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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM BEAUFORT COUNTY  
The Honorable Donald B. Hocker, Circuit Court Judge  
Beaufort County  
Trial Court Case No. 2020-CP-07-1064

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APPELLATE CASE NO. 2022-001547

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Turner's Marina LLC,

Respondent-Appellant,

vs.

Paige Lorberbaum, Jeffrey Klapper, and Diane L. Klapper,

Defendants,

Of whom Paige Lorberbaum is the Appellant-Respondent and Jeffrey A. Klapper and Diane L. Klapper are Respondents.

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**INITIAL BRIEF OF RESPONDENT-APPELLANT TURNER'S MARINA LLC IN  
RESPONSE TO THE INITIAL BRIEF OF APPELLANT-RESPONDENT PAIGE  
LORBERBAUM**

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Bluffton, South Carolina  
April 14, 2023

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## **STATEMENT OF ISSUES ON APPEAL**

1. Should Appellant-Respondent Paige Lorberbaum's appeal be dismissed as moot?
2. Did Judge Hocker err by failing to find Turner's Marina, LLC's Right of Repurchase violated the Uniform Statutory Rule Against Perpetuities, codified at S.C. Code Annot. Section 27-6-10 et. seq.?

## **STATEMENT OF THE CASE**

This appeal arises out of a breach of contract. Specifically, in April of 2019, the Plaintiff Turner's Marina LLC was (and still is) the owner of certain "Declarant" or "Developer" rights emanating from a June 12, 1981 recorded Declaration of Condominium entitled "Declaration of Covenants and Restrictions for Outdoor Resorts RV Resort and Yacht Club and Provisions for the RV Resort and Yacht Club Owner's Association, Inc." (hereinafter sometimes referred to as the "R.V. Resort Covenants"), as is recorded in the Office of the Beaufort County Register of Mesne Conveyances at Book 325, Page 920. See Plaintiff's Exhibit 3 in the Record on Appeal at p. \_\_\_\_\_. The R.V. Resort Covenants apply to 200 individually owned "lots" in the RV Resort, of which one lot, Lot 158, is the subject of this case.

The R.V. Covenants at page 18, specifically Paragraph 12.9, contain a Right of Repurchase to the Developer, which specifically provides:

12.9 In the event the Unit Owner desires to sell his Lot, then said Lot shall be offered for sale to the Developer at the same price at which the property is about to be sold, and the said Developer shall have thirty (30) days within which to exercise its option to purchase said property; and should the Developer fail or refuse (within thirty (30) days after the receipt of notice of the price and terms) to exercise its option to purchase said property at the price at which it is about to be sold, then the Owner of said property shall have the right to sell said property subject to all covenants and limitations herein contained.

This right of repurchase is sometimes referred to herein as the “R.V. Covenants Right of Repurchase.” See Plaintiff’s Exhibit 3, p. \_\_\_\_ in the Record on Appeal. Turner’s Marina LLC is the current owner of the Declarant’s Right of Repurchase. Record on Appeal p. \_\_\_\_\_.

Defendants Jeffrey A. Klapper and Diane L. Klapper purchased Lot 158 in 2007 (Record on Appeal at p. \_\_\_\_\_, and put it on the market for sale for \$60,000 in or around late 2017 (Record on Appeal at p. \_\_\_\_\_.) Defendant Paige Lorberbaum entered into a contract of purchase and sale with the Klappers to acquire Lot 158 for \$54,500 on or about April 2, 2019. See Plaintiff’s Exhibit 4, Record of Appeal at p. \_\_\_\_\_. On April 19, 2019, Chester Williams, counsel for Turner’s Marina LLC, advised D. Thomas Johnson, as counsel for the both the Klappers and Ms. Lorberbaum, that Turner’s Marina had elected to exercise its right of repurchase. See Plaintiff’s Exhibit 14 and Mr. Williams’ testimony in the Record on Appeal at p. \_\_\_\_\_. On April 22, 2019, notwithstanding that notice, the Klapper to Lorberbaum conveyance of Lot 158 was closed by Mr. Johnson, and title conveyed to Ms. Lorberbaum. See Plaintiff’s Exhibit 9, Record on Appeal at p. \_\_\_\_\_.

