

STATE OF SOUTH CAROLINA  
 COUNTY OF YORK  
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-46-870

RECEIVED

OCT 25 2016

Allen S. McCombs and Benjamin James Russell.

Edward R. Kelly and Deirdre O. Kelly

SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: William M. Brice, III	Attorney for : <input type="checkbox"/> Plaintiff	<input checked="" type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRCF;  Rule 41(a), SCRCF (Vol. Nonsuit);  Rule 43(k), SCRCF (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRCF;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk : Summary Judgment for Defendants

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Allen S. McCombs and Benjamin James Russell	Edward R. Kelly and Deirdre O. Kelly	\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

*W. M. Brice*  
 W. M. Brice, Circuit Court Judge

3063  
 Judge Code

9/29/16  
 Date

**For Clerk of Court Office Use Only**

This judgment was entered on **September 30, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **September 30, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

Brian Scott McCoy 378 E. Main St. Rock Hill, SC 29730

William M. Brice III PO Drawer 300 York, SC 29745  
N. Beth Ramsey Faulkner PO Drawer 1030 York, SC 29745

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

\_\_\_\_\_  
David Hamilton - Clerk of Court

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA  
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS  
CASE NO. 2016-CP-46-870

EDWARD R. KELLY and DEIRDRE O.  
KELLY,

Plaintiffs,

vs.

ALLEN S. McCOMBS and BENJAMIN  
JAMES RUSSELL,

Defendants.

ORDER FOR  
SUMMARY JUDGMENT

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OCT 25 2016

SC Court of Appeals

This matter came before me on September 7, 2016, upon Defendants' Motion for Summary Judgment and Motion to Dismiss.<sup>1</sup> Present and representing the parties at the hearing were: Brian S. McCoy for Plaintiffs; W. M. Brice, III, for Defendant Benjamin James Russell; and, Elizabeth R. Faulkner for Defendant Allen S. McCombs. Based on the record before the court, the applicable law, and the arguments of counsel, I make the following findings and conclusions.

**STANDARD FOR SUMMARY JUDGMENT**

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRCF. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App. 1997).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874

<sup>1</sup> As the parties have all submitted affidavits and documents in support of their respective positions, I am treating the matter as a motion for summary judgment, and applying the standard of review for such motions.

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DAVID J. HARRISON  
CLERK OF COURT

(2001); *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). "Summary judgment should be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). Summary judgment is inappropriate where further inquiry into the facts of the case is necessary to clarify the application of law. *Gadson v. Hembree*, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005); *Wogan v. Kunze*, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct. App. 2005); *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 542, 608 S.E.2d 440, 447 (Ct. App. 2004).

### **FACTUAL BACKGROUND**

This case involves a 37-acre tract of real estate located in York County ("the Property"), which was part of a 100+-acre tract owned by Plaintiffs. Henry L. McCombs ("Henry") wanted to purchase part of the 100+-acre tract, which adjoined his property.

In 1995, Plaintiffs contracted to sell the 37-acre tract to Henry. In 1996, the transaction was completed, and Henry received fee simple title to the tract. As part of the transaction, Plaintiffs reserved a first right of refusal ("FROR") in their deed to Henry. The FROR simply stated: "[t]he grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion of the same."

Defendants assert that on at least two occasions prior to 2001, Henry informed Plaintiffs, pursuant to the FROR, that he had received, or might receive, an offer to purchase the Property, and asked if Plaintiffs would match the price of the offer. Plaintiffs expressed their interest in exercising the FROR; however, Henry never provided either offer, and no sale of the Property occurred.

In April, 2012, more than sixteen years after the sale to Henry, Henry deeded the property to his son, Defendant Allen S. McCombs ("Allen"), by quitclaim deed for a consideration of "... \$5 and love and affection." Plaintiffs were not informed of the transfer, and assert that they were not aware of it until early 2016. Henry died in June, 2015. Subsequently, in November, 2015, more than nineteen years after the sale to Henry, Allen sold the Property to Defendant Benjamin James Russell ("Russell") for \$125,000.00. Allen did not notify Plaintiffs of the proposed sale.

### **PROCEDURAL BACKGROUND**

Plaintiffs filed this action on March 21, 2016. They seek rescission of the sale to Russell, and enforcement of the FROR, so that they can exercise their asserted right. They also seek damages against both Defendants as an alternative remedy. Defendants filed a Motion for

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Summary Judgment and a Motion to Dismiss Plaintiff's claims.

### DISCUSSION

Based on the record presented, I make the following conclusions of law.

