THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Bentley D. Price, Circuit Court Judge

Circuit Court Case No. 2017-CP-07-01057
Appellate Case No. 2022-000867

Bittmint LLC and Harbour Town Surf Shop LLC..…………………………..Appellants,

v.

Lynda H. Johnson, Charles S. Giannone, and Sea Pines Resort, LLC,
……………………..………………..………………………………………………Respondents.

APPELLANTS' INITIAL REPLY BRIEF

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IN REPLY

What matters most in this appeal is the standard of review. Respondents' Brief—which is full of facts contrary to those asserted by Appellants—throws the competing evidentiary questions into stark relief: **and those factual questions should have been for the jury to resolve**.

The trial judge's sole basis for granting directed verdict was his decision that the Resort holds and can exercise an obsolete right of first refusal over commercial property in the Sea Pines Plantation development. (R. p. __, Tr. Trans. p. 372: 4-9). Appellants claim this was at least a question of fact mid-way through trial, especially considering the Resort did not produce evidence it actually possesses the alleged right. In their Response Brief—instead of pointing to, say, an Assignment of Declarant Rights, or a Deed of Conveyance, or some other instrument of record in which the (long-defunct) Lighthouse Beach Company might have transferred the purported right of first refusal to the Resort—the Respondents fall back on (conflicting) testimony and their own bald assertions as their "proof" that the Resort legitimately holds a real property right. (*See, e.g.*, Resp. Br. pp. 4-8) (referring vaguely to the Resort's "long established and recognized rights as the successor and assign of rights of the original developer.").[1]

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[1] The Resort testified at trial, "Well, our right of first refusal is documented in several different -- you know, of the legal documents and the right is spelled out in several different sets of covenants." (R. p. __, Trans. p. 278: 16-19). In contrast, when asked about the alleged right, Bittmint testified, "No. To be honest, we didn't know it exist." (R. p. 97: 3-20). The Resort produced no deed or document evidencing its claim to be a successor or assign of Lighthouse Beach Company.

Conflicting testimony yields questions of fact. Fact questions are for the jury. "When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Ecclesiastes Prod. Ministries v. Outparcel*, 374 S.C. 483, 649 S.E.2d 494, 497-498 (Ct. App. 2007), *citing Harvey v. Strickland*, 350 S.C. 303, 308, 566 S.E.2d 529, 532 (2002).

What also matters in this appeal is which issues, precisely, have been appealed. Throughout their Brief, Respondents try to argue that Appellants have "abandoned" or failed to preserve certain arguments or causes of action. This is wrong. **Appellants have not abandoned anything—they have appealed the trial court's singular, dispositive finding** (*i.e.*, that the Resort holds and can enforce a purported repurchase right), which finding was the trial court's sole basis for directing a verdict on every claim in the lawsuit. *See* R. pp. ___, Tr. Trans. pp. 369: 16 – 372: 9; 374-377. Because the trial court was wrong to find that the Resort holds the purported right, its directed verdict must be reversed in its entirety and a new trial granted.

Notwithstanding that there was no evidence before the trial court proving the Resort holds (in the legal sense of the word) a purported property right, **there was also no basis in the law** for the trial judge to find that the amorphous right was valid or enforceable. Under the applicable standard of review, this Court should reverse and remand for a new jury trial. Under the law of real property in South Carolina, this Court should hold that the purported repurchase option is no longer valid or enforceable (if it ever was).

Reply to Respondents' Statement of Facts

In a semantic sleight of hand, the Resort refers to itself as "Sea Pines," hoping this Court will confuse it with the extinct "Sea Pines Plantation Company," which actually was once assigned the Lighthouse Beach Company's purported right of first refusal. These semantics sufficiently confused the trial judge, but this Court must recognize that **there is no relationship** between the former, long-defunct Sea Pines Plantation Company and the current Respondent Sea Pines Resort LLC, which is an entirely distinct and different corporate entity. From a legal standpoint, this is like saying that everyone with the last name of "Smith" can claim an interest in one another's property by virtue of their name alone. Obviously, that is not how it works. Interests in real property are proven by deed, or assignment, or by some instrument of record—and not by commonality of name. The Respondents nonetheless try to hoodwink this Court on Page 5 of their Brief by pointing to a "handwritten notation" on the 1973 Declaration that says, "assigned to Sea Pines." This is disingenuous. Not only do we have no idea who wrote this notation, but the book and page number reference is to the 1977 Assignment to the Sea Pines Plantation Company, and not to any instrument having to do with the Respondent Sea Pines Resort.

