

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

---

Case No. 2015-CP-10-03038

---

RECEIVED  
MAY 08 2018  
SC Court of Appeals

Barry Clarke,

Respondent/Appellant,

v.

Fine Housing, Inc. and RRJR, LLC,

Defendants,

Of which Fine Housing, Inc. is the

---

Appellant/Respondent.

**APPELLANT'S FINAL BRIEF OF APPELLANT/RESPONDENT**

---

W. Cliff Moore, III  
Kirby D. Shealy III  
Adams and Reese LLP  
Post Office Box 2285  
Columbia, S.C. 29202  
P: 803-254-4190  
Attorneys for Appellant/Respondent

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....1

ARGUMENT.....2

FACTS .....2

STANDARD OF REVIEW .....8

    I. The right of first refusal is not an enforceable interest in real estate.....9

        A. The Trial Court misstated Fine Housing’s argument. ....9

        B. The Trial Court relied on reasoning not supported by the precedent it cited. ....16

        C. The Trial Court failed to make findings necessary to determine the enforceability of the claimed Right of First Refusal.....18

    II. Clarke waived the right to enforce the Right Of First Refusal.....19

    III. The Doctrine Of Laches precludes Clarke’s enforcement of the Right Of First Refusal. ....24

    IV. Clarke is equitably estopped from asserting the Right Of First Refusal. ....27

    V. The Trial Court’s calculation of the price at which to exercise the Right of First Refusal is not supported by the record.....29

CONCLUSION .....30

## TABLE OF AUTHORITIES

### Cases

<i>Boyd v. Bell South Tel. &amp; Tel. Co., Inc.</i> , 369 S.C. 410, 633 S.E.2d 136 (2006).....	28
<i>Chambers of S.C., Inc. v. County Council of Lee County</i> , 315 S.C. 418, 434 S.E.2d 279 (1993).....	26
<i>Crosswell Enters. v. Arnold</i> , 309 S.C. 276, 422 S.E.2d 157 (Ct. App. 1992) .....	11
<i>Ecclesiastes Production Ministries v. Outparcel Associates, LLC</i> , 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007) .....	16, 17, 18
<i>Hallums v. Hallums</i> , 296 S.C. 195, 371 S.E.2d 525 (1988) .....	26
<i>Hallums</i> , 296 S.C. at 199, 371 S.E.2d at 528.....	26
<i>Holmon v. City of Orangeburg</i> , 118 S.C. 361, 110 S.E. 674 (1922).....	8
<i>Ingram v. Kasey’s Assocs.</i> , 340 S.C. 98, 531 S.E.2d 287 (1999) .....	8
<i>Janaski v. Fairway Oaks Villas Horizontal Prop. Regime</i> , 307 S.C. 339, 451 S.E.2d 384 (1992).....	20
<i>Kelley v. Kelley</i> , 368 S.C. 602, 629 S.E.2d 388, 392 (Ct. App. 2006) .....	27
<i>MailSource, LLC v. M. A. Bailey &amp; Assocs.</i> , 356 S.C. 363, 588 S.E.2d 635 (Ct. App. 2003) .....	30
<i>McCravey v. Otts</i> , 90 S.C. 447, 74 S.E. 142 (1912) .....	11
<i>Minter v. GOCT, Inc.</i> , 322 S.S. 525, 473 S.E.2d 67 (1996) .....	16, 17
<i>Poynter v. Century Builders of Piedmont</i> , 387 S.C. 583, 694 S.E.2d 15 (2010).....	30
<i>Robinson v. Estate of Harris</i> , 389 S.C. 360, 698 S.E.2d 801 (2010).....	26
<i>Robinson</i> , 296 S.C. at 372, 689 S.E.2d at 807 .....	26
<i>Spur at Williams Brice Owners Ass’n, Inc. v. Lalla</i> , 415 S.C. 72, 781 S.E.2d 115 (Ct. App. 2015).....	20
<i>Stonhard, Inc. v. Carolina Flooring Spec., Inc.</i> , 366 S.C. 156, 621 S.E.2d 352 (2005) .....	30
<i>Strickland v. Strickland</i> , 375 S.C. 76, 650 S.E.2d 465 (2007).....	27
<i>Strickland</i> , 375 S.C. at 84-85, 650 S.E.2d at 470 .....	28

<i>Timmons v. S.C. Tricentennial Comm'n</i> , 254 S.C. 378, 175 S.E.2d 805 (1970).....	8
<i>Wachovia Bank, Nat. Ass'n. v. Blackburn</i> , 407 S.C. 321, 755 S.E.2d 437 (2014).....	8
<i>Webb v. Reames</i> , 326 S.C. 444, 485 S.E.2d 383 (Ct. App. 1997) .....	11
<i>Wise v. Poston</i> , 281 S.C. 574, 316 S.E.2d 412 (Ct. App. 1984).....	11

Statutes

Dead Man's Statute, S.C. Code Ann. § 19-11-20 (Rev. ed 2014).....	13
---	----

Other Authorities

61 Am. Jur. 2d <i>Perpetuities and Restraints on Alienation</i> §§ 88, 90, 109 and 108 (2002).....	12
<i>Page v. Page</i> , Opinion No. 2004-UP-110.....	9, 10, 11
Restatement (Third) of Property: Servitude § 3.4, cmt. (f) (2000) .....	11, 12

