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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The 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' FINAL BRIEF

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This case involves a commercial real estate sale. The sale fell apart when Respondent Sea Pines Resort LLC ("Resort") purported to exercise an obsolete right of first refusal, buried in a declaration made by a long-defunct developer. The prospective buyer was Appellant, Bittmint LLC ("Bittmint"). The sellers were Respondents Lynda H. Johnson and Charles S. Giannone (collectively, "Sellers"). Sellers ultimately conveyed the property to the Resort, despite their purchase and sale contract with Bittmint.

STATEMENT OF THE CASE

On May 26, 2017, Appellant Bittmint filed a Complaint against Respondents, Sellers and the Resort, alleging causes of action for Breach of Contract, Interference with Contractual Relationship, and to Set Aside Deed. Answers were filed on July 27, 2017. The Complaint later was amended on December 9, 2018, to add Appellant Harbour Town Surf Shop LLC as a plaintiff, as well as additional causes of action pertaining to Violation of the Rule Against Perpetuities and an Invalid Assignment of Rights. (R. p. 88). The Amended Complaint sought damages to the surf shop based on breach of and interference with contract. *Id*. Sellers and Resort answered that amended pleading on January 3, 2019. (R. pp. 109, 118).

The parties submitted cross-motions for summary judgment, all of which were denied on January 13, 2020. (R. pp. 39, 42; 148-256). Sellers and the Resort filed amended answers on January 27, 2021. (R. pp. 128, 127). Respondent the Resort filed another motion for summary judgment (partial), which was denied on January 20, 2022. (R. p. 33). The case was scheduled for trial by jury.

Bittmint filed several motions in limine. (R. pp. 311-326). Bittmint's Motion in Limine No. 1 sought (*inter alia*) to exclude, or restrict, references to a right of first refusal allegedly held by the Resort. Bittmint's basis included "because the right of first refusal extinguished with the dissolution of Sea Pines Plantation Company and Defendant Sea Pines Resort, LLC never acquired the right of first refusal." (R. p. 311-312). The trial judge denied the motions, finding the issue of a right of first refusal was a fact question for the jury. (R. p. 743: 15-20).

The case was tried to a jury from February 28 – March 2, 2022. At the close of plaintiff Bittmint's evidence, the trial judge verbally granted a directed verdict on all causes of action in favor of the defendants (Respondents). No written order was issued. The trial judge's verbal ruling is on pages 359–377 of the trial transcript. (R. pp. 1048-1066).

Bittmint filed a motion for reconsideration and to alter or amend order on March 11, 2022 (R. pp. 455-673); Respondents filed opposition on March 28, 2022 (R. p. 681-1) and Bittmint filed a reply on April 4, 2022 (R. p. 686). A hearing was held on the motion on May 18, 2022. (R. p. 1068). The trial court denied the motion on May 24, 2022. (R. p. 7).

Sellers filed a motion for attorney's fees and costs on March 14, 2022 (R. p. 674); Bittmint filed an opposition on March 28, 2022 (R. p. 682); and Sellers filed a reply on April 4, 2022. (R. p. 686). The court granted the motion by orders dated May 24, 2022, and June 6, 2022, awarding attorney's fees and costs in the amount of $103,618.64. (R. p. 4).

Appellants timely filed their notice of appeal on June 22, 2022.

On September 27, 2022, the trial court entered a Form 4 order stating that Judge Price had granted Defendant's motion for a directed verdict on March 2, 2022. (R. p. 1).

STATEMENT OF THE FACTS

This is an appeal from the erroneous grant of a directed verdict to Respondents, which cut short a jury trial. The trial judge decided that the Respondent Resort holds and can enforce an obsolete right of first refusal, despite that the Resort did not submit evidence showing—let alone *proving* as a matter of law—that it holds such a right. Based solely on his incorrect determination, the trial judge wrongly directed a verdict in Respondents' favor as to each of Appellants' causes of action. (R. pp. 1048-1066).

But the facts in evidence at trial could—and likely would—have led a reasonable juror to find liability by Sellers and Resort, including that Resort interfered with Bittmint's real estate contract with Sellers when it purported to exercise a "right" that it did not have, and that Sellers breached their contract with Bittmint when Sellers sold the subject property to the Resort instead of to Bittmint.

A. Interesting History

The setting for this lawsuit is Hilton Head Island, South Carolina, which in 1950 was wild forest, accessible only by boat, with a total population of less than one thousand people.[1] In the 1950s and 1960s, growth on Hilton Head exploded under the leadership

[1] Danielson, Michael N., *Profits and Politics in Paradise, The Development of Hilton Head Island* (University of South Carolina Press, 1995) (well worth a read), Ch. 7, "Growing Pains." The island's population now hovers at 40,000 year-round residents, ballooning by many hundreds of thousands during the tourist season.

of Charles Fraser.[2] Fraser had the novel (at the time) idea of *private* development, in an era when the government controlled the development of most municipalities. The mechanism for Fraser's private development was also novel at the time: the land was subjected to covenants and restrictions, which imposed a master private development plan.[3] Fraser's development vision was embraced and carried out on Hilton Head Island by a constellation of development companies, nearly all of which went bankrupt in the 1980s.[4] (R. p. 1195, 1230).

B. Half a Century Ago: A "Right" Is Born

One of those early developers under Fraser's influence was the Lighthouse Beach Company, a limited partnership. The Lighthouse Beach Company is not a party to this litigation—perhaps because it dissolved in 1975.[5] (R. p. 1113). The Lighthouse Beach Company historically owned and developed *hundreds* of acres of property on Hilton Head Island, including residential and commercial properties. (R. p. 1095, 1113). Many

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[2] Fraser was not alone, but his vision was singular and predominant.

[3] The next time the Court encounters a case involving covenants and restrictions, it can silently thank Charles Fraser for waking up the South Carolina landscape to this development concept.

[4] This mass bankruptcy of multiple development entities was nearly catastrophic for Hilton Head Island. Seeing the impending crisis, Judge Solomon Blatt, Jr. stepped in to preside over the bankruptcy. (R. p. 1230). One commentator noted, "Blatt's retention of the case was unusual because federal district judges normally do not oversee bankruptcy cases, especially judges with no experience in bankruptcy." As Judge Blatt explained, "I'm not going to supervise the demise of Hilton Head Island when I can stop it." Danielson at Ch. 11, *A Friend in Court*, pp. 212-216.

[5] The trial transcript shows that the trial judge confused the bygone Lighthouse Beach Company with a different modern-day Charleston-area developer, The Beach Company. (*See, e.g.* R. p. 1052: 7-9). There is no connection whatsoever between these entirely unrelated entities, and the judge's confusion is part of the reason that his directed verdict was erroneous.

of those properties were within the massive development of Sea Pines Plantation, on the southern tip of the island.

Fifty years ago, in 1973, the Lighthouse Beach Company recorded its *Declaration of Rights, Restrictions, Affirmative Obligations, Conditions, etc., which constitute covenants running with certain commercial lands of Lighthouse Beach Company* with the Beaufort County Register of Deeds (the "1973 Declaration"). (R. p. 1095). The 1973 Declaration does not describe with any specificity the real property that it purports to bind. Instead, it includes indefinite descriptions such as "certain commercial lands," "certain lands located on Hilton Head Island," and "certain properties designated for commercial use," and it indicates the restrictions and obligations apply to property already owned, or to-be-owned, by the Lighthouse Beach Company. (R. p. 1095).