In another misleading, red-herring argument, the Resort relies extensively in its Brief on a federal district court case (which is on appeal), which happens to have the same setting of Sea Pines Plantation, but which involves entirely different covenants (governing certain residential property), which were imposed by a different developer than Lighthouse Beach Company, and which case concerns the entirely different question

of whether a referendum vote of residential property owners was validly conducted. (Resp. Br. at pp. 4-5, 19, 25-26, *citing Jinks v. Sea Pines Resort LLC* (D. S.C. 2022)). Not only is the *Jinks* case not legally on point—having nothing to do with commercial covenants or alleged repurchase rights—but the *Jinks* case was based on very different factual evidence, including that the Resort apparently did submit evidence in that case showing it had been assigned a right to make amendments to the particular residential covenants at issue. *Jinks* at p. 30 ("Jinks does not appear to dispute that a chain of assignments from 1987, 1989, and 2007 purports to convey the right to approve covenant amendments to the Resort."). **In the case before this Court, the Resort produced no such evidence.**[2]

This Court should disregard the confusing comparison to the *Jinks* case, and it should be aware that the massive Sea Pines Plantation community was developed, in stages, by numerous, distinct development entities, over the course of more than 30 years. (*See* App. Br. pp. __). To successfully show that it holds a particular real property interest (a purported repurchase right) over the Surf Shop Property at issue in this appeal, the Resort needs to have established a chain of title running back to the Lighthouse Beach Company—a developer of commercial property in the 1970s and the declarant in the 1973 Commercial Covenants. But the Resort failed to do this; its sole exhibit at trial was its own "Waiver Form," which it hands out to real estate agents on Hilton Head Island, in which the Resort perfunctorily asserts in fine print at the bottom that it has a "re-purchase

[2] Moreover, the *Jinks* Plaintiff sought only declaratory relief as to the Resort. *Jinks* at pp. 29-30 ("Jinks seeks two declarations from this court as to the Resort."). South Carolina's Declaratory Judgment Act is clear that "no declaration shall prejudice the rights of persons not parties to the proceeding." S.C. Code § 15-53-80. For this additional reason, the federal district court's opinion in *Jinks* has no bearing on the Appellants here, who are strangers to that litigation.

option." (R. p. __, Def. Ex. 9). It ***almost*** goes without saying that an unsigned xeorox copy of a self-drafted fill-in-the-blank form is not sufficient evidence upon which to base a finding of law as to ownership of a real property interest.[3]

The remainder of the Respondents' "Facts" are he-said/she-said testimony about who might have thought what, and when, about the question of whether the Resort might hold a real property interest, or not. Conflicting evidence by the Appellants means that these cherry-picked "facts" in Respondents' Brief (representing about 9 transcript pages out of two days' and 340 pages' worth of testimony) were insufficient to drive a directed verdict on the facts. This Court should so hold.

Proving a Negative

Appellants' causes of action in this lawsuit revolved around their claims that the Sellers breached their contract to sell the Surf Shop Property to Bittmint, by instead selling the property to the Resort (which thus interfered with the contract). Respondents defended by claiming that the Resort possesses a right of first refusal, giving it legal justification to disrupt the sale to Bittmint. But, throughout trial, and in their Brief to this Court, Respondents demanded that Appellants prove the negative—that the right does not exist. For example, Respondents proclaim in their Statement of Facts to this Court: "At trial, Appellants failed to submit any proof *that Sea Pines* ***does not hold*** *the right of first*

[3] Unfortunately, though, the trial court seemed to think the xeoroxed form was proof. *See*, R. p. __, Tr. Trans. p. 364: 20-24, in which the trial court asked, "Well, let me stop you there and ask you this question: If that is, in fact, true and accurate, why would Sea Pines Resort ever create a document such as this [*i.e.,* the Waiver Form]?" This query by the trial court demonstrates a grave misapprehension about the law of real property, and about how real property interests are created and conveyed.

refusal in the Commercial Use Covenants . . .". (Resp. Br. at p. 8, 15, 23-25; *see also* Tr. Trans. pp. 74:13-14, R. pp. __)[4] (emphasis added).

Respectfully, Appellants were not required to prove the negative, that the Resort does not hold a right of first refusal. *See State v. Lee*, 653 S.E.2d 259, 375 S.C. 394 (2007) (Toal, J., dissent) ("No Court may justifiably ask a litigant to prove a negative."); *see also Anderson Armored Car Service, Inc. v. South Carolina Public Service Com'n*, 367 S.E.2d 444, 295 S.C. 148 (Ct. App. 1987) ("the quoted language plainly requires the intervenor to prove the affirmative; it does not remotely suggest the applicant must prove the negative.").

Instead, the lawfulness of the Resort's exercise of the purported right **was the Respondents' affirmative defense, and it was the Resort's burden to prove** that the Resort does hold such a right. (*see*, R. p. __, ¶¶ 11, 18, 58, Answer to Second Amended Complaint) (alleging lawfulness as an affirmative defense and asserting, "such contract was subject to [Resort]'s legal right of first refusal."). Respondents' apparent surprise at the idea "that [the Resort] was required to substantiate its claim to the right of first refusal with a written legal instrument" is surely feigned. (Resp. Br. p 24). The party *asserting* a fact or right—here, Respondents and their purported right of first refusal—has the burden of submitting admissible evidence proving that alleged fact or right. The South

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[4] *See also* R. pp. __, Tr. Trans. pp. 74:13-14 (The Resort told the trial judge: "You need to see an exhibit that says they don't have a right of first refusal."); Tr. Trans. pp. 362-363 ("We do not think that [Appellants] have proved they don't have the right, which is what [Appellants] had to do.") (emphasis added); Resp. Br. p. 24, "If Bittmint was to challenge the right of first refusal to [the Resort], it was required to do so with evidence."

