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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

Sup. Ct. Case No. 2026-000117

Bittmint LLC and Harbour Town Surf Shop LLC.....Respondents,

v.

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

RESPONDENTS' RETURN
TO PETITION FOR A WRIT OF CERTIORARI

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As Petitioners say, trial is where the rubber hits the road. But, in this case, the automobile was still sitting in the driveway—and the jurors were still kicking its tires—when the trial judge granted directed verdict on fact-intensive claims and defenses, mid-way through this jury trial. The Court of Appeals correctly applied the directed verdict standard to find that the trial judge was wrong to grant directed verdict on contested factual questions.

There is nothing special or novel or compelling about the Court of Appeals' Unpublished Opinion No. 2025-UP-273 (the "Opinion"), of the sort which might propel this Court to consider it under Rule 242, SCACR. The unanimous Opinion demonstrates a careful review of the lengthy trial record by the Court of Appeals. The Opinion includes nine single-spaced pages devoted to the disputed testimony and evidence presented at trial. To these conflicting facts, the Opinion applies the established standard of review: "If the evidence at trial yields more than one reasonable inference or its inference is in doubt, the circuit court must deny the motion for directed verdict . . . When ruling on a motion for a directed verdict, the [circuit] court is concerned with the existence or non-existence of evidence, not its weight." Op. at p. 10, *quoting Kunst v. Loree*, 424 S.C. 24, 38, 817 S.E.2d 295, 302 (Ct. App. 2018) and *State v. Condrey*, 349 S.C. 184, 190, 562 S.E.2d 320, 323 (Ct. App. 2002).

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. It goes without saying that the application of the recognized standard of review to the evidence within a record on appeal does not involve a federal question, and nor does it directly involve a substantial constitutional issue. There was no dissent from the Court of Appeals' detailed and well-reasoned Opinion. And Petitioners do not argue that the Opinion applied the *wrong* standard of review, nor that the Opinion actually conflicts (as a matter of law) with a prior

decision by this Court.

Instead, the thrust of the Petitioners' argument is that the Court of Appeals misapprehended the disputed facts in the record, or gave certain evidence too much weight, or erred as to the credibility of certain witnesses. First, an asserted misapprehension of facts by the Court of Appeals is not grounds for certiorari review by this Court. *See* Rule 242(b), SCACR. Second, the Petitioners' own differing view of the facts and evidence—on which they focus their argument—simply throws into stark relief the reality, recognized by the Court of Appeals, that directed verdict was improper because disputed facts are for the jury.

This Court should deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

This is an appeal from the erroneous grant of directed verdict to Petitioners, which cut short a jury trial. The case involves a real estate purchase contract between Respondent Bittmint, LLC ("Bittmint") and Petitioners Lynda H. Johnson and Charles S. Giannone ("Sellers") for the purchase of real property (the "Surf Shop Property") in Sea Pines Plantation on Hilton Head Island, South Carolina. (R. pp. 1150; 1151-1153). The sale fell apart when Petitioner Sea Pines Resort LLC ("Resort") purported to exercise an obsolete right of first refusal, buried in a declaration made by a long-defunct developer.[1] (R. pp. 1164, 1165, 1166-

[1] The (1) invalidity of these vague, ambiguous, indefinite rights (or "options to purchase")—described as pertaining to property "on Hilton Head Island"—which options may have once been held by a now-extinct, long-ago-bankrupt developer, as well as the (2) unenforceability of a moth-eaten right of first refusal (if it is not void) almost 50 years later by Petitioner Resort, were Issues No. II and IV on appeal. *See* Appellants' *Final Brief* and *Final Reply Brief*, filed with the Court of Appeals on October 4, 2023, and fully incorporated herein by reference.

The Court of Appeals declined to decide Issues II and IV. *See* Opinion at 12-13 ("We decline to address Bittmint's remaining issues on appeal in light of our reversal of the circuit court's grant of directed verdict."). Nonetheless, those issues, which raise questions of law, are additional sustaining grounds for the Court of Appeals' Opinion.

68). The Sellers ultimately conveyed the property to the Resort, in violation of their purchase and sale contract with Bittmint. (R. p. 1179-1182).