On May 13, 2020, Turner’s Marina filed its Summons and Complaint alleging breach of contract and seeking monetary damages or specific performance of its right of repurchase, and attorney’s fees as are allowed under the R.V. Resort Covenants. Record on Appeal at p. \_\_\_\_\_. The Klapper Defendants answered on June 10, 2020, alleging that Turner’s Marina did not have any “Right of First Refusal” in April 2019 because allegedly Turner’s Marina’s assignor, Billybob’s Marinas, Inc., had retained “the right of repurchase acquired from Property Research Holdings, Inc.” for a certain time period that Billybob’s had extended partial owner financing. Record on Appeal at p. \_\_\_\_\_.

Defendant Lorberbaum answered on June 12, 2020, and also alleged that Turner's Marina did not have the right of repurchase in April 2019 because "the assignment of right of first refusal did not take effect until the later of several events." Record on Appeal at p. \_\_\_\_\_. Defendant Coastal States Bank answered on June 12, 2020 also, but a settlement was reached with the Bank, they were dismissed from the case and have no interest in this appeal. Record on Appeal at pp. \_\_\_\_\_.

Although the Plaintiff initially requested a jury trial, the Honorable Bentley Price, serving as the Chief Administrative Judge for the 14<sup>th</sup> Judicial Circuit, strongly suggested that the case be tried non-jury after the Plaintiff subpoenaed Defendant Lorberbaum's attorney Tom Johnson as a witness and Mr. Johnson filed a Motion in Limine to block his testimony. The parties agreed to try the case non-jury and trial was held on June 30, 2022 before the Hon. Donald B. Hocker in Beaufort County. At trial, the Plaintiff requested that Defendant Lorberbaum be ordered to convey Lot 158 to Turner's Marina, for \$54,500 less the three years of lost rental revenues, or that Turner's Marina be awarded damages of \$252,997.50 as the lost revenue it would suffer as a result of not having Lot 158 to rent out over the next 61 years.

On August 4, 2022, Judge Hocker entered a final Order in the case, finding that the failure of the Klappers and Ms. Lorberbaum to allow Turner's Marina to purchase Lot 158 was a material breach of the R.V. Resort Covenants' right of repurchase held by Turner's Marina, and ordered Defendant Lorberbaum to convey Lot 158 to Turner's Marina for \$54,500 within ninety (90) days of August 4, 2022, or by November 2, 2022. He declined to award Turner's Marina attorney's fees. See Record on Appeal at p.\_\_\_\_\_.

On August 15, 2022, Turner's Marina filed its SCRCP 59(e) Motion to Alter or Amend the August 4, 2022 Order (Record on Appeal at p. \_\_\_\_\_) and Ms. Lorberbaum's new counsel Russell Patterson filed her Motion to Alter or Amend the Order on August 16, 2022. (Record of Appeal at p. \_\_\_\_\_.) On September 21, 2022, Turner's Marina filed its Petition for Reformation of Right of Repurchase pursuant to S.C. Code Annot. Section 27-6-60. Record on Appeal at p. \_\_\_\_\_.

On September 27, 2022, Judge Hocker entered his Order denying both motions to alter or amend the August 4, 2022 final Order. Record on Appeal at p. \_\_\_\_\_. Defendant Lorberbaum's counsel then filed her Notice of Appeal by mail on October 27, 2022, which was received by Turner's Marina's counsel on November 2, 2022. On November 3, 2022, Turner's Marina filed this cross-appeal.

On November 1, 2022, Defendant Lorberbaum filed a Motion in Circuit Court entitled "Motion for Clarification of Order or in the Alternative For A Stay," seeking to extend the time until Defendant Lorberbaum "would eventually be required to move." See Record on Appeal, p. \_\_\_\_\_. Defendant Lorberbaum therein argued "It is clear it was the Court's original intent to give Lorberbaum sufficient time to make said transition when it originally set forth the time period of ninety (90) days. Now that a 'final' decision has been rendered, Lorberbaum is entitled to the full ninety (90) days to make arrangements to find another suitable location for her RV, or make other living arrangements." *Id.*

On November 28, 2022, Appellant Lorberbaum filed her Initial Brief herein alleging that Judge Hocker committed an error of law by failing to find that Turner's Marina's "Right Of First Repurchase" "violated the Uniform Statutory Rule Against Perpetuities." See Appellant's Initial Brief, p. 4. Appellant Lorberbaum argued that "the Trial Court's decision requiring Lorberbaum

to convey the RV Lot to Turner for \$54,500 should be reversed.” Appellant’s Initial Brief Conclusion, p. 10. At no time did Defendant Appellant Lorberbaum seek a stay pursuant to SCRC 62 nor SCACR 241, nor did Defendant Lorberbaum seek a supersedeas.