Carolina Supreme Court has so held for well over one hundred years. *See Bennett v. Sandifer*, 15 S.C. 418 (1881) ("upon the universal principle that he who affirms must prove, and that no one can be required to prove a negative."); *Copeland v. Western Assur. Co*, 20 S.E. 754, 43 S.C. 26 (1895) ("when defendant's time to open arrived, then it should have proved that there was such a stipulation in the policy Issued by it to plaintiff."). Similarly, the South Carolina Supreme Court has held that it is reversible error to require a party to prove a negative, because "it is next to impossible to prove a negative." *Copeland*, 20 S.E. at 754, 43 S.C. at 26 (internal citations and quotations omitted); *Roach v. Kentucky Mut. Sec. Fund Co.*, 28 S. C. 431, 6 S. E. 286 (1888) ("it is next to impossible to prove a negative."). Respondents' repeated argument that Appellants should have proven that "that Sea Pines *does not hold* the right of first refusal" should be disregarded as both a logical fallacy and contrary to law.

And, if the Resort actually did possess such a right, that burden should have been easy enough to meet. **There should be a "smoking gun" in this case: the Resort should be able to brandish a piece of paper, or some writing,[5] assigning to Sea Pines Resort LLC the right of first refusal over the Surf Shop Property that it claims that it holds**.[6] But the Resort submitted no such evidence to the trial court.

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5 Preemptive rights, including options and rights of first refusal, are interests in real property and must be conveyed in writing. S.C. Code § 27-23-50.

6 Footnote 4 of Respondents' Brief refers to the Resort's Affidavit in support of its Motion for Summary Judgment, which motion was argued and denied more than two years before trial, and again 3 months before trial. (R. pp. __, Order Jan 13, 2020; Order Jan. 20, 2022). This Court should disregard the affidavit's "evidence," first and foremost because **it was not before the trial court**; secondly because it is not probative of anything—there is no derivation clause or other indication in the purported assignments linking them to the Surf Shop Parcel; and thirdly because it is extraordinarily misleading—any real estate attorney worth his salt knows that the massive

ARGUMENT IN REPLY

Most of the arguments in Respondents' Brief wrongly assume nuanced rulings that the trial court never made. For example, the trial judge did not find evidence of breach or damages to be lacking, nor that the alleged right of first refusal does not violate the rule against perpetuities, nor that the purported right of first refusal was somehow assignable. (Resp. Br. pp. 1, 14, 19, 23-27).

Rather, **the trial judge's entire decision rested on a faulty premise:** that the Respondent Resort holds a right of first refusal and can "do whatever the heck they want over here because they are the developer and they can create any covenant they want."

> So what I'm saying is this, Sea Pines over here on this side says well, as to Harbour Town, we're stuck. We don't get to create new covenants because we inherited them when we purchased the property out of bankruptcy from Lighthouse,[7] and so they are operating under that auspice that they have no way of changing it because they can't. **But they can do whatever the heck they want over here because they are the developer and they can create any covenant that they want.**
>
> It's over. All right. I'll grant the motion for a directed verdict.[8]

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and unexplained twenty-year gap between the ostensible bankruptcy documents from the 1980s and the subsequent 2007 conveyance of "rights" in unspecified property by nine disparate corporations who were not parties to the bankruptcy is highly tenuous. How did those nine scattered corporations obtain those alleged rights, and from whom? The Resort does not say.

It is particularly telling that the Resort chose not to put these purported assignments into evidence at trial, relying instead on its "Waiver Form." This Court should disregard the citations in Footnote 4 as disingenuous and outside of the evidence before the trial court.

7 This statement by the trial judge is downright wrong. There is no evidence that the Respondent Resort "purchased the property out of bankruptcy from Lighthouse," and the trial judge seems to have pulled this decision from conjecture. Instead, Respondent Resort did not own anything on Hilton Head until it first arrived on the scene about twenty years after the original developers' bankruptcy.

8 The trial court never issued a written order further explaining its decision to grant a directed verdict, despite a motion to reconsider. We are left with the trial judge's verbal rulings,

(R. p. __, Tr. Trans. p. 370-372) (emphasis added) (ruling that the right of first refusal was assigned to Respondent Sea Pines Resort LLC, "[s]o your appeal will be based on that."). In the trial transcript, in the pages following this initial holding, the trial judge went on to grant directed verdict on each cause of action for the repeated reason that "They exercised their right of first refusal."[9] (R. pp. __, Trans. p. 374: 11; 374-377).