### **STATEMENT OF ISSUES ON APPEAL**

- I. DID THE RESPONDENT OWN AN ENFORCEABLE RIGHT OF FIRST REFUSAL IN THE REAL PROPERTY THAT IS THE SUBJECT OF THIS ACTION?
- II. DID THE RESPONDENT WAIVE THE ABILITY TO ENFORCE THE RIGHT OF FIRST REFUSAL?
- III. WAS THE RESPONDENT BARRED BY THE DOCTRINE OF LACHES FROM ENFORCING THE RIGHT OF FIRST REFUSAL?
- IV. WAS THE RESPONDENT ESTOPPED FROM ASSERTING THE RIGHT OF FIRST REFUSAL?
- V. DID THE TRIAL COURT ERR IN DETERMINING THAT THE RESPONDENT COULD EXERCISE THE RIGHT OF FIRST REFUSAL UPON THE PAYMENT OF THREE HUNDRED FIFTY THOUSAND DOLLARS (\$350,000.00)?

### **STATEMENT OF THE CASE**

On May 28, 2015 Respondent Barry Clarke (“Clarke”) initiated this action to enforce a claimed right of first refusal (“Right of First Refusal”) to purchase a parcel of real estate located at 2028 Pittsburg Avenue in Charleston County, South Carolina (the “Property”). Clarke’s Complaint asked only for the specific performance of a contract provision contained in a recorded lease of real estate and asked for that relief against the current owner of record of the Property, Appellant Fine Housing, Inc. (“Fine Housing”), and Fine Housing’s grantor, RRJR, LLC (“RRJR”).

RRJR did not appear in the matter and was held in default. In its Answer, Fine Housing challenged the enforceability of the Right of First Refusal and alleged that Clarke waived the ability to enforce the Right of First Refusal; was estopped from exercising the Right of First Refusal; and was barred by the doctrine of laches from enforcing the Right of First Refusal.

The action was tried on July 26, 2017 as a non-jury matter. The trial judge entered the Order of Judgment on September 28, 2017 finding the Right of First Refusal to be enforceable and

requiring Fine Housing to deliver title to the Property to Clarke upon the payment of Three Hundred Fifty Thousand Dollars (\$350,000.00). Fine Housing received written notice of the entry of the Order of Judgment on October 6, 2017. Fine Housing filed a Motion to Reconsider on October 13, 2107 that was denied by Order of the trial court dated October 20, 2017. On October 31, 2017 Fine Housing served a Notice of Appeal on Clarke. On November 10, 2017 Clarke served his Notice of Cross Appeal on Fine Housing.

## ARGUMENT

### FACTS

On January 8, 1999 Group Investment Company, Inc. (“Group Investment”) and Clarke entered into a Lease and Agreement (“Lease”) (R. pp. 355-367). Clarke negotiated the Lease with John Robinson (R. p. 297, lines 19-20). Robin Robinson signed the Lease on behalf of Group Investment (R. p. 364). Clarke and Fine Housing stipulated that Robin Robinson and John Robinson were shareholders of Group Investment, but not the sole shareholders (R. p. 350, lines 7-25).

The Lease was recorded in the Office of the Register of Deeds for Charleston County, South Carolina on January 27, 1999 in Book C319 at page 791.

The Lease provided for Clarke’s use of one half (1/2) of the parking spaces (“Leased Parking Spaces”) on the Property. (R. p. 357, Article VII). The description of the Property attached to the Lease references a plat recorded in the Office of the Register of Deeds for Charleston County in Book CE at page 116. (R. p. 368). Clarke does not claim that he leased the other one half (1/2) of the parking spaces or the buildings that are located on the Property. (R. p. 312, line 21 to R. p. 314, line 21). The Leased Parking Spaces are described by reference to a plat of the entire Property.

Article V, Section 5.2 of the Lease provides: “[Group Investment] grants [Clarke] the right of

first refusal should it wish to sell.” (R. p. 357). Clarke contends that this language creates a valid Right of First Refusal not only to the Leased Parking Spaces, but also to the entire Property. (R. p. 316, line 1 to p. 317, line 7). Group Investment transferred the Property to RRJR by Deed dated February 19, 2007 and recorded on April 25, 2007 in the Office of the Register of Deeds for Charleston County in Book H623 at page 181. (R. pp. 434-441). Clarke knew of the transfer to RRJR (R. p. 327, line 23 to p. 328, line 24) but did not attempt to exercise the Right of First Refusal. Clarke did not believe that transferring the Property from Group Investment to RRJR triggered the Right of First Refusal because John Robinson and Robin Robinson were both shareholders of Group Investment and were both members of RRJR (R. p. 328, lines 3-24). Clarke and Fine Housing stipulated that John Robinson and Robin Robinson were members of RRJR, but not the sole members (R. p. 350, lines 7-25).