On December 14, 2022, Judge Hocker issued another Order “clarifying” his original intent as to the timing of the conveyance of Lot 158 by Lorberbaum to Turner’s Marina, holding:

It was the Court’s intention to provide Lorberbaum a full ninety (90) days to move her recreation vehicle (used as her full time residence) and to convey the Subject Property once the Court’s decision became final. The decision did not become final until the issuance of the September Order. Lorberbaum is entitled to the full ninety (90) days from the issuance of the September Order, and must complete the sale and vacate the Subject Property no later than December 28, 2022.

See Record on Appeal, p. \_\_\_\_\_.

On December 28, 2022, Plaintiff Turner’s Marina LLC tendered its \$54,500 as per Judge Hocker’s Orders, and Appellant Lorberbaum accepted same and transferred the property to Turner’s Marina by General Warranty Deed. See Affidavit of Neil Turner, Record on Appeal, p. \_\_\_\_\_. That voluntary conveyance of Lot 158 by Appellant Lorberbaum renders her portion of this appeal moot as to the issue of Turner’s Marina’s right of repurchase and her appeal should be dismissed.

### **STANDARD OF REVIEW**

An action for breach of contract seeking money damages is an action at law. Branche Builders, Inc. v. Coggins, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009) (quoting McCall v. IKON, 380 S.C. 649, 658, 670 S.E.2d 695, 700 (Ct. App. 2008.)) In an action at law, this Court should affirm the trial Judge’s factual findings if there is any evidence in the record which reasonably supports them. Query v. Burgess, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006)(quoting Lowcountry Open Land Tr. V. State, 347 S.C. 96, 101-02, 552 S.E.2d 778,781 (Ct.

App. 2001)). “In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law. Pope v. Gordon, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006). *See also* Temple v. Tee-Fab, Inc., 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009). “The [c]ourt will not disturb the trial court findings unless they are found to be without evidence that reasonably supports those findings.” *Id.* at 600, 675 S.E.2d at 415.

## ARGUMENT

***1. Appellant-Respondent Paige N. Lorberbaum’s appeal should be dismissed as moot. Her voluntary conveyance of Lot 158 to Turner’s Marina on December 28, 2022, and acceptance of the \$54,500 renders her portion of this appeal moot (as to the issue of Turner’s Marina’s right of repurchase).***

In this appeal filed October 27, 2022, Defendant Lorberbaum seeks the reversal of Judge Hocker’s orders holding that Turner’s Marina LLC held a valid right of repurchase of the Lot when Ms. Lorberbaum bought it, and was improperly denied its right of repurchase. Judge Hocker’s several orders affirmed the validity of that right of repurchase and granted Turner’s Marina the specific performance remedy of purchasing the lot from Ms. Lorberbaum for \$54,500. Instead of seeking a stay or supersedeas as both the Rules of Civil Procedure and the South Carolina Appellate Court Rules allow, Ms. Lorberbaum voluntarily complied with Judge Hocker’s orders on December 28, 2022, by conveying Lot 158 to Turner’s Marina by General Warranty Deed in exchange for \$54,500, and by that action, rendered her appeal moot. No actual controversy now exists as to the right of repurchase because the lot has been sold by Ms. Lorberbaum and full payment accepted.

“A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” Mathis v. S.C. State Highway Dep’t., 260 S.C. 344, 195 S.E.2d 713 (1973). *See also* Appellate Practice in South Carolina, Third Edition, Toal, Walker and Baker, 2016, “Mootness,” p. 134 *et. seq.* “The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation. Accordingly, cases or issues which have become moot or academic in nature are not a proper subject of review.” Sloan v. Greenville Cnty., 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003).