Because the sole pillar of the trial court's ruling had no foundation in fact or law, for all the reasons argued in Appellants' Brief, the directed verdict was improper and this Court should remand for a new trial. It really is that simple.

To address Respondents' individual arguments:

I. *Of course* there was enough evidence for a jury to find breach of contract and interference with contract.

On motion for directed verdict, the trial judge was required to take the evidence and every inference to be made from it in the light most favorable to the non-moving party (Appellants, here). At the conclusion of their case in chief, Appellants had introduced exhibits and testimony showing that:

(1) Bittmint had a Sale Contract with Respondent Sellers to purchase the Surf Shop Property;

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and a Form 4 Order stating only: "On March 2, 2022, Judge Price GRANTED the Defendant's Motion for a Directed Verdict." (R. p. __).

[9] R. pp. ___, Trans. pp. 374: 21 – 375: 8 ("if they, in fact, invoke their right to purchase the property under their right of first refusal . . . And that's exactly what they did. So tortious interference is being dismissed.") (pp. 375: 9- 376: 11 ". . .third cause of action . . . all right, well, I find that they did have the right.") (pp. 376: 19 – 377: 9 "Intentional interference with perspective contractual relationships . . . I find there was no intent. And obviously I am not going to require any form of specific performance because under the terms of the contract, I find that [the Resort] had every right to purchase the property.").

(2) Sellers did not sell the property to Bittmint, in breach of the Sale Contract;

(3) Sellers instead conveyed the property to the Resort, in breach of the contract;[10]

(4) Bittmint thus lost the benefit of its bargain, $500/month in rent from an existing tenant,[11] as well as the Surf Shop Property itself.

This evidence—which was fleshed out over the course of several days of testimony and multiple exhibits, and which is only summarized briefly here—was entirely sufficient to survive directed verdict on the breach of contract and interference with contract claims.

Respondents' Brief makes an upside down and backward argument that the Resort's interference with the Sale Contract was justifiable because . . . Appellants did not prove it ***wasn't*** justifiable:

> Bitton and Mintz, the members of Bittmint, knew at the time of contracting that Sea Pines holds the right of first refusal, as did Johnson.[12] Bittmint failed to introduce any *evidence* to the contrary, relying entirely on its *legal argument* that the right was not assignable. No one testified that the Commercial Use Covenants do not apply to the Property or that Sea Pines did not hold the right of first refusal thereunder.

(Resp. Br. at p. 15) (emphasis in original). In other words, Respondents are now claiming in their Brief that Appellants could not rely on ***legal arguments*** on an issue that **Respondents told the trial judge was one of law**:

> THE COURT: . . . so the question then begs, is it a legal question or is it a factual question whether, in fact, Sea Pines Resort had the right of first refusal based on the assignments?

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10 For Record citations to this evidence, please see Appellants' Final Brief, including its Statement of the Facts and Issue III.

11 *See* R. pp. ___, Trans. pp. 110: 19-111; 211: 11-216. For additional discussion on evidence of damages, see *infra* Section IV.

12 This statement is not accurate—Bittmint's principals testified they did <u>not</u> know about an alleged right. (*See* R. p. __, Trans. pp. 97: 3-20, "To be honest, we didn't know it exist.").

The question is, is that a legal question or is that a factual question through the covenants?

What is your opinion?

MR. WALKER: **In my opinion, it's a legal question**.

(R. p. __, Trans. at p. 362: 12-19) (emphasis added).

But, in their Brief, Respondents now claim that Appellants failed to prove a negative by not submitting ***factual*** evidence that the purported right did not exist. This portion of Respondents' Brief is a nonsensical attempt to explain a ruling by the trial court that was equally nonsensical. Among other things, there were no "assignments" before the trial court that would prove the Resort's purported repurchase right exists. Moreover, the trial judge heard the legal arguments at the outset of the case, rejected them, and ruled the existence of a right of first refusal was "a question of fact for the jury."[13] (R. p. __, Trans. p. 54: 15-20). Throughout the trial, Appellants challenged the Resort's claim that it held a right over the Surf Shop Property. The question of the existence of the alleged right was therefore for the jury, and the trial judge was wrong to grant a directed verdict—especially in the utter absence of an assignment instrument. Jean H. Toal, Appellate Practice in South Carolina, 3d ed. at p. 550 ("Where there is no conflicting testimony or where there is no evidence upon a material matter, the question presented is one of law; if the evidence is contradictory, the question is one of fact."), *citing Guerin v. Hunt*, 118 S.C. 32, 110 S.E. 71 (1921).

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[13] As discussed in Appellants' Initial Brief, the ***existence*** of a right (*i.e.* the question of whether the Resort had been assigned and holds a right) is a question of fact. But, the ***enforceability*** of the right (*i.e.* whether or not it is void as an unreasonable restraint on the alienation of property) is a question of law.