Buried within the fifty-year old 1973 Declaration is the right of first refusal at issue in this appeal, which Lighthouse Beach Company purported to reserve for itself as part of its development plan:

> 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

(R. p. 1105, ¶ 19) (emphasis added). There is no dispute that the "Company" identified in the right of first refusal is the Lighthouse Beach Company. (R. p. 1096, Definitions ¶ 1). There is also no dispute that the party in this lawsuit—Respondent Resort—is not the "Company" identified in Paragraph 19. (R. p. 1018:23 - 1019:1). Lighthouse Beach Company's purported right is extraordinarily broad—Paragraph 19 says that it applies to land and improvements "on Hilton Head Island." (R. p. 1105, ¶ 19).

The Lighthouse Beach Company dissolved in 1975, shortly after making its 1973 Declaration. (R. p. 1113). In 1977—two years after it dissolved—Lighthouse Beach Company purported to assign rights pertaining to "various options to repurchase" to the Sea Pines Plantation Company (an entity that later went bankrupt in 1987). (R. p. 1113-1118) (the "1977 Assignment"); (*see also* R. p. 1195). Within the 1977 Assignment, it is noted that the (now-defunct) Sea Pines Plantation Company apparently had been waiving the rights of first refusal so that property once owned by Lighthouse Beach Company could be conveyed "free, clear, and unencumbered." (*Id.*).

The 1977 Assignment is not linked to any specific real property or recorded instrument. Instead, it casts a broad and vague net:

> WHEREAS, by diverse documents recorded in the Office of the Clerk of Court for Beaufort County, South Carolina, Lighthouse Beach Company was seized and possessed of various options to repurchase property within Sea Pines Plantation sold to others and which options to repurchase ran with the land requiring the waiver thereof in order that title to conveyances would be free, clear and unencumbered by virtue of said options; and

(*Id*.). In other words, it is impossible to determine from the 1977 Assignment precisely which repurchase options,[6] pertaining to which property, were purportedly assigned to the Sea Pines Plantation Company. However, the 1977 Assignment—including within the above passage—repeatedly recognizes that the intent of the assignment is that the repurchase rights should be ***waived***. (*Id.*). Moreover, the 1977 Assignment is on its face non-transferable: it assigns the right only to Sea Pines Plantation Company, and not to its successors or assigns. (*Id*. at 1114).

The Sea Pines Plantation Company (the assignee in the 1977 Assignment) went bankrupt in 1987. (R. p. 1195). As happens in bankruptcies, the Sea Pines Plantation Company's assets were sliced, diced, and sold at auction to pay off creditors. The buyers in bankruptcy were Fogelman Properties, Inc., and Sea Pines Associates. (R. p. 1223).

Ever since the developers went bankrupt in 1987, the Sea Pines Plantation community has been governed by the property owners—both residential and commercial—by virtue of a property owners' association called Community Services Associates, Inc. ("CSA"). (R. pp. 1000: 21 – 10001: 11).

1987 was 35 years ago. 1973 was 50 years ago.

In this litigation, Respondents contend that a right of first refusal lies buried in a decades-old declaration by long-defunct developers, which can today be awakened and invoked.

C. A "Vampire" Right, Awakened

Respondent the Resort is a Virginia limited liability company. It arrived on the Hilton Head Island scene in 2006—30 years after Lighthouse Beach Company dissolved,

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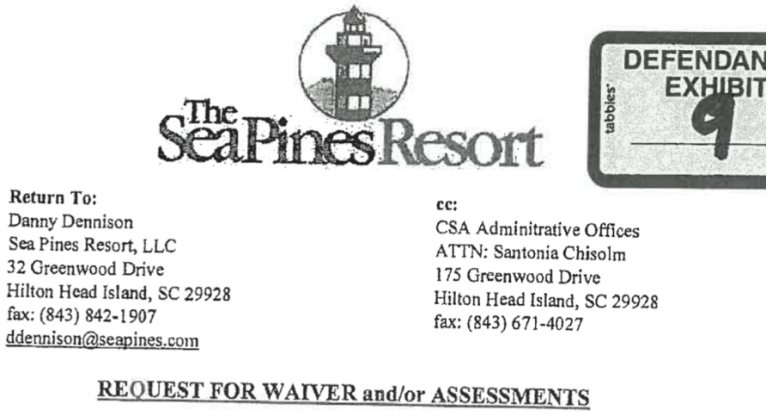
[6] The 1977 Assignment refers to "diverse documents" as the source of the right. (R. p. 1113).

and 20 years after the mass bankruptcy of developers on Hilton Head, including Sea Pines Plantation Company. (R. p. 755: 4-5, p. 965: 1, p. 972: 12-13). The Resort owns various commercial interests, including the resort hotel, golf courses, and various other resort amenities in the Sea Pines Plantation Development. (R. pp. 973: 16 – 974: 14). **Although the Resort introduced no evidence at trial showing as much**, the Resort says that it also owns some of the former developers' rights, including Lighthouse Beach Company's old rights of first refusal from 1973.

The Resort created its own pre-printed form document, entitled "REQUEST FOR WAIVER and/or ASSESSMENTS"—on which it has its own "THE SEA PINES RESORT" logo stamped at the top of the form:



(R. p. 1282). The Resort circulates this "Waiver Form" to real estate agents, brokers, and closing attorneys in the Sea Pines community. (R. p. 928: 5-7). The Waiver Form states that "Waivers and assessments will be mailed to the closing attorney," but it also contains language (in fine print at the bottom of the form) suggesting that the Resort can purchase the subject property if it is offered to the Resort. (emphasis added) (R. p. 1282). **This self-serving form document—generated by the Resort itself—was the sole exhibit**

introduced at trial by the Resort. Although it is not entirely clear from the trial judge's order, presumably the finding that there exists (as a matter of law) a right of first refusal held by the Resort is based on this "evidence" of nothing more than that the Resort *claims* it has a right of first refusal.[7]

D. The "Vampire Right" Strikes

Amir Bitton and Alon Mintz ("Bitton and Mintz") have together run a successful surf shop business in the touristy Harbour Town district of Sea Pines Plantation, on Hilton Head Island, for many years. They lease their storefront, paying approximately $55,000/year in rent, but their goal was to someday purchase the property (the "Surf Shop Property"). (R. pp. 764-767, 771, 781: 10-15; 1119). Bitton and Mintz formed Appellant Bittmint LLC ("Bittmint")[8] for the purpose of buying real estate in Harbour Town.

In 2016, the owner of the Surf Shop Property which Bitton and Mintz were renting died. She left the property to her adult children, Respondents Lynda Johnson and Charles Giannone ("Sellers"). (R. pp. 781: 8 – 782: 14). Sellers indicated a desire to sell their mother's property to Bitton and Mintz. *Id*. So, Sellers and Bittmint spent months

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[7] The trial judge asked Bittmint's counsel, who was in the midst of arguing that the right of first refusal died in bankruptcy along with Sea Pines Plantation Company:

> Well, let me stop you there and ask you this question: If that is, in fact, true and accurate [that the old right of first refusal died in bankruptcy], why would Sea Pines Resort ever create a document such as this [the Waiver Form]? This document [the Waiver Form] would be null and void and there's no reason for anybody to ever have it.