In a verbal ruling characterized by confusion and improper factual assumptions, the trial judge decided that the Petitioner Resort holds and can enforce an alleged right of first refusal, despite that the Resort failed to submit actual evidence showing—let alone *proving as a matter of law*—that it holds such a right. Based entirely on its incorrect determination that the Resort possesses the former right as a matter of law, the trial court wrongly directed a verdict in Petitioners' favor as to each of Respondents' causes of action. (R. pp. 1048-1066). However, the Court of Appeals found that the facts in evidence at trial could have led a reasonable jury 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.

I. Procedural History

In 2018, Bittmint and Harbour Town Surf Shop LLC (collectively, "Respondents" or "Bittmint" or "Plaintiffs") filed an Amended Complaint against Petitioners Sellers and the Resort, alleging, *inter alia*, causes of action for Breach of Contract, Interference with Contractual Relationship, and to Set Aside Deed. (R. pp. 51-63, 90-108). Petitioners filed answers, which hinged on their defense that any alleged interference with contract, or breach of contract, was justified by the Resort's exercise of a right of first refusal over the property at issue. (*See* R. pp. 118-126, ¶¶ 11, 18, 58) (alleging lawfulness as an affirmative defense and asserting, "such contract was subject to [Resort]'s legal right of first refusal.").

The parties submitted cross-motions for summary judgment, all of which were denied

on January 13, 2020. (R. pp. 39, 42). Petitioner 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. At the outset of the trial, the trial judge denied motions in limine pertaining to the purported right of first refusal, 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.

However, after three days of trial, at the close of Plaintiffs' evidence, the trial judge verbally granted a directed verdict on all causes of action in favor of the defendants (Petitioners, here). No written order was issued. The trial judge's verbal order is on pages 1048 - 1066 of the Record on Appeal. (R. pp. 1048-1066).

Bittmint filed a motion for reconsideration and to alter or amend order on March 11, 2022 (R. pp. 455-673); Petitioners filed opposition on March 28, 2022 (R. p. 681) 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).

Respondents timely filed their notice of appeal on June 22, 2022. Subsequently, on September 27, 2022, the circuit 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).

Within a detailed Opinion, which focuses on conflicting evidence in the Record, the Court of Appeals reversed the trial court's grant of directed verdict and award of attorneys'

fees. Petitioners moved the Court of Appeals for Rehearing, which the Court denied on December 18, 2025. Petitioners now ask this Court to hear this fact-intensive dispute.

II. Factual Background

The Record on Appeal for this case is over 1,200 pages long. Within their Petitions' Statement of the Case, Petitioners extract three (3) pages of soundbites from the testimony of six witnesses and thirty-six exhibits and then proclaim those cherry-picked excerpts to be "undisputed" or "understood." (Petition at 3-5). Respondents incorporate herein the Opinion's "Facts," as well as the "Statement of Facts" from within Appellants' Brief to the Court of Appeals, which each conflict with the Petitioners' version of what transpired. The contradictory facts flushed out by these differing accounts are alone sufficient to demonstrate the propriety of the Opinion's decision to reverse directed verdict. Testimony and evidence, especially when they conflict or involve credibility determinations, are for the jury. This was a jury trial.

Not only was this a jury trial, but it was a jury trial about breach of a real estate purchase contract between Bittmint and Sellers, and interference with that contract by Resort. To survive directed verdict on those its claims, Bittmint needed to show evidence of a contract, evidence of its breach, evidence of interference with that contract, and evidence of harm suffered as a result. Remarkably, Petitioners do not contend that Bittmint did not submit sufficient evidence of the elements of its claims. Instead, Petitioners argue that Bittmint did not anticipatorily *disprove* Petitioners' affirmative defenses, before Petitioners even put on their evidence.

Petitioners' affirmative defense was that the Resort had the right to disrupt the Sellers' sale to Bittmint based on an obsolete right of first refusal. The question of whether the Resort

actually possesses the right is a factual question, and it was disputed. In a nutshell, the Resort claims it holds the right, and the Respondents claim that it does not. On the other hand, the questions of whether the right is legally valid, and whether the Resort can legally enforce it, are questions of law. This distinction between questions of fact and questions of law is important, because (as discussed below) the Petitioners try to argue that the Court of Appeals was wrong to "mention" factual testimony from a lawyer (Bittmint's closing attorney) as to the factual issue of whether the Resort possesses a right of first refusal. (Pet. at 9).