Respondents next try to argue that because Bittmint sent an (unsigned) version of a boilerplate Resort "Waiver Form" to the Resort, Bittmint "thereby offered" the Surf Shop Property for sale to the Resort. Although Bittmint nods to Respondents' creativity in this argument, the so-called "Waiver Form" only further shows why this case should have gone to the jury. Among many other ambiguities, the document (a) is a vague, boilerplate form that is not binding in any regard, (b) has an ambiguous purpose in that (among other things) it is titled a "REQUEST FOR WAIVER and/or ASSESSMENTS" (waiver of what? assessment to whom? does "and/or" here mean one, both, or neither? — the document keeps its secrets); (c) was conveyed by the attorney for someone who indisputably had no authority to offer—or sell—the property at issue (the pending purchaser); (d) is unsigned; and (e) the purported "offer" by "purchaser" was not accepted, and would not have constituted a valid contract even if it had been. In sum, the Waiver Form raises more questions than it answers (none) and should have gone to the jury to unravel its many mysteries.

Remarkably, while arguing that the unsigned Waiver Form somehow constituted "a separate offer" to sell the Surf Shop Property, Respondents also argue that Bittmint's signed Letter of Intent was <u>not</u> an offer sufficient to trigger the muddy mechanism of the 1973 Covenants' purported repurchase option provision. Respondents apparently hope this Court will disregard all the testimonial and documentary evidence describing the many months the Resort spent communicating with Sellers about the property and the pending purchase of it by Bittmint. As discussed in Appellants' Brief, this tsunami of conflicting factual evidence created a jury question on whether (<u>**if**</u> it is not void, as

discussed next) the "repurchase option" was properly exercised. *See, Ingram v. Kasey's Associates*, 340 S.C. 98, 531 S.E.2d 287 (2000) (discussing the precision with which preemptive rights must be exercised and holding: "if the option requires performance in a certain manner, time is of the essence and **exact** compliance with the terms of the option are required.").

In sum, the trial judge was obligated to view the considerable evidence and its inferences in the light most favorable to the Appellants. The many fact questions rendered directed verdict improper, and this Court should reverse.

II. Forever is a very long time.[14]

This Court should rule as matter of law that—even if the Resort had sprinted into the trial court, waving a document conclusively showing it had been assigned Lighthouse Beach Company's purported repurchase right from 1973—the Vampire Right is nonetheless an unreasonable restraint on the alienation of property and therefore void and unenforceable.

A. Gotcha.

First, this Court should discard the Respondents' contention that Bittmint did not preserve certain arguments, including pertaining to the unenforceability of the Resort's alleged right. The entire ***theme*** of Appellants' lawsuit was that the alleged right was unenforceable, unassignable, and an unreasonable restraint on the alienation of property.[15]

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[14] This Section of the Reply is intended to address Sections II and IV of Respondents' Brief.

[15] As just a few examples, *see, e.g.,* R. pp. ___, Complaint ¶ 43 ("As a direct and proximate result of Resort's erroneous belief that there was a valid assignment of an enforceable right to

As a reminder, **the Resort came into trial without documentary evidence that it actually holds an ostensible repurchase interest** in the Surf Shop Property. Nonetheless, the Respondents demanded that Bittmint either (1) prove that the Resort's claimed interest does not exist, or (2) play a complex guessing game as to all the reasons the purported right might be invalid . . . if it ever turns out that it does exist. Lacking psychic powers and the ability to foresee that the trial judge would find (without evidence) that the Resort possesses the Lighthouse Beach Company's old option to purchase from 1973 apparently by virtue of the 1977 Assignment to another defunct developer, Bittmint made multiple arguments on the question—all of which boil down to this: the Vampire Right is void, unassignable, and unenforceable as a matter of law.

The trial judge ultimately granted directed verdict to Respondents because it found **the Resort could "do whatever the heck they want over here because they are the developer,"** and thus the Resort held the repurchase right as a matter of law. Especially given this broad, all-encompassing, and (candidly) baffling holding by the trial court, this Court should find that the Appellants preserved the opposite argument—that the purported right is unenforceable as a matter of law.

This is further true because the trial court was given multiple opportunities to clarify its ruling, which the court did;[16] and now the function of this Court is to review

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repurchase, the existence of which Plaintiffs deny, the Resort has unlawfully interfered with the Plaintiff Bittmint's Contract of Sale."); Trans. p. 65 ("We don't believe that right of first refusal. We don't believe it's valid."); Memorandum filed Jan. 5, 2022 ("This case involves the validity of a right of first refusal to purchase commercial property in Sea Pines Plantation ('Sea Pines') on Hilton Head Island purportedly held by Defendant Sea Pines Resort, LLC ('SPR')."); *see also* R. pp. __ , Motions in Limine re: the Right of First Refusal; Trans. pp. 28-43.

