendants,

of which Fine Housing, Inc. is theRespondent.

REPLY TO RESPONDENT'S RETURN
TO PETITION FOR REHEARING

Ashley G. Andrews, # 76667
Lafond Law Group, P.A.
544 Savannah Highway
Charleston, South Carolina 29407
(843) 762-3554
E-mail: andrews@lafondlaw.com
Attorneys for Petitioner

Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net
Attorneys for Petitioner

In its January 27, 2023, Return Respondent mischaracterizes Petitioner's request for rehearing.

First, the Petitioner's request for rehearing is based entirely on the Court's disclosed reasoning because the function of an application for rehearing is to ask the Court to take another look at its Opinion. The premises identified and analyzed in the Opinion under review do not support the conclusion reached. Every legal principle identified by the Court as controlling, including, but not limited to, the reliance on the *Restatement*, leads to a deduction that the trial court reached the correct conclusion finding the Right-of-First-Refusal enforceable against a third party. For example, Opinion 28126 sites a Georgia case for the proposition that a Right-of-First-Refusal that does not set a sales price does not inhibit a sale: "If the holder of the preemption right is merely entitled to meet the offer of an open market purchaser, there is little clog on alienability." Opinion at page 6 citing *Shiver v. Benton*, 304 S.E.2d 903, 905 (Ga. 1983). Any **unreasonable** restraint on alienation affects the signatories to the contract, not a third party who purchases property without examining the record.

Second, Respondent is correct about the parties finding common ground with the Court on the *Restatement* factors, but the Respondent fails to explain how the facts support a deduction (or inference) from "(1) the legitimacy of the purpose of the right, (2) the price at which the right may be exercised, and (3) the procedures for exercising the right" (Opinion at page 4) to a conclusion that the Agreement is an **unreasonable restraint** on alienation. (No one questions the "legitimacy" of the contract, and it is indisputable that the signatories freely and voluntarily entered into the terms. This leaves only two Restatement terms in

play.) Thus, if there is an “inconsistence,” it is in the unsupported leap from the facts of the case to a conclusion that this Right-of-First-Refusal that is (1) legitimate, (2) leaves the determination of price to the seller, and (3) leaves the procedures for exercising the right in the hands of the seller to a conclusion that open-endedness creates an **unreasonable** restraint on the Sellers. “It is inconsistent to make that concession and advance the arguments Petitioner presents.” (Return at page 2.) Petitioner submits the inconsistency runs the other way because the *Restatement* factors are all met. The signatories to the Agreement arrived at mutually agreeable terms, mutually selected a lawyer who drafted a document that did not restrain the Robinson’s alienability in any way. Thus, the parties stand on common ground with the Court, and the Petitioner, in an abundance of caution, framed his prayer for rehearing on the six *Franklin v. Johnson* factors as being more comprehensive list than the *Restatement*’s three factors. The Petitioner points out further that while this Court identifies the *Restatement* factors as foundational, the Opinion fails to explain how Petitioner falls short in meeting them because the Right-of-First-Refusal must be read as whole and not as separate or unrelated parts:

The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. *Thomas-McCain, Inc. v. Siter*, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977); see also *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct.App.2000) (“The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used.”). “Documents will be interpreted so as to give effect to all of their provisions, if practical.” *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct.App.1997) (citing 17A Am.Jur.2d *Contracts* § 385 (1991)). In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977); *Bruce v. Blalock*, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962); *Mattox v. Cassady*, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct.App.1986).

In *Brady v. Brady*, 222 S.C. 242, 72 S.E.2d 193 (1952) the South Carolina Supreme Court asseverated:

It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning.

Agreements should be liberally construed so as to give them effect and carry out the intention of the parties. In arriving at the intention of the parties to a lease, the subject matter, the surrounding circumstances, the situation of the parties, and the object in view and intended to be accomplished by the parties at the time, are to be regarded, and the lease construed as a whole. Different provisions dealing with the same subject matter are to be read together. *Id.* at 246-47, 72 S.E.2d at 195.

