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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

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' RETURN TO RESPONDENTS' PETITION FOR REHEARING

Respondents Sea Pines Resort, LLC ("Resort"), Lynda H. Johnson, and Charles S. Giannone, have petitioned this Court for rehearing of its Unpublished Opinion No. 2025-UP-273 (the "Opinion"). But this Court neither misapprehended the law, and nor did it overlook any facts; instead, its Opinion correctly reversed the trial court's erroneous grant of directed verdict in the teeth of conflicting evidence, mid-way through a jury trial. Respondents' petition largely rehashes the same fact-intensive arguments made in their Brief, which this Court has already considered and properly rejected. As this Court correctly held, "neither the [circuit] court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Opinion at p. 10, *quoting Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). Further, the Opinion left undecided several of Appellants' issues on appeal, and those undecided issues also compel reversal of the trial court's errors and independently sustain the Opinion.[1] Respectfully, Respondents' petition should be denied.

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[1] Appellants incorporate herein their Brief and Reply Brief, filed on October 4, 2023.

ARGUMENT

Initially, the Petition makes repeated claims that certain issues were abandoned or not appealed. However, Appellants were not required to appeal every single improper ruling that the trial court made, and indeed if they had done so then their brief would have been unnecessarily voluminous. Instead, the Appellants appealed the trial court's core, fundamentally erroneous, fact-centric directed verdict decision, made mid-way through a jury trial, which wrongly was based on an alleged (yet factually and legally unproven) right of first refusal, and which the trial judge himself explained dispensed with the entire case and every cause of action:

> [Respondent Resort], obviously, moving forward has developed a lot of property in the Resort, I would assume.[2] And in doing so, since they were the original builders and developers,[3] 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,[4] 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.

The trial judge went on to reiterate his ruling:

> So [the Resort] has been working under the auspices that they can't create anything

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2 The judge was without authority to make factual assumptions such as this one, in a jury trial.

3 The Resort was neither the original builder nor the original developer, and this misapprehension by the trial judge underscores the improper factual bases for his decision.

4 Respondent Resort did not purchase the property out of bankruptcy from Lighthouse. Lighthouse Beach Company dissolved in 1975. The Resort arrived on the scene in 2006. Again, the trial court's directed verdict ruling was tainted by incorrect factual suppositions and evidentiary assumptions that are outside of the authority of a trial court on directed verdict.

> new because they can't. They purchased the rights and assigns from Lighthouse.[5]
>
> So they have created an entirely separate company, which is real estate administration -- not company, a sector of [the 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.[6]
>
> 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]. . . . So your appeal will be based on that. Fair enough?
>
> . . . I find that they did have the 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[7] 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. pp. 1059 – 1061: 9) (emphasis added); (*see also* R. pp. 1061-1066, ruling summarily on each cause of action because, "I find that they did have the right.").

On appeal, Appellants argued that the trial court was wrong for at least two basic reasons: (1) factually, there was insufficient and conflicting evidence about the possession and exercise of the alleged preemptive right that made directed verdict improper; and (2) legally, even if the Resort had actually, indisputably proven that it possessed the right as a matter of fact (which it failed to do), an alleged generalized preemptive right over vaguely described property "on Hilton Head Island" is unenforceable as a matter of law, and it was legally incapable of transfer. (R. p. 1105 ¶ 19). This Court's Opinion found only that that the trial court wrongly decided disputed

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5 The evidence does not show that the Resort purchased *anything at all* from Lighthouse. It seems likely from statements he made 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.

6 The Waiver Form—created, xeroxed, and disseminated by the Resort itself—does nothing to prove that the right truly exists or is legally enforceable. At best, the Waiver Form is one piece of factual evidence for the jury to consider, rather than a proper basis for a directed verdict decision.

7 The Charleston judge was apparently wrongly basing his decision on his confusion between the defunct Lighthouse Beach Company and the modern-day Charleston-area developer called The Beach Company. (*See, e.g.,* R. p. 1052: 7-10) ("THE COURT: Correct me where I'm wrong. Beach Company Developer, correct?" "MR. WALKER: This is a hypothetical?" "THE COURT: No, this is factual.").

facts; it declined to address the questions of law going to the validity of the right. (Op. at p. 12).