(R. p. 1053: 16-24).

[8] "Bittmint" is a combination of Alon and Amir's last names. (R. pp. 772: 25-773).

negotiating a potential purchase price for the Surf Shop Property. (R. pp. 782: 10 - 783: 23; 893: 1-20).

During the time that Sellers were negotiating with Bittmint, they also were communicating with the Resort. (R. pp. 1135-1147; pp. 857-861; pp. 823-835). The record shows that during the several months of negotiations between Bittmint and Sellers, the Sellers kept the Resort updated on the offered purchase price, and they provided the Resort with information that the Resort might need to evaluate its own purchase of the Surf Shop Property:

From: Rob Bender
To: Cliff McMackin
Subject: Harbour Town Surf Shop
Date: Wednesday, January 18, 2017 5:25:00 PM
Attachments: Harbour Town Surf Shop Purchase Evaluation 1-18-17.xlsx
image001.jpg
image002.gif

Cliff,
The owner of the retail space for Harbour Town Surf Shop called Steve and I this morning to discuss the listing. The current tenant has put in an offer of $585,000 and she realizes that we have the right of first refusal. I have attached a quick review of the space with some financial modeling. Based on my calculations it looks like something we should strongly consider. Please let me know when you have time to review.
Thanks,
Rob

(R. pp. 1141; *see also* R. pp. 1135-1147). Even before Bittmint and the Sellers had arrived at a purchase price, the Resort had conducted a financial feasibility analysis of its own purchase of the Surf Shop Property. (R. pp. 1141-1143; pp. 824-828). Notably, despite believing the Surf Shop Property to be "something we should strongly consider," the Resort did not make its own independent offer to the Sellers. (R. p. 1141; p. 1029: 13-18).

Bittmint and Sellers agreed to a purchase price of $580,000 in late January of 2017. (R. p. 1150). Bittmint and Sellers together executed a Letter of Intent on January 31, 2017, memorializing the anticipated purchase of the Surf Shop Property. (*Id.*). The Letter of Intent describes in detail: (1) the property to be sold, (2) the purchase price and terms, and (3) the date of closing. (*Id.*). Bittmint testified that Sellers requested the Letter of

Intent so that Sellers would have something in writing to give to the Resort. (R. pp. 893: 7 – 895:12).

In early February of 2017, Sellers took the Letter of Intent to Respondent Resort. (*Id.*; R. pp. 894: 22 – 895: 12; 875: 4-9). The Resort evaluated the price and terms—indeed it had been doing so *for months* at this point—including Bittmint's offer price, existing lease terms, square footage of the property, annual amounts for real estate taxes, regime fees and insurance and tenant's requirement to pay those expenses, and tenant's responsibility to pay additional assessments and utilities on the Surf Shop Property. (R. pp. 1141-1147; 977: 16 – 981: 16).

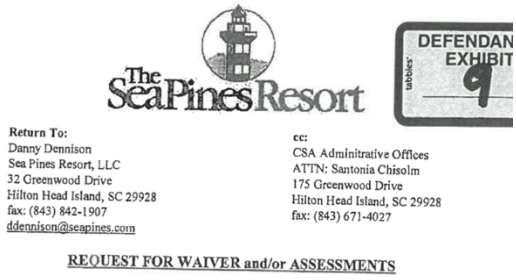
However, the Resort did not exercise its purported right to repurchase over the course of the next thirty days. (R. p. 1141-1147; 981: 23 – 982: 10).

Bittmint and Sellers entered into an "Offer and Contract for Sale of Real Property" on March 17, 2017 (the "Sale Contract") (R. p. 1151-1153). The Sale Contract does not mention a potential option to purchase by the Resort. (*Id.*). It does state: "Seller(s) shall obtain all appropriate waivers and approvals from Sea Pines and the applicable horizontal property regime within thirty (30) days from the date of execution hereof." (*Id.* ¶ 6). The contract is not clear about which "waivers" might be "appropriate," but the mandatory provision puts the onus on the Sellers to obtain them.

Testimony about whether the Sellers communicated with the Resort about the March 17 contract is unclear and conflicting. (R. pp. 878: 9 – 20; 897:10 – 899:12; 912:21 – 913:9; 989: 4 – 23; 1006: 4-14; 1155-1158, 1160-1162; 878: 7-20). Almost thirty *more* days passed, and there was doubt about whether Sellers were doing whatever was necessary

to get the "waivers" that the Sellers were obligated to procure, pursuant to the Sale Contract, before closing could occur.

In an effort to speed up the closing process, at Sellers' request, Bittmint communicated with the Resort, sending to the Resort an unsigned copy of the Resort's own boilerplate Waiver Form on April 3, 2017:



(R. p. 1282; R. p. 1154). At the bottom of the Resort's Waiver Form, the Resort perfunctorily states that the property is "hereby offered for sale" to the Resort:

> This form must be received by Real Estate Administration no less than 30 business days prior to the proposed closing date. Processing this request starts at that time but his form may be submitted earlier. Any information omitted or inaccurate (i.e. property description) will delay processing. Waiver and assessments will be mailed to requesting attorney. The above referenced property is hereby offered for sale to the company pursuant to the same terms & price contained in the current contract of sale with the bona fide purchaser (s) referenced above. It is hereby understood by all parties that the company has thirty (30) business days from receipt of this offer in which to determine its re-purchase option.

(R. p. 1282). Bittmint, which transmitted the Resort's Waiver Form to the Resort, obviously could not have offered the Surf Shop Property for sale to the Resort, because it did not own the Surf Shop Property.

On May 2, the Resort informed Bittmint that it had "elected to exercise its right of first refusal to purchase [the Surf Shop Property]." (R. pp. 1164, 1165, 1166). When Bittmint asked questions about the source of the purported right, the Resort initially identified covenants applicable to residential—not commercial—property. (R. pp. 1166-

1168). Pressed further, the Resort eventually pointed to the Lighthouse Beach Company's former repurchase option within the 1973 Declaration, discussed above. (R. p. 1095, R. pp. 935-941). But, the Resort is not the Lighthouse Beach Company, which dissolved in 1975. (R. p. 1113). Nor is the Resort the Sea Pines Plantation Company, which went bankrupt in 1987. (R. p. 1195). Bittmint filed a Lis Pendens on May 10, 2017, and it informed both Resort and Sellers that it did not believe the Resort had rights to the Surf Shop Property. (R. pp. 49-50; p. 1169). Bittmint informed Sellers that it intended to proceed with the Sale Contract to purchase the property. (R. p. 1169). On May 11, 2017, Appellant Harbour Town Surf Shop LLC made a back-up offer to Sellers to purchase the property, for $590,000, which Sellers rejected. (R. p. 1171-1177). In fact, by May 4, 2017, Sellers had already executed a deed to transferring the property to the Resort. (R. p. 1179-1182).