[16] The trial judge elaborated:

the lower court's decision. "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 appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Preservation rules are not a gotcha game to trap litigants—and particularly not when the trial judge made a broad ruling (the Resort "can do whatever the heck they want over here because they are the developer"), the substance of which is now before this Court on appeal.

B. On bringing dead things back to life.

At issue in this case is what the original developer described as an "Option to Repurchase," which is literally buried in the ground: entombed in a declaration that ostensibly runs with the land, and which was imposed by a developer entity that died in

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> So Sea Pines has been working under the auspices that they can't create anything new because they can't. . . . **So they have created an entirely separate company, which is real estate administration -- not company, a sector of Sea Pines, which sends these [Waiver Forms] out to everybody that wants to purchase the property** because they know that they have the right of a first refusal as to those properties that they inherited that were developed by Lighthouse.
>
> How hard is that – that's not hard to understand? . . . I'm telling you from a legal standpoint they did [have a right of first refusal].

(R. pp. __, Trans. p. 371-372) (emphasis added). Within this paragraph, the judge also reiterated his belief, pulled out of thin air, that the Resort had "purchased the rights and assigns from Lighthouse." Not only does this not make sense, but even Respondents do not claim that it is true. The Resort did not purchase anything from Lighthouse, which went out of business in 1975, and there was no evidence at trial suggesting otherwise. The judge might have based this decision on his confusion with the defunct Lighthouse Beach Company and the modern-day Charleston-area developer called The Beach Company. (*See, e.g.,* R. p. __, Trans. p. __) ("THE COURT: Correct me where I'm wrong. Beach Company Developer, correct?" "MR. WALKER: This is a hypothetical?" "THE COURT: No, this is factual."), or by confusing the name and identity of "Sea Pines" as discussed above on page 3.

bankruptcy long ago. (R. p. __, Pl. Ex. 2). But the old covenants are problematic; there is no derivation clause or property description to show precisely with which land they might run. Instead, they ostensibly bind everything the old developer once might have owned "on Hilton Head Island." (R. p. __).

This "Vampire Right" is the closest thing to a legend this Court may ever see—the Resort itself does not even understand where it comes from. The Resort testified at trial, "My understanding, it comes from the covenants of Sea Pines . . . . I don't know where in the covenants it is." R. p. __, Trans. p. 159: 11-12; 166: 22.[17] Despite this uncertainty, the Resort contends that it can revive the old right, dust it off, and deploy it half a century after it was buried and the old developer dissolved. The law of South Carolina says otherwise.

Here is the alleged right, as described in 1973 by the Lighthouse Beach Company:

19. In the event the owner desires to sell a Commercial Property site on Hilton Head Island together with its improvements, if any, then said property shall be offered for sale to the Company at the same price at which the highest bona fide offer has been made for the property, and the said Company shall have thirty (30) days within which to exercise its option to purchase said property at this price; and should the Company fail or refuse, within thirty(30) days after receipt of written notice of the price and terms, to exercise its options to purchase said property at the offered price, then the owner of said property shall have the right to sell said property, subject, however, to all covenants and limitations herein contained, at a price not lower than that at which it was offered to the Company. For

[17] The Resort's own lawyer guessed three times (wrongly) about where such a right might be found, before finally settling on the 1973 Declaration. (R. p. __, Pl. Ex. 22).

But in 1977, the liquidating partner of the Lighthouse Beach Company assigned what it described as "various options to repurchase" to another development company (called Sea Pines Plantation Company) in a contract, which did not run with any land:

ASSIGNMENT OF OPTION TO REPURCHASE

(R. p. __). This 1977 Assignment describes the options being assigned as stemming from "diverse documents" pertaining to "that general area known as Sea Pines Plantation," and it noted that the options "require[e] the waiver thereof." (R. p. __, *id.*). Its reason for assigning the options to the Sea Pines Plantation Company was because that company apparently "has, since dissolution of Lighthouse Beach Company, been waiving said repurchase options." Thus, the 1977 Assignment says that "Lighthouse Beach Company hereby ratifies and confirms all previous waivers of repurchase options by Sea Pines Plantation Company." (*Id.*).

Almost fifty years later, the Respondent Resort claims that through this 1977 Assignment (to which it was not a party) it holds and can exercise a specific right of first refusal over the Surf Shop Property. This is a deeply problematic claim.

The South Carolina Supreme Court provides a roadmap for analysis of preemptive rights in the case of *Clarke v. Fine Hous., Inc.*, 438 S.C. 174, 882 S.E.2d 763 (2023). The goal of the *Clarke* test is to flush out **unreasonable restraints on the alienation of property,** which are against public policy. Among other things, the *Clarke* test requires specificity as to the encumbered property—which is abjectly lacking here. *Id.* "[A] Commercial Property site on Hilton Head Island" and the "general area known as Sea Pines Plantation" are both too indefinite a description to bind any real property in particular,

and for this simple reason alone this Court should find the Vampire Right is unenforceable.