For the reasons below, and in the Opinion, and in Appellants' briefs, this Court should deny Respondents' petition for rehearing because the Opinion correctly reversed directed verdict.

However, if this Court is inclined to grant rehearing, Appellants respectfully request that it rule on the questions of law that are Issues II and IV on appeal, and hold that the alleged right of first refusal is void as an unreasonable restraint on the alienation of real property and nontransferable as a matter of law, as argued in Appellants' briefs.

1. The Opinion is right: the facts, evidence, and inferences to be drawn from it, including the disputed facts asserted in the Petition for Rehearing, were for the jury.

Respondents' argument in Section 1 of its Petition ignores reams of testimony and exhibits to claim there was "no conflicting evidence" mid-way through this jury trial, and then jumps to the (unproven) presupposition that the Resort holds (in the real property sense of the word – *habendum*) a preemptive right of first refusal over the real estate that is the subject of this litigation. Respondents' argument requires this Court to ignore plaintiffs' case entirely and presume as a matter of fact and law that Respondents' affirmative defenses would be utterly impervious (although they had not yet been presented). The purported right of first refusal was Respondents' defense to plaintiffs' case, yet Respondents argue that the Resort's verbal claim to hold such a right is an absolute truth, which the Appellants were obligated to anticipatorily *disprove* prior to the Resort putting on its defense or introducing documentary evidence of possession of a real property preemptive right.[8] But, that is not how a trial works, and the Respondents' argument is

[8] Throughout this case, Respondents have wrongly insisted Appellants must prove the negative: that the Resort does **not** have a right of first refusal. This is backwards – it is the Resort's burden to prove that it *does* possess the right, which it had failed to do, mid-way through this jury trial. *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."); *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."); *Bennett v. Sandifer*, 15 S.C. 418 (1881) ("upon the universal principle that . . . no one can be required to prove a negative.").

emblematic of why directed verdict at the close of plaintiffs' evidence was improper.

Respondents also dwell on the testimony of attorney Michael Mogil, dissonantly arguing that, in the midst of a *factual* dispute, Mogil was not "disclosed or qualified" as an expert on the law, and so therefore he could not "testify to any legal conclusions;" thus, Respondents assert, Mogil's testimony was somehow insufficient to raise a question of fact as to the Resort's purported right of first refusal. (Pet. pp. 4-7). This argument by Respondents ignores that Mogil could—***and did***—testify on the facts, and his purported "legal conclusions" (which Respondents concede in footnote 2 were not actually offered, anyway) are immaterial to the evidence and inferences about the disputed fact of possession of the right.

A. The conflicting evidence mid-way through trial made directed verdict improper.

The Opinion correctly found that during their case in chief Appellants introduced ample evidence to support their claims and thus survive directed verdict, presenting evidence sufficient for a jury to find on behalf of plaintiffs: (1) Bittmint had a Sale Contract with Respondent Sellers to purchase the Surf Shop Property; (2) Sellers did not sell the property to Bittmint, in breach of the Sale Contract; (3) Sellers instead wrongly conveyed the property to the Resort, in breach of the contract;[9] (4) Resort knew about and procured the breach of the Sale Contract;[10] and (5) 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 developed over the course of several days of testimony and multiple exhibits, and which is only summarized here—was entirely sufficient to create jury questions on plaintiffs' claims. *Ecclesiastes Prod. Ministries v. Outparcel*,

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

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

[11] *See also,* R. pp. 799: 19 – 800; 211: 11-216. For additional discussion on evidence of damages, please see Appellants Reply Brief, Section IV.