More than 70 years ago, the Supreme Court in Berry v. Zahler, 220 S.C. 86, 6 S.E.2d 459 (1951), set forth in detail numerous circumstances where actions subsequent to the notice of appeal rendered an appeal moot. The Berry case is instructive in these circumstances. Specifically in Berry, the Court dismissed as moot an appeal brought by parties against whom an order of ejectment had issued, when the appellants advised the Court that after filing the appeal, they had moved out and delivered possession of the premises to the Landlord. “Under these circumstances, the issue, which was the right to possession of the premises, has become moot, and the appeal will not be considered.” Berry, 220 S.C. at 87. In 2020, the Supreme Court in Skydive Myrtle Beach, Inc. v. Horry County, 428 S.C. 638, 837 S.E.2d 485 (2020), differentiated such a voluntary act triggering the application of the mootness doctrine, from the situation in Skydive where “ten Horry County sheriff’s deputies arrived at the hanger to ensure Skydive vacated the premises by the court-ordered deadline.” Here, not only did Lorberbaum voluntarily choose to accept the court’s orders, but she also accepted the \$54,500, has kept it, and willingly conveyed the lot by General

Warranty Deed, instead of seeking an easily available supersedeas. The issue as to whether Turner's Marina held a valid right of repurchase is moot as to the Lorberbaum appeal.

There are three general exceptions in which an appellate court will review an issue despite its mootness. *See Sloan v. Greenville County, id.* First, an appellate court could take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case. *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001).

None of the generally recognized exceptions to the mootness doctrine is applicable in these facts. While Appellant Lorberbaum may argue that there are 199 other Lots at the RV Resort that are subject to the Turner's Marina Right of Repurchase, and thus argue the issue is capable of repetition, it is not a situation where the issue will truly evade review in other cases. *See Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006). The issue may be reviewed in any later case where the lot owner asserts the same defense and then simply follows the Appellate Court rules and seeks a stay or supersedeas during the pendency of the appeal, in lieu of taking \$54,500 from Turner's Marina, voluntarily conveying their lot, and then appealing the right of repurchase.

Likewise, the second general exception--an imperative and manifest urgency in matters of important public interest--simply does not apply. Under this exception, the issue is moot unless it is both (1) of public importance, and (2) of imperative and manifest urgency. *Sloan, id.* This is

simply a private controversy between individuals and does not warrant consideration under this exception. *Cf. Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 44 S.E.2d 88 (1947).

Finally, nor do the circumstances of this case bring it under the third exception, where a decision in the case may affect future events or have collateral consequences for the parties. Here, Ms. Lorberbaum is, in reality, no longer a party to her appeal alleging a violation of the Rule Against Perpetuities now that she has accepted the \$54,500 payment and tendered the deed. Lorberbaum's voluntary sale of the lot renders any further judicial consideration of whether Judge Hocker's order mandating the sale was legally erroneous, pointless. See *Sloan, id.* Ms. Lorberbaum made her voluntary decision to accept Turner's Marina's money and tender the deed. An action by this Court will have no practical legal effect upon the controversy. Ms. Lorberbaum's appeal is moot and her portion of the appeal should be dismissed.

***2. Judge Hocker did not err by failing to find Turner's Marina, LLC's Right of Repurchase violated the Uniform Statutory Rule Against Perpetuities codified at S.C. Code Annot. Section 27-6-10 et. seq.***

The Appellant Lorberbaum asserts that Turner's Marina's Right of Repurchase, established by the recorded Declaration of Covenants on June 12, 1981, violates the South Carolina Uniform Rule Against Perpetuities enacted in 1987 and codified at *S.C. Code Annot. Section 27-6-10 et. seq.* Initial Brief of Appellant at p. 7. That assertion is incorrect.

The Uniform Statutory Rule Against Perpetuities, enacted in 1987, does indeed (as the Appellant quotes) provide that a "nonvested property interest is invalid unless (1) when the interest is created, it is certain to vest or terminate no later than twenty-one years after the death of an individual then alive; or (2) the interest either vests or terminates within ninety-years after its

creation.” Initial Brief of Appellant at p. 7. However, the Appellant overlooked the critical provision of the statutorily-enacted “Rule Against Perpetuities” that sets forth the effective date of the new law, and of critical importance herein, created a “savings clause” for any nonvested property interest created prior to July 1, 1987, if the nonvested interest is attacked as violating the old common law rule against perpetuities.

Section 27-6-60 entitled “Effect of timing of creation of property interest; savings clause” states that:

**SECTION 27-6-60.** Effect of timing of creation of property interest; savings clause.

(A) Except as extended by subsection (B), this chapter applies to a nonvested property interest or a power of appointment that is created on or after July 1, 1987. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(B) If a nonvested property interest or a power of appointment was created before July 1, 1987, and is determined in a judicial proceeding, commenced on or after July 1, 1987, to violate this State’s rule against perpetuities as that rule existed before July 1, 1987, a court upon the petition of an interested person shall reform the disposition by inserting a savings clause that preserves most closely the transferor’s plan of distribution and that brings that plan within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

HISTORY: 1987 Act No. 12, Section 1.