C. The Rule Against Perpetuities: Not that Scary.

Respondents' Brief contains a long argument on the Rule Against Perpetuities (the "RAP"). The RAP is not as daunting as when it haunted us back in law school—nor as complicated as Respondents try to make it. First, Respondents are wrong that the Legislature "did away with the common law rule against perpetuities when it enacted the Uniform Statutory Rule Against Perpetuities." (Resp. Br. pp. 19-22). According to the plain language of the Statute, under its section unambiguously entitled "Exceptions to the rule," the Uniform RAP "does not apply to: . . . [1] a nonvested interest . . . [2] arising out of a nondonative transfer." S.C. Code § 27-6-50(1).

Let's break it down: the repurchase option in the 1973 Declaration is (1) a nonvested interest—it would not vest unless or until an owner of commercial property chose to try to sell the property and received a bona fide offer for it.[18] It therefore meets the first requirement for an exception to the statutory rule. Second, the repurchase option (2) arises out of a nondonative transfer—it was created within commercial covenants surrounding commercial land—its origin is not in a donation, or gift, or a trust, or a will.

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[18] *See also, Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384, 385 (Ct. App. 1997) ("this pre-emptive right is a contingent, nonvested interest in that the grantee or the grantee's heirs might never choose to sell the property. It is an interest not conditioned on an event certain to occur."), *citing* R. Cunningham, W. Stoebuck, & D. Whitman, The Law of Property § 3.18, at 132 (2d ed. 1993) ("A pre-emptive right merely requires the owner, when and if he decides to sell, to offer the property first to the holder of the pre-emptive right so that he may ... buy at a price set out in the pre-emption agreement.").

The Legislature's specific intent to except nonvested interests arising out of nondonative transfers is unambiguous and clear from the plain language of the section of the Statute entitled, "**Exceptions to rule**." S.C. Code § 27-6-50. The Respondents are therefore wrong to delve into extrinsic evidence, such as scholarly commentary, to argue something different from the Legislature's clear intent. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Neal v. Brown*, 383 S.C. 619, 682 S.E.2d 268, 270 (2009), *quoting Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). Here, the "literal meaning" of an "Exception to the rule," for nonvested interests arising out of nondonative transfers, is that . . . nonvested interests arising out of nondonative transfers are excepted from the rule.

Respondents protest that "Bittmint offers no explanation as to why the legislature would have excepted certain nondonative transfers from the statutory rule." (Resp. Br. p. 20). Although Bittmint does not need to explain the Legislature's clear language, perhaps it would satisfy Respondents to read the explanation given by the good people at the North Carolina Law Review: "The period of the [Uniform Statutory] Rule is designed to provide a fair limit **in family dispositions** such as wills and trusts, **<u>not</u> arm's length commercial deals.**"[19] Quoting this law review article, and examining North Carolina's version of the Uniform RAP, the Supreme Court of North Carolina held that the Uniform RAP is designed to exclude commercial interests—which fall under the

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[19] Ronald C. Link & Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*, 74 N.C. L. Rev. 1783, 1799-1800 (1996) (emphasis added).

common law rule, instead. "Nevertheless, our common law rule against perpetuities does not exclude commercial interests from its application." *Rich, Rich & Nance v. Carolina Const. Corp.*, 558 S.E.2d 77, 79-80 (N.C. 2002), *citing Village of Pinehurst v. Regional Invs. of Moore, Inc.*, 330 N.C. 725, 412 S.E.2d 645 (N.C. 1992) (finding a preemptive right of first refusal was void as violative of the common law Rule Against Perpetuities).

Like North Carolina, South Carolina appellate courts—including in cases decided after the enactment of the statutory Rule—hold that the common law Rule Against Perpetuities does apply to nondonative preemptive rights, like the one in Lighthouse Beach Company's 1973 Declaration and the 1977 Assignment. *See, Webb*, 326 S.C. 444, 485 S.E.2d 384, 385-386 (Ct. App. 1997) ("Because the right [of first refusal] 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 therefore void.") (emphasizing that the right of first refusal was **void, as opposed to voidable**, because it violates the Rule). For all the reasons discussed in Appellants' Initial Brief, the Vampire Right violates the common law RAP.

Ultimately, this Court should consider the Rule Against Perpetuities as just one of many safeguards against unreasonable restraints on the free alienation of property, which are against public policy. Preemptive rights are especially subject to scrutiny, and **this case is a perfect illustration of a preemptive right gone wrong**. If Respondents are correct that the Vampire Right can be resurrected and enforced by a stranger to the original covenants, based only on a vague claim of assignment, and because the Resort passes out xeoroxed, boilerplate Waiver Forms to all the real estate agents on Hilton Head

Island, then the residents of Sea Pines Plantation have earned their tickets to the Parade of Horribles.

This Court should find that the Vampire Right is an unreasonable restraint on the alienation of property and void as against public policy, under the common law Rule Against Perpetuities, under the *Clarke* factors, and for the reasons discussed in Appellants' Brief.