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."). "The trial court must deny [a directed verdict] 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." *Id.*

But the trial judge's directed verdict—like the Respondents' arguments in their Petition for Rehearing—skipped over the question of whether there was evidence for the jury on plaintiffs' claims, and instead rested on the faulty notion that the Resort's affirmative defense, its purported right of first refusal, is a veritable ***presumption*** that Appellants failed to rebut, in advance of any evidence on it. This idea was wrongly based on the trial judge's (incorrect, unproven, and erroneous) belief that the Resort "can do whatever the heck they want over here because they are the developer and they can create any covenant they want." (R. p. 1059-1061) (emphasis added) (ruling that the Resort has a right of first refusal, "[s]o your appeal will be based on that."). Within 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." (R. pp. 1063-1066). The Opinion correctly reversed the trial court's rulings, which were unclear, illogical, and improperly fact-laden on directed verdict.

Ignoring days of testimony and pages of exhibits, the Respondents announce in their Petition that the "only evidence at trial" showed that the Resort proved its affirmative defense—before even putting it on and without introducing a chain of title showing it possessed a real property right. However, as the Opinion correctly catalogues, the Resort's own witness, as well as the Resort's real estate lawyer, gave inconsistent and confused answers about the source of the purported right, and Appellants testified they did not know the Resort had a right of first refusal, because one had not come into play in a similar sale a few years earlier. (Op. pp. 4-7). The jury

could have inferred from this testimony and evidence that the Resort did not (in fact) possess the alleged right. Likewise, the jury could have inferred the same from the plaintiffs' testimony, as well as from the email exhibits in which questions about the right's existence are discussed, or even from looking at the Resort's Waiver Form.[12] (*See also,* R. pp. 1164-68). "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*, 350 S.C. 303, 308-309, 566 S.E.2d 529 (2002). The Opinion correctly applied this standard and reversed directed verdict.

B. Respondents' arguments about Mogil's testimony are a red herring.

Respondents' Petition, in addition to ignoring facts and wrongly requiring this Court to presume as a matter of undisputed fact that the Resort possesses a right of first refusal, focuses overmuch on one piece of evidence: the testimony of attorney Michael Mogil. Respondents claim that "the Court misapprehended this evidence and overlooked a critical evidentiary ruling on the issue." (Petition at p. 4). Respondents argue that because Mogil was not "disclosed or qualified as an expert" to give opinions on the law, he therefore could not "testify to any legal conclusions;" thus, Respondents say, Mogil's testimony was somehow insufficient to raise a question of fact as

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[12] 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. 967: 16-19). In contrast, when asked about the alleged right, Bittmint testified, "No. To be honest, we didn't know it exist." (R. p. 786: 3-20). Mogil testified, "I didn't agree with [Resort's claim to have the right of first refusal] and then I filed what's called a lis pendens," (R. p. 947:18-20), and "I looked at everything that Mr. Frazier referenced me to [about the alleged right], I just didn't agree." (R. p. 948:1-4). Meanwhile, the Resort produced no deed or document evidencing its claim to be a successor or assign of Lighthouse Beach Company. **The evidence within this footnote alone, taken in the light most favorable to Appellants, implicates questions of fact for the jury on the purported right.** At this phase of trial, at the close of plaintiffs' case in chief, a reasonable jury could have decided from plaintiffs' evidence that Respondents breached their contract/interfered with the purchase. "Essentially, this court must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the [directed verdict] motion under the facts as liberally construed in the opposing party's favor." *Ecclesiastes Prod. Ministries*, 649 S.E.2d at 494.

to the Resort's purported right of first refusal. (Pet. pp. 4-7). But Mogil testified on the ***facts***, including how the Resort's interference with the real estate transaction unfolded; his testimony (along with other evidence) supports the ***factual inference*** that the Resort does not actually have the right that it purported to exercise.

Whether the Resort possesses a right of first refusal over the Surf Shop property is a question of fact. "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); *see also 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). It was unnecessary for Mogil to give expert testimony on the law, at all, when it came to the factual question of whether the Resort possesses a preemptive right of first refusal over the Surf Shop Property.