Context on the Alleged Preemptive Right

Within their Petition, the Petitioners package the Resort's possession of a right of first refusal as if it were a *fait accompli*, baldly proclaiming that "all parties understood [Resort] possess a right of first refusal for commercial property sold on Hilton Head Island[2] . . .". (Pet. at 3-4; n. 3). *Mais*, *au contraire*. At a minimum, the Resort's unproven chain of title was a disputed question of fact mid-way through jury trial. At a maximum, the purported preemptive right is invalid and void as a matter of law. This is because the alleged "right of first refusal" that the Resort claims to possess is an old declarant's right over uncertain, undefined property, which was reserved by a developer entity that dissolved back in 1975. The Resort claims it can revive and exercise the right in the present day, notwithstanding its lack of proven connection to the old developer.

In 1973, the Lighthouse Beach Company recorded its Declaration of Rights,

[2] This sentence in the Petition pushes the very envelope of realism. First, Bittmint did not "understand" and nor did it accept that the Resort holds a preemptive right over the Surf Shop Property; instead, the driving force of Bittmint's entire lawsuit was that the Resort held no such right, as further discussed herein. Second, the notion that the Sea Pines Resort holds a preemptive right over "commercial property sold on Hilton Head Island" is legally nonsensical and the core reason that the right fails as a matter of law as an indefinite covenant and an unreasonable restraint on the alienation of real property. Hilton Head Island is approximately 44,260 acres in total size.

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 *et seq.*). 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, alternatively, to-be-owned, by the Lighthouse Beach Company. (R. p. 1095). Buried deep within the old 1973 Declaration is the right of first refusal at issue in this appeal, which Resort claims now to possess:

> 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) (yellow underline emphasis added).

The Lighthouse Beach Company dissolved in 1975, just two years after making its 1973 Declaration. (R. p. 1113). Then, 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). 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,[3] pertaining to which property, were purportedly assigned to the Sea Pines Plantation Company. 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). And, thereafter, the Sea Pines Plantation Company (*i.e.*, 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. (R. p. 1223).

(Decades Passed).

Petitioner Resort is a Virginia limited liability company. It arrived on the Hilton Head Island scene in 2006—which was 30 years after Lighthouse Beach Company dissolved, and 20 years after Sea Pines Plantation Company went bankrupt. (R. p. 755: 4-5, p. 965: 1, p. 972: 12-13). **Although the Resort introduced no evidence at trial showing as much**, the Resort baldly claims that it can exercise the dissolved Lighthouse Beach Company's 1973-vintage preemptive rights over "commercial property" "on Hilton Head Island."

Based on its professed claim, the Resort has gone about creating 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:

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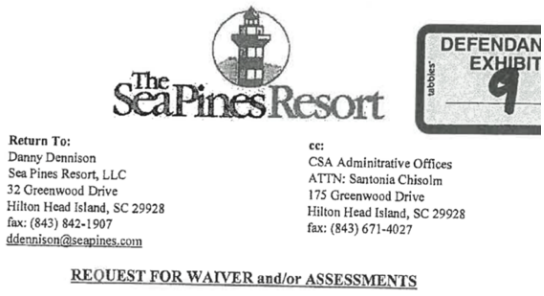
[3] The 1977 Assignment vaguely refers to "diverse documents" as the source of the right. (R. p. 1113).



(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 the Resort will mail "waivers" "to the closing attorney." (R. p. 1282). In fine print at the bottom, the Waiver Form contains language saying that the Resort can purchase property, if it is offered to the Resort. (R. p. 1282). This self-serving form document—generated and xeroxed by the Resort itself—was the sole exhibit introduced at trial by the Resort as "evidence" that it possesses the defunct old developer's preemptive rights.

Context on the Disrupted Sale

Meanwhile, 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. For years, they leased their storefront, paying approximately $55,000/year in rent, but their goal was to someday buy the property (the "Surf Shop Property"). (R. pp. 764-767, 771, 781: 10-15; 1119). Bitton and Mintz formed Bittmint LLC ("Bittmint")[4] for the purpose of buying real estate in Harbour Town.

In 2016, the owner of the Surf Shop Property 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,

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

Sellers and Bittmint spent months 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, the Sellers 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 potential 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 never made 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, as the Sellers explained, Sellers would have something in writing to give to the Resort. (R. pp.