By Deed dated December 2, 2013 and recorded December 9, 2013 in the Office of the Register of Deeds for Charleston County in Book 0377 at page 843, RRJR transferred the Property to Fine Housing. (R. pp. 369-372). No one advised Clarke that RRJR intended to transfer the Property to Fine Housing (R. p. 402; R. p. 305, lines 20-24 and p. 311, lines 18 to p. 312, line 20). The consideration stated in the Deed from RRJR to Fine Housing was One Hundred Fifty Thousand Dollars (\$150,000.00). The attorney who represented Fine Housing in the closing of the sale of the Property from RRJR to Fine Housing, William H. Sloan, Jr., was not aware of the Lease containing the Right of First Refusal at the time of the closing (R. p. 270, lines 12-20 and p. 285, line 10 to p. 286, line 1).

Clarke discovered that RRJR had conveyed the Property to Fine Housing on or immediately prior to March 21, 2014. On March 21, 2014 Clarke spoke with Mr. Sloan and advised him of the

Lease. In turn, Mr. Sloan advised Fine Housing's representative, Vincent DeStaso, of the Lease and that the lease contained a provision for a Right of First Refusal. This was Mr. Sloan's first actual knowledge of the Right of First Refusal and Fine Housing's first actual knowledge of the Right of First Refusal. (R. p. 307, line 3 to p. 308, line 23 and p. 286, line 2 to 287, line 16; R. p. 401). During Mr. Sloan's conversation with Clarke on March 21, 2014, Mr. Clarke did not raise the Right of First Refusal (R. p. 286, lines 2-23; R. p. 401).

Following Mr. Sloan's conversation with Clarke on March 21, 2014, Mr. Sloan engaged in email communication with Thomas R. Goldstein, counsel for Clarke. During those communications, Mr. Goldstein advised Mr. Sloan that Clarke was unsure of what he wanted to do concerning the Right of First Refusal (R. p. 286, lines 25 to p. 287, line 8).

On April 7, 2014, Mr. Goldstein, on behalf of Clarke, sent Fine Housing a check for One Thousand Dollars (\$1,000.00), representing the payment due under the Lease for the year 2014 (R. p. 422). In the letter transmitting the 2014 lease payment to Fine Housing, Mr. Goldstein explained why the payment was late. He indicated that Clarke earlier sent a separate check to RRJR because "[a]t the time we sent the lease payment to the former owner, we were not aware that you held title." (R. p. 422). The letter sending the lease payment to Fine Housing did not mention the Right of First Refusal and contained the unqualified acknowledgement that Fine Housing was the owner of the Property.

At trial, Clarke testified that, instead of enforcing his Right of First Refusal, he offered to purchase the Property from Fine Housing for Six Hundred Fifty Thousand Dollars (\$650,000.00) (R. p. 308, line 18 to p. 308, line 13; p. 310, line 14 to p. 311, line 3; and p. 331, lines 5-10). Clarke desired to secure title to the Property as quickly as possible so that he could start generating profits

from its operation (R. p. 333, lines 7-18). That was his goal in offering an amount greater than required under his claimed Right of First Refusal (*Id.*). Clarke directed his attorney to prepare a proposed contract and send it to Fine Housing on April 10, 2014 (R. p. 420; R. pp. 464-470; R. p. 309, line 14 to p. 310, line 13).

Clarke revised the proposed contract to include, among other things, an option to lease the Property. Clarke's attorney sent the revised proposed contract to Fine Housing on April 21, 2014 (R. p. 421; R. pp. 471-479; R. p. 309, line 14 to p. 310, line 13). Neither of the proposed contracts mentioned the Right of First Refusal.

Mr. DeStaso and Clarke's attorneys exchanged electronic mail concerning the proposed contracts through at least July 8, 2014 (R. p. 460, R. pp. 461-462, R. p. 463), but Fine Housing and Clarke did not execute a contract.

On December 11, 2014, Mr. Goldstein, on behalf of Clarke, sent Fine Housing the payment due under the Lease for the year 2015 (R. pp. 423-424). The letter sent with the check did not mention the Right of First Refusal.

Following its purchase of the Property, Fine Housing invested time and money improving the Property and resolving issues that clouded title to the Property. Clarke acknowledges this (R. p. 323, lines 8-18). With the assistance of legal counsel, Fine Housing resolved tax liens against the Property, resolved building code violations, made concessions to tenants to accommodate eviction, made rent concessions to tenants to encourage needed improvements to the Property, and paid funds to resolve litigation that encumbered the Property (R. p. 235, line 24 to p. 239, line 3). Mr. DeStaso testified that, exclusive of attorney fees, Fine Housing had invested over Two Hundred Thirty-Two Thousand Dollars (\$232,000.00) in the Property post purchase (R. p. 235, line 24 to p. 239, line 3).

On April 13, 2015, Mr. Goldstein, on behalf of Clarke, sent a letter to Fine Housing's counsel, Charles S. Altman (R. p. 480). In that letter Mr. Goldstein first raised the Right of First Refusal to Fine Housing and advised that Clarke was exercising his right. Mr. Goldstein demanded a deed from Fine Housing to Clarke on payment of One Hundred Fifty Thousand One Dollars (\$150,001.00), an amount that was One Dollar (\$1.00) more than Fine Housing paid RRJR as consideration for the purchase of the Property. (R. p. 480).