The Sellers did not ever sell the Surf Shop Property to Bittmint. Instead, on May 11, 2017, the Resort closed on its purchase of the Surf Shop Property from Sellers:

> Good deal. We're the proud owner of a surf shop!!

(R. p. 1179).

This lawsuit ensued.

STANDARD OF REVIEW

Appellants were entitled by law to have a jury to decide the facts of this case. Instead, the trial judge wrongly decided this case, based on "facts" that were not in evidence. The judge's factual decisions pertained to both claims and defenses mid-way through trial, at the directed verdict phase, before Respondents had put up their case and while there was evidence supporting Appellants' claims.

"A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability." *Ecclesiastes Prod. Ministries v. Outparcel*, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007). "In deciding whether to grant or deny a directed verdict motion, the court is concerned only with the existence or nonexistence of evidence." *Id.* "In ruling on a motion for a directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. The trial court must deny such a motion when the evidence yields more than one inference or its inference is in doubt. If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied." *Ecclesiastes Prod. Ministries*, 374 S.C. at 483, 649 S.E.2d at 494 (citations omitted).

"When reviewing an order granting a directed verdict, the appellate court views the evidence and all reasonable inferences from the evidence in a light most favorable to the party against whom the directed verdict was granted. If the evidence is susceptible of more than one reasonable inference, a jury issue is created and 'the court may not grant a directed verdict.'" *Heyward v. Christmas*, 352 S.C. 298, 573 S.E.2d 845 (Ct. App. 2002)

(internal citations omitted), *quoting Hunley v. Gibson*, 313 S.C. 350, 351, 437 S.E.2d 554, 555 (Ct. App.1993).

"Essentially, this court must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor." *Ecclesiastes Prod. Ministries*, 649 S.E.2d at 494.

ARGUMENT

The trial court granted a directed verdict to the Respondents as to all of Appellants' causes of action, based on its singular finding that Respondent Resort possesses and can exercise a right of first refusal over commercial property within Sea Pines Plantation. The court made this ruling without any evidence to support it—the trial court's record is *devoid* of an assignment or other transfer of the ostensible right to the Resort. In addition to the questionable factual evidence showing that the Resort possesses a right of first refusal, the purported right of first refusal is an unreasonable, indefinite, and unenforceable restraint on the alienation of property, as a matter of law. Finally, the existence of conflicting evidence on numerous other disputed facts rendered the directed verdict improper. This Court should reverse and remand for a new trial.

I. It was error for the trial judge to decide that the Resort possesses a right of first refusal over the Surf Shop Property, which was a disputed question of fact for the jury.

A key issue at trial was whether the Resort, half-a-century-later, holds and can enforce a moth-eaten right of first refusal buried in covenants imposed on unspecified property by a long-defunct developer in 1973, despite there being no evidence that the developer ever transferred the right to the Resort. The directed verdict to Respondents—which extinguished all of Bittmint's causes of action—was based entirely on the judge's determination that the Resort does possess such a first refusal interest in Sellers' Surf Shop Property. (R. p. 1061: 1-9). But absent from the trial record is any legal instrument that could support the trial court's ruling. Moreover, there was conflicting testimonial

evidence on the question.

At trial, Bittmint contended that the Resort did not hold or possess a right of first refusal interest in the Surf Shop Property. The Resort baldly stated that it did possess such a right, but it did not put into evidence any contract, assignment, or other legal instrument of conveyance whereby the defunct developers had given the right to the Resort. (R. p. 848: 4-17). The evidence at trial was that a right of first refusal over uncertain property was created in 1973 by Lighthouse Beach Company, which subsequently assigned to Sea Pines Plantation Company unspecified rights, imprecisely identified as "various options to repurchase" from within "diverse documents," by the 1977 Assignment. (R. p. 1095-1115, 1169). Sea Pines Plantation Company went bankrupt in 1987, and neither of the buyers in bankruptcy were the Resort—the Resort did not arrive on the scene until 20 years later. (R. p. 1195). **At best, the possession of a right of first refusal by the Resort pertaining to the Surf Shop Property was a question of fact for the jury, which the trial judge wrongly decided.**[9]

"A trial court should submit to the jury the issue of existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference." *Small v. Springs Industries, Inc.*, 292 S.C. 481, 357 S.E.2d 452 (1986). Here, Bittmint repeatedly challenged the existence of the Resort's right of first refusal. The Resort did not put into evidence an assignment or other contract assigning or transferring

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[9] Remarkably, the trial judge recognized the factual nature of the existence of a right by the Resort when it denied Bittmint's Motion in Limine. The trial judge stated before trial began, "[T]o be quite honest with you, I think that's pretty much the crux of the case. So, obviously, I'm going to deny that [motion in limine] and allow that as a question of fact for the jury and I'm going to allow them to take that into consideration." (R. p. 743: 15-20).

the purported right to the Resort. Thus, if the Resort claims to hold the right of first refusal by contractual assignment, then the **existence** of that assignment was a question of fact for the jury.

Similarly, the existence of a property interest, such as a covenant or easement, is also a question of fact. *Garrett v. Locke*, 309 S.C. 94, 419 S.E.2d 842 (Ct. App. 1992) (issue of paramount title is a question of fact for the jury); *Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987) (the determination of the existence of an easement is a question of fact for the trier of fact). Here, Bittmint challenged the existence of the Resort's right of first refusal, which was a creature of a declaration of covenants and restrictions purportedly running with the land. The Resort did not put into evidence a deed or other instrument of record conveying the purported right over the Surf Shop Property to the Resort. The **existence** of the Resort's right of first refusal, if it is a property interest, was therefore a disputed factual question, for the jury.

On directed verdict, halfway through a jury trial, the factual nature of the question was especially significant. In considering a motion for directed verdict, the trial court "is concerned **only** with the existence or nonexistence of evidence." *Ecclesiastes Prod. Ministries*, 649 S.E.2d at 497 (emphasis added). Here, documentary evidence that the Resort was assigned or otherwise granted a right of first refusal in the Surf Shop Property was practically non-existent and certainly ambiguous. The Resort's sole exhibit at trial was its own Waiver Form, which contains conflicting language both mandating waiver ("will be mailed") and suggesting an ability to exercise the right it was required to waive. Further, the testimonial evidence was conflicting and unclear, with the Resort claiming

to hold the right and Bittmint contesting that it did not. Therefore, the question was for the jury and not the trial judge. The ultimate determination of "whether the evidence supports one or the other of conflicting views is for the jury and not for the court." *Garrett*, 419 S.E.2d at 845, *citing Mixson v. Rossiter*, 223 S.C. 47, 74 S.E.2d 46 (1953).

It was reversible error for the trial judge to decide a fundamental disputed fact question on motion for directed verdict in a jury trial, despite conflicting evidence on the material issue of whether the Resort's purported right exists. This Court should reverse and remand for a new trial.

As discussed next, for the purpose of efficiency and economy at a new trial, this Court should reverse the trial court's legal error as to enforceability and hold that the purported right of first refusal is void and unenforceable as a matter of law.

II. The right of first refusal that the Resort claims to possess is an unreasonable restraint on the alienation of property, as a matter of law.