This “enactment” section (27-6-60) expressly provides that the new Code provision applies to those nonvested property interests created after July 1, 1987. See Section (A). This Court may take judicial notice of the Legislature’s clear intent to provide advance notice to drafters of future Rights of Repurchase to appropriately include language falling within the time guidelines of Section 27-6-20, or risk that right of repurchase being held void under the new statutory Rule Against Perpetuities. But to protect all of those coastal developments from the 1970s and 1980s with restrictive covenants containing previously recorded rights of repurchase, the Legislature

included Subsection (B), protecting the validity of all those nonvested property interests created before July 1, 1987, requiring any court that finds a nonvested property interest created before July 1, 1987 violative of the old common law rule against perpetuities, to reform the nonvested property interest by inserting a savings clause “that preserves most closely the transferor’s plan of distribution and that brings the plan within the limits of the rule against perpetuities applicable when the nonvested property interest was created. “The only requirement is that the owner of the pre-July 1, 1987 right of repurchase, must ask. “[A] court upon the petition of an interested person shall reform the disposition by inserting a savings clause....” See Section 27-6-60 (B).

As of the filing of this Brief, no court has held that Turner’s Marina’s right of repurchase violated the old common law rule against perpetuities, and the Appellant Lorberbaum herein does not assert that; instead, she hangs her hat on a claim that Turner’s Marina’s 1981-established right of repurchase, violates the 1987 statutorily-enacted Rule Against Perpetuities codified at Section 27-6-10. See Appellant’s Initial Brief at p. 7 and the Defendant Lorberbaum’s Motion To Alter or Amend Order dated August 16, 2022, pp.1-2. (Record on Appeal pp. \_\_\_\_\_.) Thus, this Court’s analysis should begin and end with Section 27-6-10. Thereunder, the provisions of 27-6-10 *et. seq.* do not apply to the Turner’s Marina right of repurchase, which was created in 1981. See Section 27-6-60(A). That should be end of this Court’s review because the statutory Rule Against Perpetuities only applies to nonvested property interests created after July 1, 1987.

Should this Court be inclined to look further, and see fit to analyze Turner’s Marina’s right of repurchase under the scrutiny of Section 27-6-60(B), then the Respondent Appellant Turner’s Marina, LLC hereby petitions this Court (as it did the Circuit Court by the filing of its Petition for Reformation” on September 21, 2022) (Record on Appeal p. \_\_\_\_\_), to reform the right of repurchase by inserting a savings clause therein that closely resembles the original Declarant’s

plan of distribution and that brings the right of repurchase within the limits of the common law rule against perpetuities arguably applicable in 1981 by adding as follows: “This Right of Repurchase reserved to the Developer, terminates twenty-one (21) years after the death of American tennis player Venus Ebony Starr Williams.” (Ms. Williams was born on June 17, 1980 and was thus a life in being at the creation of the Declaration of Covenants in 1981.)

The statutorily-enacted Rule Against Perpetuities took effect on July 1, 1987 and does not apply to Turner’s Marina’s 1981 Covenant-based right of repurchase. The single case cited by the Appellant Lorberbaum in her argument asserting that Section 27-6-10 *et. seq.* renders the right of repurchase void, Webb v. Reames, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997), is a case involving a 1955 deed for lake front property containing a right of repurchase for the same price paid as the initial sale (\$64), and was an extraordinary situation where the Respondents for some unknown reason, failed to petition the circuit court to reform the deed by inserting a savings clause, as was their clear right to do under Section 27-6-60. This Court even pointed out that section in its 1997 Webb decision: “[S]ee also S.C. Code Ann. Section 27-6-60(B)(1991)(savings clause provision of the Uniform Statutory Rule Against Perpetuities).” *Id.* at 447; 485 S.E.2d at 385.

An in-depth analysis of the Webb case reveals that it falls into that realm of hard cases discussed by Justice Oliver Wendell Holmes in his dissent in Northern Securities Company et. al. v. United States, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed.679 (1904), when he stated: “Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.” 193 U.S. at 364. Webb was one of those hard cases that created an arguable precedent that all rights of repurchase created and recorded prior to July 1, 1987 in South Carolina, are void as violative of the rule against

perpetuities, notwithstanding the clear Legislative intent of Code Section 27-6-10 *et seq.* The Respondent Appellant urges this Court to overturn Webb and embrace the Legislative directive of 27-6- 60 and its required savings provision.