The Right-of-First-Refusal conforms to the Restatement's prescription, and the *Restatement's* stated goal is to prevent **unreasonable** restraints on alienation. Neither the Respondent nor the Opinion under review explain how the document here is an **unreasonable** restraint on alienation or how a stranger to the transaction can raise a complaint about a document he ignored. The point Petitioner makes—and which the Respondent ignores—is that the Court's identification of the necessary factors is inconsistent with the Court's conclusion, and this gap between the factors and the conclusion is **exactly** what reconsideration is designed to address: "In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 32 (2001). Pointing out the logical insufficiency of an Opinion's deductive reasoning is not "rework[ing] the same arguments, hoping for a different result." (Respondent's Return at page 1)

Respondent also pushes the envelope on word games: "The terms 'ambiguous' and 'vague' were not used in Opinion No. 28126. The Court's decision did not rest on the

determination that right of first refusal was vague or ambiguous; its decision was that the right of first refusal was unreasonable because it lacked essential terms . . .” (Respondent’s Return at page 1, footnote 1) The Court may not have used the words “vague” or “ambiguous,” but there are many synonyms for these words, **exactly as Respondent says.** The Court reached its conclusion based on, as Respondent says, “because it lacked essential terms,” which is the meaning of “vague.” If there is a difference between “vague,” “ambiguous,” and “lacking essential terms,” the difference is undiscovered. “Vague” means “not clearly expressed: stated in indefinite terms.” *Webster’s Seventh New Collegiate Dictionary* While § 5.2 is succinct, the Court’s error is in reading this section in isolation and not part of a whole, and on this ground alone, the Petitioner is entitled to a rehearing and reconsideration. Moreover, the Opinion under review suggests the Court’s function in enforcing contracts is as a super monitor to strike down contracts it finds lack essential terms by reading provisions in isolation and not part of the whole. Such super review has never been a power third parties and strangers to the contract possess. The Respondent was not involved in the negotiation, the execution, or the recording of the Lease and never consulted the public record prior to purchasing the power. This third-party veto power potentially interferes in every contract and impairs the signatories’ constitutionally protected rights to entire into agreements.

In short, the Opinion under review identifies controlling legal principles but never applies them to the facts in the Appendix. The Court never identifies how the Right-of-First-Refusal becomes an **unreasonable** restraint on alienation when the Record demonstrates the Seller controlled purchase price, time of sale, and terms of sale, and, unless amended,

the Opinion invites mischief by third parties launching collateral attacks on contracts. The Court analyzes individual sections of the document in isolation but never puts them all together or reads the document as a whole. This not only violates hundreds of years of common law—and Constitutionally protected in both the State and Federal Constitutions—protecting parties’ freedom to contract as they see fit, but also opens the door to sharp practice in real estate. Under the Court’s holding in the Opinion under review, any purchaser can ignore any Right-of-First-Refusal because it will either be too restrictive or too vague, never just right. The Court has opened the door to mischief. Every real estate lawyer in America is now left to grope in the dark to find the Goldilocks zone of drafting an enforceable Right-of-First-Refusal—if they are too restrictive they fail, and if they are not restrictive at all they fail, eviscerating the rights of parties to contract freely.

In conclusion, the Petitioner is not restating his original arguments; rather, he points out the logical conflict in the Opinion under review, which is not something he could raise or discuss until the Opinion came into existence.

For any or all of these reasons, the Petitioner prays that the Court grant a rehearing on the case and allow the parties to brief fully the points raised by the Court in Opinion No. 28126.

Respectfully submitted,

February 1, 2023

/s/ Ashley G. Andrews
Ashley G. Andrews, # 76667
Lafond Law Group P.A.
544 Savannah Highway
Charleston, S. Carolina 29407
(843) 762-3554
E-mail: andrews@lafondelaw.com

Thomas R. Goldstein
Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 711121
N. Charleston, S. Carolina 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net