Although it is a fact question for the jury as to whether there exists a contract or deed transferring the right of first refusal to the Resort, the right's enforceability is a question of law for this Court. (R. p. 1051: 19-24). The right of first refusal that the Resort seeks to enforce in this case is the "Vampire Right," which lies buried in the 1973 Declaration made by Lighthouse Beach Company and subsequently transferred to Sea Pines Plantation Company by the 1977 Assignment. The Vampire Right is void, as a matter of law.

The construction of a clear and unambiguous contract is a matter of law for the

court. *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014). Similarly, the determination of the grantor's intent when reviewing a clear and unambiguous deed is a question of law for the court. *Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012). "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required, and the contract's language determines the instrument's force and effect." *Id*. (internal citations omitted).

South Carolina law prohibits the enforcement of unreasonable restraints on the alienation of real property. *Clarke v. Fine Housing, Inc.*, Opinion No. 28126 (2023), *citing Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct. App. 1984) ("Under South Carolina common law, any unreasonable limitation upon the power of alienation is against public policy and must be construed as having no force and effect."). Courts do not enforce indefinite covenants. *Vickery v. Powell*, 225 S.E.2d 856, 267 S.C. 23 (1976) *citing* 21 C.J.S. Covenants § 1(c) ("A covenant must express the purpose of the parties thereto to be valid and enforceable and it must not be too indefinite or against public policy."). Further, a contingent, non-vested interest violates the Rule Against Perpetuities.

Generally, a right of first refusal is a pre-emptive right which "requires the property owner, when and if he decides to sell, to first offer the property to the holder of the right of first refusal." *Clarke v. Fine Housing, Inc.*, 438 S.C. 174, 180, 882 S.E.2d 763, 766 (2023). Such a right has the potential to restrain the free alienation of property. The South

Carolina Supreme Court has adopted the Third Restatement of Property's test for evaluating whether a right of first refusal unreasonably restrains a property owner's power to alienate his property:

> The Restatement (Third) of Property provides, "A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable. Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint." Restatement (Third) of Property: Servitudes § 3.4 (Am. L. Inst. 2000). Comment f to section 3.4 of the Restatement addresses rights of first refusal: "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."
>
> **We agree with the Restatement approach and hold the factors to be considered in assessing whether a right of first refusal unreasonably restrains alienation include (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. These factors are not exclusive** . . .

Id. at 180-182, 882 S.E.2d at 766-767 (emphasis added).

In addition to the Restatement's factors, the Supreme Court held that "lack of clarity as to the real property encumbered by a right of first refusal is a factor to consider in determining whether a right of first refusal is an unreasonable restraint on alienation." *Id.* at 183, 768. The right of first refusal at issue in this appeal fails the Supreme Court's test because the encumbered property is not clearly identified, because there is no legitimate purpose given for the right, and because of inherent lack of clarity in the procedures for exercising the right.

A. The Vampire Right does not identify the encumbered property.

As discussed in the Statement of Facts above, the right of first refusal that is the subject of this appeal has its genesis in Lighthouse Beach Company's Declaration of

Rights from 1973, which ostensibly runs with "certain lands located on Hilton Head Island, Beaufort County, South Carolina." (R. p. 1095). The "certain lands" with which the right runs are not identified in the 1973 Declaration with any specificity. The right is buried on the 1973 Declaration's eleventh page, in its nineteenth paragraph. Paragraph 19 describes the property subject to the right as being "on Hilton Head Island":

> 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

(R. p. 1105). "Hilton Head Island"—the stated area to which Lighthouse Beach Company's right applies—is approximately 44,260 acres in total size.[10]

The failure of Paragraph 19 to clearly identify the property to which the right of first refusal purportedly applies is fatal to the enforceability of the right. This fatal flaw is compounded by the equally-vague 1977 Assignment, which purported to transfer the original developer's rights to a different entity. (R. p. 1113). In the 1977 Assignment, the dissolved Lighthouse Beach Company broadly acknowledged that it "owned certain real estate in Beaufort County, South Carolina in that general area known as Sea Pines

[10] https://en.wikipedia.org/wiki/Hilton_Head_Island,_South_Carolina

Plantation on Hilton Head Island." The Company further acknowledged, again without precision, that it was "possessed of various options to repurchase property" by virtue of "diverse documents." (R. p. 1113).

In other words, neither the 1973 Declaration nor the 1977 Assignment specifically identify the subject property, over which the old developers purported to own the right. The text of Paragraph 19 itself, identifying Hilton Head Island as the situs, is enormously broad and patently indefinite.

Paragraph 19's uncertainty is untenable under South Carolina law. In the recent *Fine Housing* case, our Supreme Court examined a right of first refusal which was "buried in a lease of parking spaces, and the Lease contains Exhibit A—the description of the Subject Property, which includes the buildings, the leased parking spaces, other parking spaces, and other land." *Clarke v. Fine Hous.* at 182, 882 S.E.2d at 767. The Court found that the lack of clarity about the property encumbered by the right rendered the right unenforceable as a matter of law: "it is readily apparent that a right of first refusal that does not identify the property it encumbers can substantially restrain alienation of real property." *Id*. at 183, 768. **Under the same test, the old Lighthouse Beach Company's right of first refusal fails.**

This Court should hold that—even if the Resort could resolve the question of fact as to whether it possesses an interest in the Lighthouse Beach Company's right of first refusal—the right itself is unenforceable as a matter of law for its plain failure to identify the encumbered property.

B. The Vampire Right does not have a legitimate purpose—or any purpose at all.

In addition to being unenforceable due to its lack of certainty about the bound property, the "Vampire Right" does not identify a legitimate purpose—and certainly not a purpose that would permit a stranger to the original developer to revive and exercise it to intercept Bittmint's purchase of the Surf Shop Property, half a century later.

Paragraph 19 of the 1973 Declaration contains the right at issue, which is described as Lighthouse Beach Company's "options to purchase." (R. p. 1105). Paragraph 19 is silent as to the purpose of the right. As our Supreme Court observed in *Fine Housing*, one indication of unreasonableness in a right of first refusal is lack of legitimate purpose. *Id.* at 181, 767. This factor is buttressed by South Carolina common property law, which requires a covenant to express the purpose of the parties in order to be valid. *Vickery v. Powell*, 225 S.E.2d at 856, 267 S.C. at 23 *citing* 21 C.J.S. Covenants § 1(c) ("A covenant must express the purpose of the parties thereto to be valid and enforceable . . ."). The 1973 Declaration purports to contain covenants running with the land. (*See* R. p. 1095).

At trial, the Resort testified and admitted that <u>there is no stated purpose</u> for the right of first refusal that it claims to hold:

> Q So as we know, as of 1973, Lighthouse Beach Company was the one that proclaimed this right of first refusal?
>
> A And the rest of the covenants.
>
> Q As of 1973?
>
> A That's correct.
>
> Q And all that other stuff that's in there dealing with esthetics and

everything, right?

A That's right.

Q But there's still nothing in this document that says Lighthouse Beach Company, you can exercise that right of first refusal if it's a good deal?

A **It doesn't state any reason. . . . It doesn't indicate a reason why we would exercise our right of first refusal. The property is just supposed to be offered to us for sale.**

(R. p. 1021:24 – 1022:16, examination of S. Birdwell) (emphasis added).