The Respondents' Petition for Rehearing wrongly focuses on the question of whether the right of first refusal (if it in fact belongs to the Resort) is <u>*legally*</u> *enforceable*, which is a question of law that this Court declined to decide. The Petition argues that "Mogil never testified whether the right of first refusal was enforceable or applied . . . [t]hus, no reasonable inference—or any inference at all—regarding the validity or applicability of the right could be drawn from Mogil's testimony." (Pet. pp. 5-6). This is an inapposite argument: the question for the jury was whether the Resort *possessed* the right as a matter of fact—not whether it was valid or legally enforceable—and Mogil's testimony supported the factual inference that the Resort did not possess a right of first refusal over the Surf Shop Property. Among other things, as the Opinion finds, Mogil testified about his communications with the Resort's attorney, in which he asked the attorney, repeatedly, to show him that the Resort possessed a right of first refusal. After reviewing the Resort's email responses, Mogil stated, "I do not find any rights of first refusal which apply to the

commercial area of Sea Pines" and then, "I probably asked for more information or evidence that these generalized covenants from 40 or 50 years ago applied to this transaction;" and "I didn't agree with [the Resort's lawyer] and then I filed what's called a lis pendens . . . I looked at everything that [the Resort's lawyer] referenced me to, I just didn't agree. . . I asked [the Sellers' lawyer] not to close, saying we thought it was a breach of contract for her clients, to sell to Sea Pines instead of my clients." (R. pp. 935-49; 1164-69). As this Court rightly found, the jury could have inferred from this testimony—in addition to other evidence—that the Resort does not have a preemptive right to the Surf Shop Property.

Ultimately, Respondent's argument about Mogil's legal opinion has no bearing on the correctness of the Opinion. The Opinion does not decide, one way or the other, whether the alleged right was valid or enforceable as a matter of law; it decides only that the trial testimony and evidence, taken as a whole, implicated questions of fact for the jury which made directed verdict improper.[13] **No expert opinion on the *law* was necessary to implicate this <u>factual dispute</u>**—particularly in the phase of trial before the defendants had put on their case and submitted evidence showing possession, such as an assignment of the right. In sum, this Court correctly found that the evidence (of which Mogil's testimony was just one piece), taken in the light most favorable to Appellants, implicated factual questions for the jury.

2. The conflicting evidence on the exercise of an ambiguous preemptive right (*arguendo*, <u>if</u> the Resort holds it, and *arguendo* <u>if</u> it is not void) made directed verdict improper.

Respondents' arguments in Section 2 (Petition, pp. 8-11) again require the Court to presume as a matter of fact and law that the Resort holds (*habendum*) a real property preemptive right to the Surf Shop Property. It also requires this Court to presume that the right is not void

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[13] The enforceability and transferability of the right, which were Issues II and IV on appeal, are separate questions of law which this Court declined to decide. However, the answers would obviate much of this factual discussion. A vague, non-transferable, indefinite, generalized preemptive right over undefined property "on Hilton Head Island" is an unreasonable restraint on the alienation of real property as a matter of law, and if this Court rehears its Opinion, it should strike the purported right as void *ab initio*.

as indefinite, or in violation of the Rule against Perpetuities, or otherwise an unreasonable restraint on the alienation of real property. Stepping into a realm where Respondents' presumptions are true, *arguendo*, this Court should nonetheless reject Respondents' fact-intensive arguments, which urge this Court to take all the evidence, testimony, and inferences in the light most favorable to Respondents (the moving party), while ignoring conflicting evidence and credibility issues. This is the opposite of how the directed verdict standard works. The Opinion correctly applied the standard and reversed directed verdict because of conflicting evidence, credibility questions, and factual inferences—all of which are the sole province of the jury.

A. The 1973 Covenants are ambiguous and internally conflicting on what might be required to exercise the purported preemptive right. Yet, a reasonable jury could have found that notice of the offer price is the trigger.

Respondents argue for two pages about how factual differences between the terms of the Letter of Intent versus the terms of the Contract for Sale might really have mattered to the Resort, thereby underscoring nuanced facts, which were for the jury, as to exactly when and how and what the Resort came to know about an offer that might have triggered its purported right, if it has one. However, a reasonable jury could simply look at the 1973 Covenants and find that notice of the <u>price</u> is all that is required to start the thirty-day clock ticking.