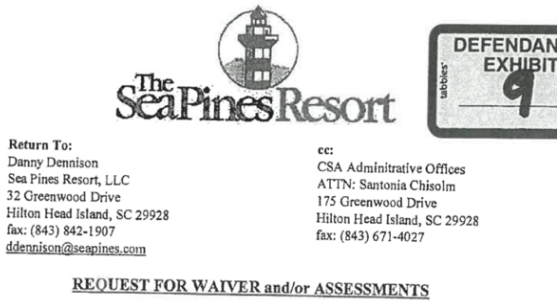
893: 7 – 895:12). Indeed, in early February of 2017, Sellers took the Letter of Intent to Respondent Resort. (*Id.*; R. pp. 894: 22 – 895: 12; 875: 4-9). The Resort evaluated the price and terms—in fact it had been doing so *for months* at this point—including Bittmint's offer price, existing lease terms, 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" the Surf Shop Property 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 the "waivers."

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. So, in an effort to speed up the closing process, and 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).

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, through its real estate attorney Michael Mogil, 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 by Mogil, the Resort 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 over 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, Respondent 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 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.

ARGUMENT

The Court of Appeals correctly held that that the trial court improperly weighed and decided disputed facts when it granted directed verdict mid-way through this jury trial.[5]

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

Petitioners' argument in Issue I of its Petition ignores reams of testimony and exhibits to claim there was "no conflicting evidence" mid-way through this jury trial. Petitioners' argument requires this Court to ignore Plaintiffs' case entirely and presume as a matter of fact and law that defendants' affirmative defenses would be utterly impervious (although they had not yet been presented). The purported right of first refusal was Petitioners' ***defense*** to Plaintiffs' case, yet Petitioners argue that the Resort's verbal claim to hold such a right is an absolute truth, which the Respondents were obligated to anticipatorily *disprove*, even before the Resort put on its defense or introduced documentary evidence that it possesses a

[5] For the reasons herein, and in the Opinion, and in Bittmint's appellate briefs to the Court of Appeals, this Court should deny Petitioners' Petition for a Writ of Certiorari because the Opinion correctly reversed directed verdict. However, if this Court is inclined to hear this case, Bittmint respectfully requests that it hear and rule on the questions of law that were 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 to the Court of Appeals.

real property preemptive right.[6] But, that is not how a trial works, and Petitioners' argument is emblematic of why directed verdict at the close of Plaintiffs' evidence was improper.

Petitioners ignore all other testimony and exhibits and dwell solely on the testimony of closing 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, Petitioners 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. 9-13). This argument by Petitioners ignores that Mogil could—***and did***—testify on the facts, and his purported "legal conclusions," which the Petition acknowledges he did not ever even provide, 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 its case in chief Bittmint introduced ample evidence to support its 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

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[6] Throughout this case, Petitioners have wrongly insisted Bittmint 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."). That said, Bittmint certainly argued that the preemptive right was invalid as a matter of law. However, the trial judge held it was a fact question for the jury . . . and then improperly decided the fact question himself.

to the Resort, in breach of the contract;[7] (4) Resort knew about and procured the breach of the Sale Contract;[8] and (5) Bittmint thus lost the benefit of its bargain, $500/month in rent from an existing tenant,[9] 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*, 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 Petitioners' arguments to this Court—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

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

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

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

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 Petitioners now announce in their Petition that the "only evidence at trial" showed that the Resort proved its affirmative defense—that it holds (*habendum*) and can exercise a right of first refusal—before even putting on its defense 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 Bittmint's members 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. at 4-7). The jury could have inferred from this testimony that the Resort did not (in fact) possess the alleged right. Likewise, the jury could have inferred the same from Bittmint's 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.[10] (*See also,* R. pp.

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[10] 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 Plaintiffs, 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 Defendants 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.

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. This Court has no need to review the Opinion.

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

The Petition focuses overmuch on only one piece of evidence: the testimony of attorney Michael Mogil. Petitioners 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, Petitioners say, Mogil's testimony was somehow insufficient to raise a question of fact as to the Resort's purported right of first refusal. (Pet. at 9-13). This is so, argue Petitioners, because "[Mogil] offered no facts contradicting the clear and unambiguous terms of the right of first refusal in the 1973 Covenants that would create a jury issue as to whether the right existed. . . ". (Pet. at 11).