A review of the Webb Record on Appeal, Brief of Appellant dated September 18, 1996 and Brief of Respondent dated September 18, 1996, shows that the lower court Order of the Hon. G.W. Jefferson dated March 28, 1996 rejected any analysis of the impact of Section 27-6-10 *et seq.* on the facts of the case because Judge Jefferson erroneously believed that the right of repurchase therein had “vested” upon a deed being delivered and filed with the Register of Deeds. Under that premise, Judge Jefferson reasoned:

Under the saving’s clause of Section 27-6-60 the savings clause of the common law property right exists only for a non-vested property interest. In this action the right of first refusal clearly vested upon acceptance and filing of the deed in question. Therefore, the plaintiff’s argument that the statutory scheme involving the rule against perpetuities acts to declare invalid the instant right of first refusal is without merit.

Webb Record on Appeal, p.16.

Further review of Judge Jefferson’s 1996 Order shows the foundation of his thoughts, as he summarily dismissed the Plaintiff’s argument that the Webb deed’s right of repurchase guaranteeing the Grantor and his heirs the right to repurchase the lake front land anytime in the future for \$64 (plus the appraised value of any improvements), was a restraint on alienation. “[S]he has the right to sell the property to any person in the world she likes as long as she lives up to the language contained in the deed which she has had actual knowledge of for approximately thirty-four (34) years....There is no evidence that the right of first refusal was unconscionable or inequitable.” Webb Record on Appeal, pp. 17-18.

Judge Jefferson's Order denied the Plaintiff Webb's request for a declaration that the right of repurchase language in the deed "is void in that it violates the common law rule against perpetuities, that it is inequitable and also because it is a restraint on the free alienation of property." See Webb Appellant's Brief at p. 6 and Complaint at pp. 5-6, Webb Record on Appeal at pp. 6-7.

Both the Appellant Webb and the Respondents (the Bleases and the Reames), acknowledged Section 27-6-10 *et seq.* in their appellate briefs. Appellant Webb urged that the codified rule against perpetuities played no role in the case because it "was created for those distributions created after July 1, 1987. With distributions made before that time, the common law rule against perpetuities applies." Webb Appellate Brief at p. 15, noting also the existence of the "savings clause" of 27-6-60(B), but not calling upon the Court to invoke it.

On the other hand, the Respondents Bleases and Reames, who no doubt were elated by Judge Johnson's decision holding the right of repurchase valid (because it had supposedly vested upon issuance and recording of the deed), never bothered to request the insertion of a "savings clause" allowed under Section 27-6-60(B), because they agreed with Judge Johnson that the statute was inapplicable because "the Respondent's right vested in 1956 and were never non-vested." Specifically, the Respondents asserted "The savings clause language of S.C. Code Ann. Section 27-6-60 (1976) exists only for non-vested property interest which was created before July 1, 1987. The statute looks towards the enforcement of the rule in existence and applicable when the non-vested property interest was created. (emphasis added)." Webb Brief of Respondent, p. 9.

Thus, the Court of Appeals received the perfect storm in the Webb appeal, of a circuit court case without a transcript, a lower court Order facially invalid because of its premise that the right

of repurchase had “vested” upon issuance of the deed, and a resulting appeal where no one sought, and the Court did not sua sponte offer, the relief of reformation clearly envisioned by the Legislature upon enactment of the codified Rule Against Perpetuities in 1987. From that record, briefing, and argument of counsel, emanated Judge Goolsby’s decision of March 17, 1997 that arguably established a precedent that each and every right of repurchase given in South Carolina prior to July 1987, “is a contingent, nonvested interest in that the grantee or the grantee’s heirs might never choose to sell the property” and is “an interest not conditioned on an event certain to occur.” Webb, 326 S.C. at 446. Thus, each and every right of repurchase given in South Carolina prior to July 1987 under the Webb holding, could be arguably declared void: “Because the right or interest was one that might not vest either within a life in being at the time of the creation of the interest or until later than 21 years thereafter, the interest violates the rule against perpetuities and is therefor void.” *Id.* at 446. Because the Webb holding, despite its direct reference to the unused “savings clause” of Section 27-6-60 (*id.* at 447), establishes an arguable precedent for Appellants such as Ms. Lorberbaum herein, it should be overturned as conflicting with S.C. Code Annot. Section 27-6-10 et seq. and the recent case of Clarke v. Fine Housing, Inc. et. al., Opinion No. 281126, January 4, 2023, Supreme Court. Recognition of the mandated savings clause of Section 27-6-60(B) requires such action by this Court.