Here are the words of the 1973 Covenants which the jury could reasonably consider:

> 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; . . .***
>
> . . . Should the Company fail or refuse . . . 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 to the covenants] **at a *price* not lower than that at which it was offered to the Company**.

(R. p. 1105, ¶ 19) (emphasis added). This language makes it abundantly clear that "the <u>price</u>" is what triggers the holder of the right's thirty days "to purchase said property at this price," and if

not purchased "at the offered price," then the owner can go on to sell the property so long as it is "at a price not lower than that at which it was offered to the" holder of the right. A reasonable jury could construe this language to mean that the Resort had thirty days from when the Sellers gave it notice of an offered price, on January 18, in which to exercise its purported right:

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, underlining added; *see also* R. pp. 1135-1147). Or, a reasonable jury could look at the January 31 Letter of Intent, which the testimony shows the Sellers provided to the Resort in early February, to find that the Resort did not timely exercise its right after notice of "the offered price":

> The parties have agreed that Bittmint, LLC will purchase the two units, being Lot 6 and Lot 8,for the sum of $580,000.00, provided that the units can be conveyed by Seller free and clear of all title encumbrances except Harbourtown Surf Shop's lease. and possession.

(R. p. 1150; pp. 893: 15 – 895: 12; 875: 4-9).[14] This evidence could permit a reasonable jury to conclude that the Seller offered the property to the Resort "**at the same *price*** at which the highest bona fide offer has been made for the property," thereby triggering the 30-day clock. The Opinion correctly held that a reasonable jury could find from this evidence and testimony that the alleged right was not correctly exercised, because the Resort did **nothing** for several months after notice

[14] Ignoring that testimony is evidence, Respondents pronounce that there was "no evidence" this letter of intent was provided to the Resort. However, Appellant testified:

> At that point [on agreeing to the $580,000 price], we were both [*i.e.* purchaser and seller] very excited because the whole time she wanted to sell us the property and we wanted to buy it and, finally, we agreed on the price and we hugged it out . . . so she asked me at that time that she needs to get something in writing to give to Sea Pines. . . and then she mentioned to me that she actually drop off the letter of intent to Sea Pines. So I knew they had it in their hands.

(R. pp. 893-895).

of the offer price.[15] *See, Ingram v. Kasey's Associates*, 340 S.C. 98, 531 S.E.2d 287 (2000) ("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.") (emphasis added).

B. The Respondents' argument exposes the reality that the purported right is ambiguous and unclear as to the mechanism for its exercise, <u>which is a big problem</u>.

However, Respondents seize on the word "terms," which appears, one time, in the 1973 Covenants' option provision. Respondents underline and bold the phrase, and then argue that the singular appearance of the word "terms" gave the Resort the ability to wait *for months* after it knew the offer price, before purporting to exercise the right, because it was ostensibly just waiting around to find out more about the terms. (Pet. p. 8, 10-11); (R. p. 1105, ¶ 19). But at trial, the Resort's own testimony suggested that it was itself not certain what steps the covenants require to trigger the alleged right, which is why, again, the Opinion correctly reversed directed verdict. (R. pp. 855: 23 – 856: 7; 1019 – 1022: 3). The provision's mechanism for exercise of the option is confusing and conflicting, as are the facts surrounding what the Resort knew, and from what source, and when, and how, and whether it correctly went about exercising the purported right.

Respondents' argument signifies two things: (1) at best, the 1973 Covenants' preemptive right language is ambiguous because reasonable minds could disagree as to how it should be exercised (price? terms? both? in writing? who provides notice?), and so the Opinion correctly decided that jury questions exist that make directed verdict improper; <u>or</u> (2) the 1973 Covenants' preemptive right language is unenforceable as a matter of law, because it is indefinite and it unreasonably restrains the alienability of real property. Either way, it is evident from

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[15] 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 later. (R. p. 843:18-20; pp. 752:22 - 753:5).

Respondents' arguments that the 1973 Covenants are 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 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?