Clarke filed his Summons, Complaint and Lis Pendens on May 28, 2015 seeking specific performance of the right of first refusal term in the Lease. Clarke included RRJR as a Defendant. RRJR did not appear and is in default. Fine Housing answered Clarke's Complaint with a general denial and raised the affirmative defenses of waiver, laches, estoppel, prior breach by Clarke, statute of limitations and contract terms too uncertain and too indefinite to enforce.

The trial occurred on July 26, 2017 and the trial court entered its Order of Judgment on September 28, 2017. In its Order of Judgment, the Court determined that the Right of First Refusal was enforceable and that Clarke was not barred from enforcing it by his conduct. In reaching its decision, the trial court unnecessarily addressed issues not properly before it and not germane to the controversy among the parties. Specifically, the trial court included in the Order of Judgment

- discussions and findings concerning the nature and use of the Property,
- the history of the business relationship between John Robinson and Clarke,
- the death of John Robinson,
- the financial troubles of Robin Robinson, RRJR's negotiations with Fine Housing that led to the transfer of title to the Property,
- Robin Robinson's negotiations with Fine Housing that led to the transfer of her

residence (the “Sol Legare Road Property”) to Fine Housing,

- the conduct of the closing of the sale of the Property and the Sol Legare Road Property to Fine Housing,
- the quality of the services rendered by William Sloan to Fine Housing, and
- and a separate transaction concerning the sale of other real property by Robin Robinson individually to Fine Housing.

None of those matters are relevant to the existence or enforceability of a Right of First Refusal, and the trial court’s reasoning relies on facts that are not in the record.

In the Order of Judgment, the trial court found that Clarke could exercise the Right of First Refusal by paying Fine Housing Three Hundred Fifty Thousand Dollars (\$350,000.00). The Court arrived at this number by considering the combined underlying sales price of the Property by RRJR to Fine Housing and the Sol Legare Road Property by Robin Robinson to Fine Housing and subtracting from that combined sales price the gross proceeds of Fine Housing’s resale of the Sol Legare Road Property.

This is a simple matter that has been complicated and clouded by the trial courts reliance on facts that are of no consequence to Clarke’s request for relief and Fine Housing’s defenses. Fine Housing admitted that there is a Lease containing language that attempts to create a Right of First Refusal. Fine Housing also stipulated that no one gave Clarke notice of the transfer from RRJR to Fine Housing, a transfer that would trigger the Right of First Refusal that Clarke claims. Fine Housing did not provide notice to Clarke because it did not have actual knowledge of the Lease. The only issues raised by the pleadings are (1) the enforceability of language that Clarke contends is a Right of First Refusal and (2) the consequence of Clarke’s conduct once he learned of the transfer

of the real property that triggers the right he champions.

Yet, the trial court offered discussions and made determinations as to:

- a business relationship that existed between Clarke and one of the principals of Group Investment,
- the decisions by RRJR to transfer property to Fine Housing,
- the decision by Robin Robinson to transfer her residence (property to which Clarke made no claim) to Fine Housing,
- the relationship between Fine Housing and its lawyer, and
- the quality of the legal services delivered by Fine Housing's attorney.

The last two topics are especially problematic in that there is litigation pending between Fine Housing and its lawyer concerning the legal services on which the Court commented, a fact noted by the Court in its Order of Judgment (Order of Judgment, p. 8). The admission of irrelevant evidence can confuse the issue before the court and can form the sole base's alone on which an appellate court can reverse. *Holmon v. City of Orangeburg*, 118 S.C. 361, 110 S.E. 674 (1922); *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970).

#### **STANDARD OF REVIEW**

An action for specific performance of a real estate contract is in equity. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 531 S.E.2d 287 (1999). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence." *Wachovia Bank, Nat. Ass'n. v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 441 (2014).

I. The right of first refusal is not an enforceable interest in real estate.

The gravamen of Clarke's complaint is that he was deprived of an alleged Right of First Refusal. He claims that he had the right to competitively bid against Fine Housing for the purchase of the Property from RRJR which was denied. Clarke also claims that Fine Housing had record notice of his Right of First Refusal and that, accordingly, Fine Housing took its interest in the Property subject to his ability to exercise the Right of First Refusal.

The trial court agreed with Clarke and found that Clarke had an enforceable Right of First Refusal of which Fine Housing had record notice (R. pp. 24-25). To reach this decision, the trial court misstated Fine Housing's arguments concerning the enforceability of the claimed Right of First Refusal; relied on reasoning not supported by the cited precedent; and failed to make findings necessary to determine the legitimacy of the claimed Right of First Refusal.