"The construction of a clear and unambiguous deed is a question of law for the court." *Bennett v. Investors Title Ins. Co.*, 370 S.C. 561, 570, 635 S.E.2d 660, 665 (Ct.App. 2006), quoting *Hammond v. Lindsay*, 277 S.C. 182, 184, 284 S.E.2d 581, 582 (1981). The role of the court is to ascertain the intent of the grantor from the deed as a whole. *Wayburn v. Smith*, 270 S.C. 38, 239 S.E.2d 890 (1977). That underlying principle is subject to the *caveat* that the grantor's intention must not contravene other established principles of law. *Id.*

Historically, South Carolina has disfavored clauses in deeds that have the effect of diminishing a conveyance of fee simple title. "An attempt to convey an estate in fee simple and deprive the purchaser of the incident of ownership is not effective in law." *See Sandford v. Sandford*, 106 S.C. 304, 306, 91 S.E. 294, 295 (1917). A second principle is that any restraint on alienation in the form of a right of first refusal that is not specific in all required elements runs counter to the general rule in this state that fee simple ownership carries with it the ability to convey freely, with few restrictions. *See, e.g., Shealy v. South Carolina Elec. and Gas Co.*, 278 S.C. 132, 293 S.E.2d 306 (1982); *Stylecraft, Inc. v. Thomas*, 250 S.C. 495, 159 S.E.2d 46 (1968); and, *Sandford v. Sandford*, 106 S.C. 304, 91 S.E. 294 (1917).

#### **I. FROR as vague and indefinite.**

The initial issue presented is whether the FROR, as written, is so vague and indefinite as to be unenforceable. A right of first refusal to repurchase property held by a grantor is a non-vested, contingent interest, because the grantee may choose never to sell the subject property. *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (1997). As such, it represents a restraint on alienation, but is enforceable so long as both the price term, and the time within which the right may be exercised are reasonable. 61 Am.Jur.2d *Perpetuities and Restraints on Alienation* § 110 (2002).

"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." Restatement (Third) of Property, *Servitude* § 3.4 comment (f) (2000, update to June, 2016). According to the record here, the purpose of the restriction in this case was primarily to retain the property in the family, which is a legitimate purpose. By reasonable inference, the language

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contained in the operative deed dictates that the price to be paid in repurchasing the Property would be the same as the sale price contained in the offer from a potential third party purchaser. However, the procedures for exercising the right of first refusal are not specifically stated in the grant itself.

In the present case, the FROR contains no specification for giving notice of a third party's offer to purchase, no specification of time after notice within which the FROR must be exercised by Plaintiffs, no specification of the time within which Plaintiffs must pay the consideration for repurchase, or any other terms by which the reasonableness of the servitude imposed by the FROR may be assessed. Nor are any such procedures otherwise specified in the deed to Henry. Thus, I conclude that on the facts of this case, the FROR is an unreasonable restraint on alienation, and is unenforceable.

## II. Enforcement of FROR.

The FROR as contained in the deed to Henry states: "[t]he grantors reserve unto themselves, their heirs and assigns a first right of refusal as to the sale of the above described property or any portion of the same." On its face, the FROR contains no language making it binding on the heirs or assigns of Henry. This is in contrast to a previous provision of the deed placing a restriction on the property pertaining to mobile homes. That provision states:

The above described property is also subject to the restriction that neither the *grantee nor any of his successors or assigns or heirs* will place more than one mobile home on the above described property for a period of 45 years, that being from August 29, 1995 until August 29, 2040 and this restriction is as to the above described property as well as the property from which the above was carved. (Emphasis added.)

This restriction is clearly made binding on the successors in title to Henry for a definite period. No such intent is expressed, or can be reasonably inferred, from the language of the FROR. Thus, upon Henry's conveyance of the property, or upon his death, the FROR would expire, and have no effect going forward.

After Henry conveyed the subject property to Allen in 2012, some sixteen years after he received title, the FROR was no longer binding. Even if it is assumed that the donative transfer to Allen would not operate to extinguish the FROR, as argued by Plaintiffs, Henry's death would. His heirs would not be bound by its provisions, as the language of the FROR simply did not contain any such provision or language.

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Thus, I conclude that the FROR was enforceable only between Henry and Plaintiffs, and expired either upon Henry's conveyance to Allen, or Henry's death.

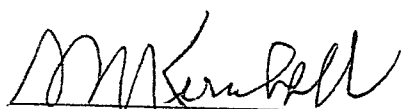
**CONCLUSION**

The right of first refusal in this case constitutes an unreasonable limitation upon the power of alienation, it is therefore violative of the applicable case law and public policy of this state, and is unenforceable. See *McCravey v. Otts*, 90 S.C. 447, 452, 74 S.E. 142, 143 (1912); and, *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct.App.1984). Further, the right of first refusal was binding only as between Plaintiffs and Henry McCombs, as it contained no language making it binding on Henry's heirs and assigns.

Therefore, it is ordered that Defendants' Motion for Summary Judgment be granted, and Plaintiffs' Complaint be dismissed with prejudice.

AND IT IS SO ORDERED.

September 28, 2016

  
S. Jackson Kimball  
Special Circuit Court Judge  
York County