The failure of Lighthouse Beach Company to express a purpose for its alleged right of first refusal renders it an unreasonable restraint on alienation under the *Fine Housing* test, as well as an unenforceable covenant under the common law.

This Court should so hold, as a matter of law.

C. The Vampire Right is inherently unclear as to how it might be exercised.

Paragraph 19 of the 1973 Declaration is riddled with ambiguity and inconsistency as to how Lighthouse Beach Company might exercise its repurchase options. (R. p. 1105).

The first clause provides "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." This first clause does not specify how the offer is to be made and it certainly does not require the offer to be communicated to the holder in a writing. Further, this clause solely requires the offer to include the "same price" as a bona fide offer and does not require the "terms" of the offer in addition to the "price."

The second clause states that "and the said Company shall have thirty (30) days within which to exercise its option to purchase said property at this price." (R. p. 1105).

Again, there is no mention of the required "terms" of the offer.

The third clause provides "and should Company fail or refuse within thirty days after receipt of written notice of the price and terms to exercise its option to purchase said property at the offered price." The clause contains the first reference to the words "written notice" and "terms" and the clause is prefaced with a "should the Company fail or refuse" qualifier. (R. p. 1105).

The fourth clause states "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." This clause refers back to "price" again and makes no mention to the "terms" of the offer. (R. p. 1105).

At trial, the Resort testified that it was itself not certain what the covenants actually require to trigger the right. (R. pp. 855: 23 – 856: 7; 1021: 14 – 1022: 3).

In sum, the alleged Right is indefinite and unclear as to:

- What notice is required to trigger the 30-day exercise period?
- How and where is notice to be given, and by whom?
- What constitutes a "bona fide" offer?
- What if the Seller *accepts* an offer before giving notice?
- What terms, if any, other than price are required to be in a bona fide offer?
- What precisely triggers the option, and when does the right of first refusal expire?
- Would a form document like the Resort's Waiver Form start the 30-day clock running a second time?

- Would a second, subsequent offer re-trigger the clock?

This lack of certainty as to the mechanism for exercising and interpreting the Vampire Right are additional grounds for this Court to find it void and unenforceable under the common law, the Restatement's test, and the test adopted in *Fine Housing*, 438 S.C. 174, 185, 882 S.E.2d 763, 769 (2023) ("The provisions governing exercise of the right of first refusal are important in determining its impact on alienability. Lack of clarity may cause substantial harm by making it difficult to obtain financing and exposing potential buyers to threats of litigation.") (*quoting* Restatement § 3.4, comment f).

This Court should hold that the lack of an express procedure for the exercise of the right renders it unenforceable. *See also Hardy v. Aiken*, 631 S.E.2d 539, 542, 369 S.C. 160 (2006) ("'[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.'. . . .") (internal citations omitted).

D. The Vampire Right violates the Rule Against Perpetuities.

In addition to failing the *Fine Housing* test, the right of first refusal within the 1973 Declaration violates the Rule Against Perpetuities. As an initial matter, this Court should look to the common law Rule Against Perpetuities, and <u>not</u> to the Uniform Statutory Rule found within S.C. Code § 27-6-20. This is because the South Carolina Legislature specified that the statutory rule "does not apply to . . . a nonvested property interest . . . arising out of a <u>non-donative</u> transfer . . . ". S.C. Code § 27-6-50 ("Exceptions to rule") (emphasis added). The 1973 Declaration arose out of a non-donative transfer—it was part of the

commercial development of land on Hilton Head Island—and it is therefore excepted from the statutory rule. The statutory rule states that it is intended to apply only to donative transfers, such as wills and trusts. *Id*.

The reason the right of first refusal at issue here is a "Vampire Right" is because it is apparently of unlimited duration, buried beneath the earth (in covenants pertaining to the land). There is no telling—from its own language—when this right might rise and strike; Paragraph 19 of the 1973 Declaration does not give a time frame in which the right of first refusal might be exercised by Lighthouse Beach Company. Instead, the right ostensibly is conditioned on an owner's unclear and indeterminate desire to sell, at which point the repurchase option purportedly vests. (R. p. 1105, ¶ 19: "In the event the Owner desires to sell a Commercial Property site on Hilton Head Island . . . then said property shall be offered for sale to the Company . . . ") (emphasis added). As such, the "Vampire Right" is a contingent, non-vested interest, in that a commercial owner might never choose to sell the property.

In *Webb v. Reames*, this Court of Appeals examined a right of first refusal similar to the Vampire Right, which was located within a deed. *Webb v. Reames*, 485 S.E.2d 384, 326 S.C. 444 (Ct. App. 1997). The right of first refusal at issue in that case stated, "The condition, running with the land conveyed, is that the Grantee, in case he or his heirs should sell the property, the Grantor, his heirs and assigns shall be given the first refusal to buy the same." *Id*. at 384 (ellipses omitted). The *Webb* Court noted the right of first refusal at issue in that case was a preemptive right and "an interest not conditioned on an event certain to occur." *Id*., *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 *Webb* Court found that such a right of first refusal violates the rule against perpetuities and is therefore void. *Id*. at 385 (holding "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 therefore void."), *citing* 61 Am.Jur.2d Perpetuities and Restraints on Alienation § 65, at 75 (1981); *Love v. Love*, 208 S.C. 363, 374, 38 S.E.2d 231, 236 (1946) ("It is not enough that a contingent event may happen, or even that it will probably happen, within the limits of the Rule against Perpetuities; if it can possibly happen beyond those limits, an interest conditioned on it is too remote."); *see also Estate of Johnson v. Carr*, 286 Ark. 369, 691 S.W.2d 161 (1985) (where preemptive right is of unlimited duration, the provision is considered void as violative of the rule against perpetuities); *Atchison v. City of Englewood*, 170 Colo. 295, 463 P.2d 297 (1969) (same); *Peele v. Wilson County Bd. of Ed.*, 56 N.C. App. 555, 289 S.E.2d 890.

Under the same analysis used by the *Webb* Court, the Vampire Right is void. Paragraph 19 of the 1973 Declaration purports to give to Lighthouse Beach Company an interest in commercial property that is apparently of unlimited duration and might never vest. This clause violates the rule against perpetuities and is an unreasonable restraint on the alienation of property, as a matter of law.

In sum, for each of the reasons discussed above, this Court should construe Paragraph 19 of the 1973 Declaration—a question of law—and hold as a matter of law that the right of first refusal it contains is unenforceable and void. The Court should therefore reverse the trial court's erroneous ruling to the contrary, and it should remand for a new trial with instructions that the Vampire Right has no teeth.

III. Even if the Resort holds and can enforce the Vampire Right, directed verdict was improper because liability by the Respondents could be inferred from the evidence.

For the sake of argument, and as additional grounds for reversal, even if the right of first refusal is valid (which it isn't), and even if the Resort had evidence proving it is the holder of the right (which it didn't), then a reasonable juror ***still*** could have found a breach of and interference with the Sale Contract. Bittmint's evidence showed that Sellers failed to perform, the Resort failed to timely exercise the purported right, and the Resort failed to exercise the right in accordance with its terms. The trial judge was therefore wrong to grant Respondents' motion for directed verdict.