A. The Trial Court misstated Fine Housing's argument.

In its Order of Judgment the trial court misstated the position advanced by Fine Housing. It suggested that Fine Housing's primary argument relied on the February 24, 2004 unpublished opinion of this Court, *Page v. Page*, No. 2004-UP-110, and incorrectly concluded that Fine Housing espoused the idea that "the right of first refusal is not enforceable because it constitutes a 'restraint on alienation' and the Court must, therefore, apply it narrowly." (R. p. 12). After it stated that the *Page* decision has no precedential value and should have no bearing on the matter, the trial court proceeded to analyze the matter under *Page*.<sup>1</sup>

*Page* addressed the validity of a restrictive clause in a deed that purported to create a right of

---

<sup>1</sup> Rule 268(d)(2), SCACR provides that unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved. Fine Housing only raises *Page* because it was addressed by the trial court as part of its decision.

first refusal. The clause in the deed followed the granting clause that did not contain the restriction. In reaching its decision, the *Page* Court made two determinations. First, citing *Stylecraft, Inc. v. Thomas*, 250 S.C. 495, 159 S.E.2d 46 (1968), the Court held that language found in a deed after the granting clause cannot cut down or reduce the fee simple title for which provision is made in the granting clause. Second, the Court determined that the clause purporting to create a right of first refusal was not specific as to the procedures for exercising the right and was therefore an unreasonable limitation of the power of alienation of real property which violated public policy and was not enforceable. In its review of *Page*, the trial court conflated these two separate analyses into one, made unsupported conclusions as to why the decision is unpublished, and misstated the holding of *Stylecraft*.

The trial court baldly concluded that the *Page* decision is unpublished “because it is relying entirely on the published [*Stylecraft*]” (R. p. 14) and further explained that *Stylecraft* “held that any efforts to impose restrictions in a deed that are contained in granting clauses of deeds are ineffective to prevent the conveyance of an unrestricted fee simple transfer” (*Id.*). In fact, *Stylecraft* does not address restrictions in a granting clause. *Stylecraft* stands for the proposition that “where the granting clause of a deed purports to convey title in fee simple absolute, the fee simple estate may not be cut down by subsequent words in the same instrument.” *Stylecraft*, 250 S.C. at 498, 159 S.E.2d at 47.

After the incorrect statement of the holding in *Stylecraft*, the trial court squeezed the *Page* restraint on alienation analysis together with its reading of *Stylecraft* to yield the rule “...when a granting clause in a deed attempts to impose a reversion of title in a deed, it is, under *Stylecraft*, ineffectual to cut down the grant of a fee simple estate for the very reason [Fine Housing] advocates:

it represents a restraint on alienation.” (R. p. 14). Having announced this contorted rule, the trial court determined that Fine Housing’s reliance on *Page* was misplaced because this matter does not involve a restriction in the granting clause of a deed. (R. p. 14).

Fine Housing did not offer *Page* to the trial court as controlling authority. Rather, it presented *Page* as a “roadmap” or summary of South Carolina law as to the enforceability of restraints on the alienation of real property. Fine Housing did not rely on *Page*; it relied on the decisions and authorities outlined in *Page*. (R. p. 339, line 11 to p. 341, line 11). Further, Fine Housing did not argue the *Stylecraft* analysis found in *Page*. Instead, it argued the second analysis found in *Page* – the enforceability of the right of first refusal as a restraint on alienation. The decisions and authorities summarized in *Page* and separately argued to, and considered by, the trial court (R. p. 13) detail why a right of first refusal that is not specific is an unreasonable restraint on alienation which violates public policy and is not enforceable.

A right of first refusal in real estate is a preemptive right. *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 383, 385 (Ct. App. 1997). Such a preemptive right is a restraints on alienation. *Id.*; Restatement (Third) of Property: Servitude § 3.4, cmt. (f) (2000). Under common law, restraints on alienation of property were disfavored. *Crosswell Enters. v. Arnold*, 309 S.C. 276, 422 S.E.2d 157 (Ct. App. 1992). Unreasonable restraints on alienation violate public policy and are not enforceable. *McCravey v. Otts*, 90 S.C. 447, 74 S.E. 142 (1912); *Wise v. Poston*, 281 S.C. 574, 316 S.E.2d 412 (Ct. App. 1984).

When assessing the reasonableness of a restraint on alienation in the form of a right of first refusal, consideration should be given to several factors, including: (1) the method of determining the price at which the right is exercised, (2) procedures for exercising the right, and (3) the legitimacy of

the purpose for the right. 61 Am. Jur. 2d *Perpetuities and Restraints on Alienation* §§ 88, 90, 109 and 108 (2002); Restatement (Third) of Property: Servitude § 3.4, cmt. (f) (2000).

Here, the Right of First Refusal is a single line – “Lessor grants the Lessee the right of first refusal should it wish to sell.” (R. p. 357). There is no specificity as to the property encumbered by the right, there is no described method for determining the price at which the right can be exercised, and there are no procedures for exercising the right.

1. There is confusion as to the property encumbered by the Right of First Refusal.

The Right of First Refusal is contained in a Lease that provides for Clarke’s lease of parking spaces on the Property from Group Investment. (R. pp. 355-357; R. p. 312, line 21 to p. 313, line 13). Clarke acknowledged that he did not have leasehold rights in all of the parking spaces on the Property and the Lease did not entitle him to any rights in the buildings that exist on the Property. (R. p. 313, lines 14-23). However, Clarke claims that he has a Right of First Refusal on the entire tract, including improvements, that comprises the Property. (R. p. 316, lines 4-19).