Petitioners' argument simply does not make sense. Mogil testified on the facts, not on the law, including how the Resort's interference with the real estate transaction unfolded. His testimony (along with other evidence) supports the ***factual inferences*** that the Resort's bald, unsupported claim to possess the right is not credible, and that the Resort does not actually possess the right of first refusal that it claimed it could exercise.

Whether the Resort possesses a right of first refusal over the Surf Shop property is a question of <u>fact</u>—and it was the Resort's burden to prove its possession with a chain of title, not Bittmint's. "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 actually possesses a preemptive right of first refusal over the Surf Shop Property—particularly when the only evidence that the Resort had put forward (mid-way through trial) was its own xeroxed "Waiver Form" that it hands out to real estate agents on Hilton Head Island.

The Petition wrongly focuses on the question of whether the right of first refusal (if it in fact belongs to the Resort) is legally valid and enforceable, which is a question of law that the Court of Appeals declined to decide.[11] The Petition argues that "Mogil offered no opinion [contradicting the enforceability of the 1973 Covenants] . . . [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. at 11). 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 Court of Appeals' Opinion found, 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. The Resort couldn't do it. After

[11] For all the reasons why the alleged preemptive right is invalid and unenforceable, as a matter of law, please see Bittmint's briefing to the Court of Appeals.

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 the Opinion rightly held, the jury absolutely could have inferred from this factual testimony—in addition to all the other evidence—that the Resort does not possess a preemptive right over the Surf Shop Property.

Ultimately, Petitioners' argument about Mogil's legal opinion has no bearing whatsoever 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.[12] No expert opinion on the *law* was necessary to implicate this factual dispute. This Court should deny the Petition for a Writ of Certiorari.

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

Petitioners' arguments in Issue II (Petition, pp. 14-17) again wrongly require the Court to presume as a matter of fact and law that the Resort holds (*habendum*) a real property

[12] The enforceability and transferability of the right, which were Issues II and IV on appeal, are separate questions of law which the Court of Appeals declined to decide. But 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 hears this case, it should strike the purported right as void *ab initio*.

preemptive right over the Surf Shop Property. It also requires this Court to presume that the right is not void as an unreasonable restraint on the alienation of real property. However, stepping into a realm where Petitioners' presumptions are true, *arguendo*, this Court should nonetheless reject Petitioners' fact-intensive arguments, which urge this Court to take all the evidence, testimony, and inferences in the light most favorable to Petitioners (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 Declaration is 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.

Petitioners 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 Declaration of Covenants (if not void) and find that notice of the price is all that is required to start a thirty-day clock ticking.

Here are the words of the 1973 Declaration which the jury reasonably could have considered, if the trial judge had not wrongly invaded its province:

> 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 price" 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: Bob 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 Letter of Intent, which the testimony shows Sellers provided to the Resort in 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).[13] This evidence could permit a reasonable jury to

[13] Ignoring that testimony is evidence, Petitioners pronounce that there was "no evidence" this letter of intent was provided to or received by the Resort. However, Bittmint 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

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 that the alleged right was not correctly exercised, because the Resort did **nothing** for several months after notice of the offer price.[14] *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 Petitioners' 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, Petitioners seize on the word "terms," which appears, one time, in the 1973 Covenants' option provision. On page 14, Petitioners 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. 14); (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

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> 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).

[14] 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).

what the Resort knew, and from what source, and when, and how, and whether it correctly went about exercising the purported right.

Petitioners' argument signifies two things: (1) at best, the 1973 Declaration's 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; or (2) the 1973 Declaration's 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 Respondents' arguments that the 1973 Declaration is 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 nine (9) 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.'. . . .").

The lack of certainty as to the mechanism for exercising and interpreting the alleged right in the 1973 Declaration renders the preemptive right void as a matter of law, which is an additional sustaining ground for the Opinion. **If this Court is considering hearing this case, 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.

CONCLUSION

For the reasons set forth herein, as well as in the Court of Appeals' Opinion and the briefing below, this Court should deny Petitioners' request for review of the Court of Appeals' decision. However, if this Court is inclined to grant the request, Respondents respectfully request that the Court rule on Issues II and IV of their appeal below and hold that the purported preemptive right is unenforceable as a matter of law, which additionally sustains reversal of the trial court.

Respectfully submitted,

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