"In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion where either the evidence yields more than one inference or its inference is in doubt." *Harvey v. Strickland*, 566 S.E.2d 529, 350 S.C. 303, 308-309 (2002). "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." *Id.* at 308.

A. A reasonable juror could have found that Sellers breached their Sale Contract with Bittmint.

In a breach of contract action, the plaintiff has the burden "to prove the contract, its breach, and the damages caused by such breach." *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962). Bittmint introduced evidence at trial showing that it had a contract with Sellers (the Sale Contract) to purchase the Surf Shop Property, thereby satisfying the first element. (R. p. 1151). Bittmint also introduced evidence showing that Sellers did not sell the Surf Shop Property to Bittmint, in breach of the contract, but that Sellers instead sold the property to the Resort. (R. pp. 792: 22-25;[11] pp. 884:18 – 885:4; p. 1180). Bittmint testified that it was damaged by the breach, in numerous ways. (*E.g.*, R. pp. 1151-1153, 1179-1181, pp. 792:13 – 793:4; 905: 1-8).

At the directed verdict stage—and particularly before Sellers had put up any evidence going to their defenses—this evidence of liability for breach of contract by Sellers was sufficient for Bittmint to survive Sellers' motion for directed verdict. "A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability." *Ecclesiastes Prod. Ministries v. Outparcel*, 374 S.C. at 483, 649 S.E.2d at 494. "In deciding whether to grant or deny a directed verdict motion, the court is concerned only with the existence or nonexistence of evidence." *Id.* Because there was evidence that Sellers breached their contract with Bittmint, to Bittmint's damage, the evidence created a jury question.

This Court should reverse the trial court's erroneous decision to remove the

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[11] "Q: Was this [Surf Shop] property ever sold to Bittmint? . . . A: No."

question of Seller's breach of contract from the province of the jury.

B. A reasonable juror could have found from the evidence that Resort tortiously interfered with Bittmint's Sale Contract with Sellers.

Similarly, "to establish intentional interference with a contractual relationship the plaintiff must prove: (1) a contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) the damage resulting therefrom." *Kinard v. Crosby*, 315 S.C. 237, 433 S.E.2d 835, 837 (1993). Bittmint put forth sufficient evidence to raise a jury question as to the Resort's liability for interference with Bittmint's Sale Contract with Sellers. Indeed, there is no question that the Resort knew about Bittmint's contract with Sellers, nor that the Resort procured the breach by convincing Sellers to convey the Surf Shop Property to the Resort, to the damage of Bittmint. Bittmint showed that the Resort was unjustified in its interference, because it did not hold an enforceable right of first refusal over the Surf Shop Property.

Moreover, the jury could have reasonably inferred from the evidence and testimony at trial that—even ***if*** (*arguendo*) the Resort held an enforceable right of first refusal—it did not validly exercise the right, according to its terms. For example, Paragraph 19 of the 1973 Declaration requires that the Lighthouse Beach Company "shall have thirty days within which to exercise its option to purchase," and that the Seller is obligated to offer the property for sale to the Company "at the same price at which the highest bona fide offer has been made." (R. p. 1105). There is conflicting evidence and testimony about whether the Sellers ever offered the Surf Shop Property to the Resort, whether the Resort exercised the purported right within 30 days of notice of the price offered by Bittmint, and whether the Resort purchased the property at the same price and

on the same terms as Bittmint had offered. Among other things, a reasonable jury easily could have found that the Resort was required to waive the right, or that it missed the thirty-day deadline for exercising its purported right.[12]

In considering Sellers' and Resort's motion for directed verdict, the trial court was bound to take all facts and inferences in a light most favorable to Bittmint, and it was without power to decide credibility issues or resolve conflicts in the evidence. *Harvey v. Strickland*, 350 S.C. at 303, 566 S.E.2d at 529. Here, the trial court did not have authority to decide, for example, whether the Resort had been assigned or granted a right of first refusal, when it could be inferred from the evidence that no such assignment or grant exists. The trial judge could not decide the factual questions surrounding whether the Resort properly and timely exercised the purported right.

Although the trial judge did not clearly say as much, it was apparently the fourth element, absence of justification, which was the focus of the trial judge's erroneous directed verdict to the Resort. The judge improperly found that the Resort had been assigned and could enforce what the judge wrongly decided was a valid right of first refusal, justifying interference and breach:

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[12] The testimony shows that the Resort knew about the offer being made as of at least January 31, 2017, including the price, the buyer, and the property. (R. pp. 833:14 - 835:7; 861:6-10; 863: 1-19; 867: 8 - 869:21; 978: 17-19; 981: 23 – 983: 10; 1019: 6-15; 1020: 10 - 1021:12); (R. p. 895: 9-12, "And then she mentioned to me that she actually dropped off the [letter of] intent to Sea Pines. So I knew they had that in their hands."); (R. p. 979:14 - 980:11, Q. All that's there. So that's information in your hands at this point on February 1st, correct? A. Right.") The Resort did not make the decision to purchase the property until May, much longer than 30 days. (R. p. 843:18-20; pp. 752:22 - 753:5). The Resort's "Waiver Form" states that the Resort ***will*** mail a waiver to the requesting attorney. (R. p. 1282).

> [Resort], obviously, moving forward has developed a lot of property in the Resort, I would assume.[13] And in doing so, since they were the original builders and developers,[14] they get to create whatever covenants that they want for those properties. Is there anything that's indicating that for Harbour Town, which was not developed by Sea Pines, it was developed by Lighthouse, that they have been operating under the auspices that they adopted the covenants and have been living under those covenants because they didn't develop the property and they can't change them because they inherited them from Lighthouse?
>
> So what I'm saying is this, [Resort] 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,[15] 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. You have 15 days from today's date to file any motions that you would like.

(R. p. 1059). According to the trial judge, his decision that the Resort's interference with the Sale Contract was justified hinged on the Resort's Waiver Form, as well as confusion over facts in evidence (which facts were in dispute and not for the judge to decide). When asked for clarification, the trial judge explained:

> So [Resort] has been working under the auspices that they can't create anything new because they can't. They purchased the rights and assigns

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13 The judge was without authority to make factual assumptions such as this one.

14 The Resort was neither the original builder nor the original developer.

15 Respondent Resort did not purchase the property out of bankruptcy from Lighthouse. As discussed above, the evidence shows that Lighthouse Beach Company dissolved in 1975 but that, two years after dissolution, it purported to assign its repurchase options from within "diverse documents" to Sea Pines Plantation Company, which went bankrupt in 1987. The buyers in bankruptcy were Fogelman Properties, Inc. and Sea Pines Associates. (R. p. 1223). There is no evidence in the record demonstrating that Respondent Resort ever acquired the long-defunct declarant right once belonging to Lighthouse Beach Company.

> from Lighthouse.[16]
>
> So they have created an entirely separate company, which is real estate administration -- not company, a sector of [Resort], 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.[17]
>
> 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].
>
> . . .
>
> [the] applicability of the '73 covenants to this transaction, Plaintiff strongly denies. **I have indicated in my ruling that I believe that it did apply and that the Beach Company vested those rights -- I mean, that Sea Pines received those rights from Lighthouse and have been operating in the auspices for the entire time** that they were, in fact, bound by that obligation.