In his deposition, Clarke acknowledged that the language purportedly creating the Right of First Refusal does not specifically state that the right applies to the entire parcel (R. p. 316, line 20 to p. 317, line 11). Clarke explained at trial that it is necessary to consult the survey attached as an exhibit to the Lease to see that the right extends to the entire tract. (R. p. 317, line 12 to p. 318, line 7). The language in the Lease does not specifically state that the Right of First Refusal encumbers the entire tract or just the leased parking spaces. It is not clear and it is not specific. The only thing that is clear is that Clarke testified that he intended the right to extend to the entire parcel. (*Id.*)

2. The Lease did not provide a method to determine the price at which the Right of First Refusal may be exercised.

Before filing this action, Clarke claimed that he was entitled to exercise the Right of First Refusal by paying Fine Housing one dollar more than Fine Housing paid RRJR for the Property. (R. p. 480). At trial Clarke testified that the Right of First Refusal gave him a stake in a “bidding war” that would be launched when the owner of the Property received a purchase offer. The “war” could have yielded a sales price higher than the One Hundred Fifty Thousand Dollars (\$150,000.00) that Fine Housing paid. (R. p. 320, line 19 to p. 321, line 14). The trial court determined that Clarke attempted to exercise his Right of First Refusal when he offered to purchase the Property from Fine Housing on April 10, 2014 for Six Hundred Fifty Thousand Dollars (\$650,000.00). (R. p. 25). Ultimately, the trial court found that the price at which Clarke is entitled to exercise the Right of First Refusal is Three Hundred Fifty Thousand Dollars (\$350,000.00). It arrived at that amount by considering all of Fine Housing’s transactions with RRJR and Robin Robinson, not just the transaction involving the Property in which Clarke has an interest.

The only evidence offered by Clarke to support the position that the Right of First Refusal could be exercised upon payment of One Hundred Fifty Thousand and One Dollars (\$151,001.00) is his subjective understanding of how rights of first refusal operate. There was no evidence offered as to what Group Investment intended. Clarke’s attempts to offer his understanding of what Mr. Robinson may have intended were refused by the trial court under the Dead Man’s Statute, S.C. Code Ann. § 19-11-20 (Rev. ed 2014) (R. p. 292, lines 10-23).

The wide range of suggestions and determinations of the price at which Clarke can exercise the Right of Refusal - \$150,000.00, \$350,000.00, \$650,000.00, an undetermined amount resulting

from a bidding war – illustrates the need for the Right of First Refusal to have specific language. There is not an “obvious” method for determining price as suggested by Clarke (R. p. 321, lines 16-21), and the language creating the right must be certain and not left to enunciation by one of the parties to the agreement that created the right. The Right of First Refusal pursued by Clarke is not only uncertain on the issue of price, it is completely devoid of any language addressing price.

3. The Right of First Refusal lacks any identified procedure for exercising the right.

On February 19, 2007, Group Investment conveyed the Property to RRJR. This was a conveyance from a corporation to a separate limited liability company. In his Complaint, Clarke alleged that the transfer from Group Investment was a “change in name only,” wrongly asserting that John Robinson and Robin Robinson were the only shareholders of Group Investment and the only members of RRJR. (R. p. 33). Clarke therefore believed that the Right of First Refusal was not triggered by the transfer to RRJR. (R. p. 327, line 23 to p. 328, line 24).

The Right of First Refusal has no provision stating it is not triggered by a transfer of the Property from one entity to another entity if the entities share common ownership. That was Clarke’s subjective expectation of how the Right of First Refusal operated.

Similarly, the Right of First Refusal is devoid of any provision that identifies when or how Clarke should be notified of events that would trigger the right and, once triggered, the time period during which Clarke must respond and how he must respond. Mr. Clarke testified clearly at trial that instead of exercising his Right of First Refusal to purchase the Property for One Hundred Fifty Thousand Dollars (\$150,000.00), he offered to purchase the Property for Six Hundred Fifty Thousand Dollars (\$650,000.00). He did this understanding that he was offering to pay more than he

was obligated to pay, but he hoped that he would secure quick possession of the property and avoid litigation. When that did not work, he waited until April 13, 2015, more than a year after he learned of the transfer to Fine Housing on March 21, 2014, to formally invoke the Right of First Refusal.

Without explanation or authority, the trial court found that “[t]he right of first refusal contains an implied condition of timeliness, and sixty (60) days is a reasonable time for performance.” (R. p. 26).

To be an enforceable interest in real estate, it is necessary that the performance criteria of the Right of First Refusal be set out in enough detail so that a third party wishing to purchase the encumbered property can understand all interests in the property. Here, a potential purchaser of the Property would not know if the right allowed Clarke sixty (60) days, as determined by the trial court, the one (1) year Clarke argued, or a different time period to delay a potential purchase while he considered his Right of First Refusal. The document creating the right does not contain those details.