III. Understanding the Assignment.

Respondents' Brief is fundamentally inconsistent in its legal description of the alleged repurchase right that the Resort claims to wield. Although the Brief harps on the right as "running with the land," it nonetheless claims that the right "is a contract right that is freely assignable." (*See, e.g.* Resp. Br. pp. 27-28). **These two concepts cannot coexist**—the right is either a contract right, <u>or</u> it is a real property right that runs with the land and may be enforced by subsequent grantees. *Queen's Grant v. Greenwood Development*, 368 S.C. 342, 628 S.E.2d 902, 913 (Ct. App. 2006) ("Restrictive covenants differ from contracts in that they 'run with the land,' meaning that they are enforceable by and against later grantees."), *citing* 17 S.C. Jur. Covenants § 18 (2005).

Appellants urge this Court to hold that, because the Lighthouse Beach Company's repurchase right was severed from the land by the 1977 Assignment, by Lighthouse Beach Company to Sea Pines Plantation Company (both of which went bankrupt in the 1980s), it is absolutely <u>not</u> "freely assignable" apart from the land—particularly not decades after the developer who once possessed it became extinct in bankruptcy and ceased to own property within the development. In other words,

because it is a mere personal contract right, the Vampire Right may not be enforced by or against subsequent grantees.

This is a difficult concept to explain within the page limit constraints here, and **perhaps it is simplest to take the Respondents' own statement at face value.** If—as the Respondents stipulate on page 27 of their Brief—the Vampire Right "is a contract right," **then it cannot touch and concern the land**. It must be a mere license, or a personal interest, and thus non-transferrable under hornbook property law. *See, Charping v. J.P. Scurry & Co., Inc.*, 296 S.C. 312, 372 S.E.2d 120 (Ct. App. 1988) (personal rights do not run with the land). This makes sense under the documents in the Record. Although the 1973 Declaration states that it "runs with the land," it does not contain a description of the property with which it runs. (R. p. __). Similarly, the 1977 Assignment does not contain a property description binding any particular property, and it does not even purport to run with any land. (R. p. __).

The 1977 Assignment is not a real covenant—it is a mere contract. It does not touch and concern any land or convey any land. Indeed, it acknowledges that Lighthouse Beach Company no longer owns any land within the development by using the past tense to state that the company "**owned** certain real estate . . . in the general area known as Sea Pines Plantation," and to describe land "which **was** owned, possessed and seized unto Lighthouse Beach Company." (R. pp. __). As discussed in Appellants' Brief, the 1977 Assignment's granting clause is personal—it is limited to the Sea Pines Plantation Company, and it deliberately excludes successors or assigns. In other words, the 1977 Assignment was a personal, contractual assignment of a right, given by Lighthouse Beach

Company to the Sea Pines Company. *Epting v. Lexington Water Ower Co.*, 177 S.C. 308, 181 S.E. 66, 71 (1935) ("Covenants which are personal and collateral to the land do not run with the land."). When the Sea Pines Plantation Company died in bankruptcy, this personal right died with it, and it could not be revived or assigned by a subsequent grantee (and, again, there is no evidence that it ever was).

This Court should find as a matter of law that Sea Pines Plantation Company was not legally capable of further assigning a personal, contractual right to control real property.

IV. Incorporeal rights and material damages.

Respondents also toss out an argument that "Bittmint admitted no evidence from which a jury could have rendered a damages verdict in their favor." (Resp. Br. pp. 31-33). This argument, which refers only to valuation of property, willfully disregards the Appellants' specific evidence of loss of rent in the amount of $500/month, as well as the Resort's own detailed document valuing the property at $158,671 more than Bittmint's contracted price. (R. pp. ___, Tr. Trans; Ex. 14B). This evidence was not speculative and was sufficient to enable the jury to determine an amount of damages with reasonable accuracy.

Notably, this argument by Respondents also disregards that what Appellants ultimately sought was specific performance of the Sale Contract—they wanted to own the property for which they bargained and contracted. "When land is the subject matter of an agreement the jurisdiction of equity to enforce specific performance is undisputed,

and does not depend on the inadequacy of the legal remedy in the particular case." *Adams v. Willis*, 225 S.C. 518, 83 S.E.2d 171 (1954).

Because there was evidence of identifiable, non-speculative damages, and because—in any event—the relief sought included specific performance, this argument by Respondents is not "additional affirming grounds" for the trial judge's improper directed verdict. This Court should reverse and remand for a new trial on the jury questions raised by the evidence.

V. Going back in time.

Because Respondents were not entitled to directed verdict, this Court should reverse the award of attorney's fees.

CONCLUSION

For the reasons set forth above and in Appellants' Initial Brief, this Court should reverse the trial court's erroneous directed verdict, hold that the Vampire Right is void as a matter of law, and remand for a trial by jury on the disputed facts.

Respectfully submitted,

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