(R. p. 1060: 14 – 1061: 9) (emphasis added).

Not only is the trial court's ruling confused, but it wrongly invades the province of the jury by determining numerous issues of disputed fact. (*See also* R. p. 1066: 4: "I find there was no intent."). Very simply, the directed verdict was erroneous because a reasonable juror could have decided from the testimony and evidence that the Resort knew about Bittmint's Sale Contract with the Sellers, and that the Resort wrongly procured the breach without justification, to Bittmint's damage. This Court should reverse the directed verdict and remand for a new trial.

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[16] The evidence does not show that the Resort purchased *anything at all* from Lighthouse. It seems possible that the trial judge was confusing the old, bankrupt, dissolved Sea Pines Plantation Company with the current Sea Pines Resort, because they both began with the words "Sea Pines." This confusion was error, as was the court's decision of fact on directed verdict.

[17] The Waiver Form—created and disseminated by the Resort itself—does nothing more than show that the Resort itself claims that it holds the obsolete right.

IV. The Vampire Right could not have been assigned to the Resort.

Although the Resort did not substantiate its claim with any legal instrument, it verbally contended at trial that it held the Vampire Right by assignment. The trial judge agreed. (R. p. 1061: 1-9). As discussed above in Issue I, the existence of such an assignment to the Resort was a disputed question of fact for the jury. As discussed in Issue II, above, the right itself is unenforceable as a matter of law. However, even **if** the Resort had introduced documentary evidence to support its claim that at some point in time the Vampire Right ostensibly was assigned to it, the right was nonetheless non-transferable, as a matter of law, and such an attempted assignment would be without effect and void.[18]

The alleged right first appears as a "purchase option" within the 1973 Declaration by Lighthouse Beach Company. (R. p. 1105, ¶19). The 1973 Declaration purports to be an instrument running with the land (although it does not specifically identify the land with which it runs). Assuming the 1973 Declaration runs with certain land, the Vampire Right therefore had its start as a real property interest—it was a servitude held by Lighthouse Beach Company. "Restrictive covenants affecting real property cannot be properly and fully understood without resort to property law." *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888, 893 (Ct. App. 2014).

[18] Bittmint makes this argument as an additional ground for reversal of the trial court; the Court need reach it only if it finds that the 1973 Declaration's Paragraph 19 is enforceable at all and not an unreasonable restraint on the alienation of property.

However, the 1977 Assignment (which does not purport to touch and concern ***any*** land) severed the right of first refusal from the property and converted it into a personal, contractual right. The interest given by Lighthouse Beach Company to the Sea Pines Plantation Company is akin to a mere license. *See Main v. Thomason,* 535 S.E.2d 918, 342 S.C. 79, 92 fn.5 (2000) (interest was a mere license without corresponding ownership of land); *Paine Gayle Props., LLC v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528 fn.6 (Ct. App. 2012) (A license is an authority "to do one or more acts on another's land, without possessing any interest therein."). In other words, within the 1977 Assignment, Lighthouse Beach Company purported to assign to the Sea Pines Plantation Company a personal interest in "various options to repurchase" found in "diverse documents" which did not correspond to any land owned by Sea Pine Plantation Company. (R. pp. 1113-1114). Moreover, at the time of the 1977 Assignment, Lighthouse Beach Company did not own any land, either, because it had dissolved two years earlier. (R. p. 1113).

The 1977 Assignment states that its intent is that the rights given "should inure to Sea Pines Plantation Company." (R. p. 1113). No mention is made that the rights would inure to any real property. The granting language within the 1977 Assignment is legally dispositive: the rights are transferred "unto Sea Pines Plantation Company, a South Carolina corporation doing business on Hilton Head Island in Beaufort County, South Carolina." (R. p. 1114).

The 1977 Assignment does not include terms authorizing subsequent assignment—that it, it does **not** contain granting language to Sea Pines Plantation Company's successors or assigns; instead, the assignment to the Company is *personal*.

Evins v. Richland County Historic Preservation Com'n, 341 S.C. 15, 532 S.E.2d 876 (2000) ("[T]he maxim `Expressio unius est exclusio alterius' is defined as: 'When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.'"). As such, in accordance with the plain language of the 1977 Assignment, the rights given were not capable of further transfer or assignment. The determination of the grantor's intent when reviewing a clear and unambiguous deed is a question of law for the court. *Proctor v. Steedley*, 398 S.C. at 561, 730 S.E.2d at 357.

Moreover, it is hornbook law that personal licenses and interests in gross, including preemptive rights, cannot be transferred or assigned. *Brasington v. Williams*, 143 S.C. 223, 141 S.E. 375 (1927). Interests that are not appurtenant to real property are "mere personal privilege" which are "incapable of transfer . . . and . . . not, therefore assignable or inheritable." *Id*. at 382; *see also AJG Holdings, LLC v. Dunn,* 410 S.C. 346, 764 S.E.2d 912 (2014), *citing Armstrong v. Roberts,* 254 Ga. 15, 16, 325 S.E.2d 769, 770 (1985) ("A developer of a subdivision who reserved [declarant rights] in covenants running with the land no longer possesses that authority after divesting himself of his interest in the subdivision."). "[R]ights of first refusal are presumed to be personal and are not ordinarily construed as transferable or assignable unless the particular clause granting the right refers to successors or assigns or the instrument otherwise clearly shows that the right was intended to be transferable or assignable." *Malone v. Flattery*, 797 N.W.2d 624 (Iowa Ct. App. 2011); *Mulberry v. Burns*, 435 P.3d 509, 511-513 (Idaho 2019); *Ryan v. Lawyers Title Ins. Corp.,* 959 N.E.2d 870, 876 (Ind. Ct. App. 2011); *Waterstradt v. Snyder*, 194 N.W.2d 389, 390 (Mich. Ct. App. 1971) (holding a right of first refusal to repurchase

property was not binding on a personal representative, because "[i]f the grantors had meant to bind her personal representative, her successors in title, or assigns (assuming they could), they should have said so"); 6A C.J.S. Assignments § 36 (rights of first refusal are **presumed** to be personal, and are thus not assignable **unless either the clause granting the right refers to successors or assigns or the instrument clearly shows that the right was intended to be assignable**); *see also*, *Kelly v. McCombs*, Opinion No. 2019-UP-308 (Ct. App. 2019) (collecting cases).

As a matter of law, when Sea Pines Plantation Company died in bankruptcy, the Vampire Right died along with the company. The trial judge's finding that the right was somehow subsequently assigned or transferred to the Respondent Resort is legally untenable. For this additional reason, this Court should reverse the trial court's directed verdict and remand this case for trial.

V. Because its directed verdict was improper, the trial court's award of attorney's fees to Respondents should also be reversed.

After trial, Sellers filed a motion for Attorney's Fees, which the trial court granted. The motion was based on a provision in the Sale Contract entitling the prevailing party to attorney's fees "in the event of litigation commenced because of a default hereunder." (R. p. 674, Motion for Attorney's Fees).

Because the trial court's directed verdict to Sellers was improper, for the reasons discussed herein, this Court should reverse the award of attorney's fees when it remands this case for a new trial.

CONCLUSION

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

Respectfully submitted,

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