On these facts, and the cited published opinions and authorities, Fine Housing argued that the Right of First Refusal lacked any certainty as to the encumbered Property, the exercise price, and the procedure for exercising the right. As such, the Right of First Refusal constituted an unreasonable restraint on alienation that violates the public policy of the State of South Carolina and is therefore unenforceable. Without certainty as to the terms of the Right of First Refusal, any seller of the Property would not know the terms on which it could offer the Property for sale, and a potential purchaser of the Property would be dissuaded from purchasing it because of a lack of understanding of competing interests. A proper understanding of the authorities and argument advanced by Fine Housing at trial makes it clear that the Right of First Refusal advanced by Clarke is not an interest in real estate that can be enforced.

B. The Trial Court relied on reasoning not supported by the precedent it cited.

Having misstated Fine Housing's position on the enforceability of the Right of First Refusal and discounted it on that misstatement, the trial court concluded that this case turns on the intention of the parties to the Lease. It found that the Right of First Refusal language in the Lease was not ambiguous and therefore enforceable. (R. pp. 15-19). To reach this conclusion, the trial court relied heavily on two cases – *Minter v. GOCT, Inc.*, 322 S.S. 525, 473 S.E.2d 67 (1996) and *Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007). Its reliance is misplaced.

The trial court observed that in *Minter* “[t]he trial court [had] granted a directed verdict for the defendant on the breach of contract claim, and the Court of Appeals reversed.” (R. p. 16). Actually, *Minter* addressed two issues: (1) the trial court's grant of a directed verdict for the defendant on the issue of damages and (2) the trial court's grant of a directed verdict for the defendant on a cause of action for breach of contract accompanied by a fraudulent act. The Court of Appeals reversed the grant of a directed verdict on the issue of damages, finding that the Minters had provided sufficient evidence to support a finding of damages. The Court of Appeals affirmed the trial court's decision to grant a directed verdict on the breach of contract accompanied by a fraudulent act claim, finding that there was no evidence of a fraudulent act. *Minter* did not involve the reversal of a directed verdict for the defendant on a breach of contract claim, as suggested by the trial court.

While a right of first refusal appears in *Minter*'s fact pattern, the enforceability of that right was not an issue on appeal. The trial court drew a parallel between Clarke's testimony and the Minters' testimony to support its findings concerning the intent of parties to a contract. However,

the *Minter* Court mentioned Mr. Minter's intentions concerning the negotiation of the right of first refusal as part of its damages analysis, not in the course of analyzing the enforceability of that right. Accordingly, the parallel drawn between the testimony in *Minter* and in this case is erroneous.

Further, *Minter* did not involve an interest in real estate. The right of first refusal concerned the right to participate in the development of future oil change facilities in Richland and Lexington Counties and was not identified by reference to any parcel of real estate.

The trial court also misreads *Ecclesiastes* as a case "construing a similar right of first refusal contract between two parties." (R. p. 16). Although a right of first refusal on a parcel of real property was contained in the contract that underlies the dispute in *Ecclesiastes*, the language from *Ecclesiastes* cited by the trial court was not addressed to the right of first refusal. In *Ecclesiastes*, a tenant leased property from a landlord and the lease contained a right of first refusal. The landlord entered a bond for title with a third party and the third party, in turn, sued the tenant for rents. The tenant counterclaimed against the third party for tortious interference with contract and included a third party claim against the landlord for breach of the right of first refusal. The tenant settled with the third party. Under the settlement terms the tenant was required to pursue the landlord and, in some instances, would share any recovery from the landlord with the third party. At trial, the landlord claimed that the mutual release and settlement between the tenant and the third party resulted in the release of the landlord from any liability to the tenant. The decision in *Ecclesiastes* concerned the construction of that release, not the right of first refusal contained in the lease.

In *Minter* and *Ecclesiastes*, the litigation involved contracts and the contracting parties were parties to the action. The parties in each action were in contractual privity with each other. One party to a contract sought to enforce its rights against the other party to the contract. Here, Clarke

seeks to bind Fine Housing to the terms of the Right of First Refusal because it is a recorded interest in real estate of which Fine Housing had record notice, not because it was a party to the contract. While the intention of the parties may be relevant to an action to enforce a contract between parties in privity with each other, such intention is not relevant when the terms of a contract are imposed upon an entity because of a recorded interest in real property.

C. The Trial Court failed to make findings necessary to determine the enforceability of the claimed Right of First Refusal.

If *Ecclesiastes* stands for the position that the claimed Right of First Refusal is to be analyzed based on the intentions of Clarke and Group Investment, a position challenged by Fine Housing, the trial court failed to make any determination as to the intention of those parties, and the record contains no testimony as to what Group Investment may have intended concerning the Right of First Refusal. Clarke testified to his intentions and understandings, but the Court precluded him from testifying as to Mr. Robinson's intentions by the Court. (R. p. 302, lines 8-23). Clarke testified that he negotiated with Mr. Robinson, and Fine Housing stipulated that Mr. Robinson was a shareholder of Group Investment. However, Ms. Robinson executed the lease on behalf of Group Investment and there is no testimony as to her intentions or the intentions of Group Investment. Therefore, any determination as to the intention of the parties in crafting the Right of First Refusal would be a lopsided analysis, only considering the intentions of one of the parties – Clarke. Since the record lacks testimony as to the intention of both parties, the trial court's reliance on *Ecclesiastes* is not appropriate.