The facts of this case, in which the parties have now litigated for eight (8) years (since 2017) about the construction and operation of this old, vague, uncertain, imprecise, indefinite alleged preemptive right over "lands located on Hilton Head Island," are precisely ***why*** South Carolina Courts strictly scrutinize such rights, and ***why*** the law prohibits the enforcement of unreasonable restraints on the alienation of real property as against public policy. *Clarke v. Fine Housing, Inc.*, 438 S.C. 174, 185, 882 S.E.2d 763, 769 (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."); *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.'. . . ."); *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.").

The lack of certainty as to the mechanism for exercising and interpreting the alleged right in the 1973 Covenants renders the covenant void as a matter of law, which is an additional sustaining ground for the Opinion. **If this Court is considering a rehearing, then it should hold the purported right to be unenforceable as a matter of law.** *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.").

In any event, the Opinion correctly reversed the grant of directed verdict. ***If*** the purported preemptive right is valid and enforceable, then it was for the jury to decide whether the Resort properly exercised it, according to its ambiguous terms, based on the conflicting testimony and evidence surrounding the transaction.

3. Respondents' "independent grounds" are built on shifting sand.

After arguing for several pages that the signed letter of intent, which was submitted to the Resort by the Sellers, was nonetheless insufficient to trigger the tolling of the 30-day clock (apparently because it bore the signature of only one Seller and did not include enough terms, if the inclusion of terms is required) . . . Respondents now argue in Section 3 of the Petition that the Resort's own ***unsigned***, xeroxed Waiver Form, which includes no terms whatsoever and was submitted by a party with no ownership over the property, nonetheless "created a separate offer that Sea Pines accepted." (Pet. p. 11). This Court should not countenance this cursory argument, which is legally incorrect and if nothing else accentuates factual questions that should have gone to the jury. Among many other ambiguities within the "Waiver Form," the document (a) is a vague, boilerplate form that is not binding in any regard, (b) has an unclear 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?); (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. Likewise, Respondents' argument that Sellers failed to procure

"the waiver"—in breach of the contract—does nothing more than underscore that there were questions of fact on contract, performance, and breach, which belonged to the jury and made directed verdict improper.

4. Appellants abandoned nothing on appeal when they appealed the directed verdict ruling that went "to the entire case."

Last, Respondents argue that Appellants abandoned claims on appeal. (Pet. pp. 12-13). This is wrong. Appellants appealed the trial court's singular, fundamentally erroneous, fact-centric directed verdict decision, made mid-way through a jury trial, which wrongly was based on an alleged (yet factually and legally unproven) right of first refusal, and which the trial judge himself explained dispensed with the entire case and every cause of action. (R. pp. 1059-1066). The trial court did not parse out his rulings, nor did he otherwise explain how the holding (quoted at length, *supra*) eliminated each and every claim and cause of action. The court simply announced: "**It's over. All right. I'll grant the motion for a directed verdict.**" (R. p. 1059). When Appellants requested clarification (which they did, multiple times), the court explained: "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]. . . . So your appeal will be based on that. Fair enough?" (R. p. 1060-61).

Respondents are wrong to demand that Appellants do something more than appeal the sole basis given by the judge for its grant of directed verdict—which went to the entire case. "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*, 649 S.E.2d at 497. Because there were numerous factual issues for the jury, the Opinion correctly reversed the erroneous grant of directed verdict and remanded for a new trial on the entire case.

CONCLUSION

For the reasons set forth herein, as well as in Appellants' Brief and Reply Brief, this Court should not rehear its Opinion. However, if it is inclined to do so, Appellants respectfully request

that the Court rule on Issues II and IV of their appeal, and hold that the purported right it unenforceable as a matter of law, which additionally sustains reversal of the trial court.

Respectfully submitted,

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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.

PROOF OF SERVICE

I certify that on October 15, 2025, I served the Appellants' Return to Petition for Rehearing on all counsel of record by sending a copy of the same to their email addresses of record with AIS:

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Charleston, South Carolina
October 15, 2025