This Court has affirmed the mandated reformation required under Section 27-6-60(B) in Queen’s Grant v. Greenwood Development, 368 S.C. 342, 628 S.E.2d 902 (S.C.App. 2006), when it noted the critical difference between a right of repurchase at the original sales price (as in Webb) as opposed to a right of repurchase as in this case, at the current proposed sale price and stated “cf. S.C. Code Ann. Section 27-6-60(B) (holding that under the Uniform Statutory Rule Against Perpetuities, *courts must reform a disposition that was created before July 1, 1987 by inserting a*

savings clause that preserves the transferor's plan of distribution 'within the limits of the rule against perpetuities')." *Id.* at 357, 628 S.E.2d at 917. [Emphasis added.]

The Supreme Court's recent decision in Clarke v. Fine Housing, Appellate Case No. 2020-001371 rendered January 4, 2023, is also instructive as to the analysis that is appropriate here. Clarke makes clear, in basically adopting the approach set forth in the Restatement of the Law, Third, Property, Servitudes, Section 3.4, that the focus in this case should be on whether Turner's Marina's right of repurchase amounts to an unreasonable restraint on alienation of real property. The Supreme Court made clear in Clarke that an overall examination of the specifics of the right of repurchase is necessary, evaluating the wording as to the purchase price and timing of the right of repurchase. "Whether a right of first refusal is valid depends on the legitimacy of the purpose, the price at which the holder may purchase the land, and the procedures for exercising the right." *Id.* at p. 4, citing Comment f to section 3.4 of the Restatement. Applying the standards set forth in Clarke, it is evident that Turner's Marina's Covenant-based right of repurchase is clear as to the properties it covers—each of the 200 Lots of the RV Resort. The price to be paid is likewise clear—Turner's Marina must match the then offering price. "[W]here the holder of the right may match the offer of a third party, the restraint on alienation may be lessened." *Id.* at p.6, citing Shiver v. Benton, 304 S.E.2d 903, 905 (Ga. 1983). "If the holder of the preemptive right is merely entitled to meet the offer of an open market purchaser, there is little clog on alienability." And finally, the time period for exercising the right of repurchase—30 days—is clear and appropriate. "[W]hen the time allowed for the exercise of the right is reasonable, the right will generally be enforced." *Id.* at 7, citing Lorentzen v. Smith, 5 P.3d 1082, 1086 (N.M. Ct. App. 2000). Applying the Clarke factors, it is abundantly clear that the right of repurchase attempted to be exercised by Turner's

Marina is not an unreasonable restraint on alienation of real property, and should be upheld if this Court reaches that point in the analysis.

Setting aside the above historical arguments, Turner's Marina acknowledges that its Covenant-based right of repurchase can never violate the statutory Rule Against Perpetuities because all of Turner's Marina's "sufficient property interests in the development" emanating from the Covenants, are calculated to end in 2080. That is when Turner's Marina's 99-year Lease to the common areas, it's 99-year Easement over and through the RV Resort property, and it's 99-year exclusive rental rights to the 200 Lots expire. Thus, under the parameters of AJG Holdings v. Dunn, 401 S.C. 346, 764 S.E.2d 912 (2014), and its progeny, Turner's Marina, and any other successor to the Declarant (if any there should be), will lose the property interests necessary to enforce the Declaration of Covenants in 2080, removing any concern about a "perpetual" right of repurchase.

### **CONCLUSION**

For the foregoing reasons, Turner's Marina LLC prays this Court deny the Appellant-Respondent's Paige N. Lorberbaum's appeal as moot. Alternatively, Turner's Marina prays this Court deny Appellant Lorberbaum's appeal that Judge Hocker erred by holding the 1981 Covenant-based right of repurchase did not violate the 1987-enacted statutory Rule Against Perpetuities, S.C. Code Annot. Section 27-6-10 et seq. Further alternatively, Turner's Marina prays that this Court reform the right of repurchase with the savings clause language requested above at pages 15-16 and hold that right of repurchase, as supplemented with the savings clause language, does not violate the common law rule against perpetuities in effect in 1981 when the right of repurchase was reserved and recorded.

Respectfully Submitted,

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