Fine Housing's positions at trial and on appeal are the same. The offered Right of First Refusal lacks the specificity required to be an enforceable interest in real estate. While it is recorded,

the instrument does not contain the details necessary for notice and understanding by a third party of the operation of the Right of First Refusal and the nature and extent of Clarke's interest. As written, the Right of First Refusal is an unreasonable restraint on alienation of real property that violates the public policy of the State of South Carolina. It is unenforceable.

II. Clarke waived the right to enforce the Right Of First Refusal.

The trial court determined that the evidence did not support Fine Housing's affirmative defense of waiver. Fine Housing first asserted the waiver defense based on Clarke's failure to exercise the claimed Right of First Refusal when Group Investment transferred the Property to RRJR. The trial court concluded that the waiver defense was not supported by the facts surrounding the transfer of the Property from Group Investment to RRJR because it was a name change only and because John Robinson and Robin Robinson were the only shareholders of Group Investment and the only members of RRJR.

Fine Housing also argued that Clarke's conduct following the transfer of the Property from RRJR to Fine Housing amounted to a waiver. The trial court disagreed, finding the defense of waiver inapplicable because: (1) RRJR's lawsuit against Fine Housing to unwind the transfer of the Property, which was filed two months after Fine Housing acquired title, clouded Fine Housing's title until it was cleared on January 9, 2015; and (2) Clarke diligently pursued the purchase of the Property once he discovered the deed from RRJR to Fine Housing.

The trial court's findings are contradicted by the record established at trial and the Order of Judgment itself.

"Waiver is the voluntary and intentional abandonment or relinquishment of a known right."  
*Spur at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 91, 781 S.E.2d 115, 125 (Ct. App.

2015). Waiver can be implied from conduct. *Id.* “Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended.” *Id.* at 91, 781 S.E.2d at 125, citing *Janaski v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 451 S.E.2d 384, 387-388 (1992). A careful review of trial transcript demonstrates that Clarke voluntarily and intentionally abandoned any rights that he may have had under the claimed Right of First Refusal.

First, as to the conveyance from Group Investment to RRJR, the record includes a copy of the deed from Group Investment to RRJR. This is clearly a conveyance from a corporation to an LLC. Group Investment did not change its name to RRJR. While Clarke and Fine Housing stipulated that Robin Robinson and John Robinson were shareholders of Group Investment and members of RRJR. They also stipulated that there may have been other shareholders of Group Investment and other members of RRJR. The record is also clear that Clarke knew of the transfer but chose not to exercise the Right of First Refusal because of his subjective understanding as to the events that triggered the Right of First Refusal. The Right of First Refusal fails to state that it is not triggered by the transfer of the Property from one entity to another if the entities share partial common ownership. If that was the parties’ intent, it should have been stated in the terms of the Right of First Refusal. Clarke’s conscious decision not to exercise his rights when the property transferred from Group Investment to RRJR was a waiver of his right to make any claim under the Right of First Refusal.

Likewise, the voluntary, intentional, and informed decisions that Clarke made when he learned of the transfer from RRJR to Fine Housing constitute waiver. The Order of Judgment is confusing. On one hand, the trial court seems to excuse exercise of the claimed right until some

point in January 2015, but on the other, it specifically finds that Clarke attempted to exercise the Right of First Refusal on April 10, 2014, when his counsel presented a contract to Fine Housing for the purchase of the Property at the price of Six Hundred Fifty Thousand Dollars (\$650,000.00) that lacked any mention of the Right of First Refusal. However, a close examination of the testimony offered at trial demonstrates that when Clarke discovered the transfer of the Property from RRJR to Fine Housing, he made the deliberate decision not to exercise his claimed Right of First Refusal and only after more than a year did he abandon his other efforts and retreat to the claimed right in an attempt to secure title to the Property.

The record indicates that when Clarke discovered the transfer from RRJR to Fine Housing, he spoke with Fine Housing's counsel, Mr. Sloan, on March 21, 2014. Mr. Sloan testified that during that conversation Clarke did not state that he wished to exercise the Right of First Refusal. To the contrary, Mr. Sloan recalled a conversation with Mr. Goldstein, counsel for Clarke, in which Mr. Goldstein stated that Clarke was "unsure what he wanted to do." (R. p. 286, line 25 to p. 287, line 8). Mr. Sloan then secured a copy of the Lease and first advised Fine Housing of the Lease and that it contained the Right of First Refusal.

Mr. Sloan's testimony regarding Clarke's stated intentions on learning of the transfer from RRJR to Fine Housing aligned with Mr. DeStaso's recollection. At trial, Mr. DeStaso testified that during his first conversation with Clarke, in March 2010, Clarke did not mention the Right of First Refusal nor did he state a desire to purchase the Property. (R. p. 241, lines 2-25).

On April 7, 2014, Mr. Goldstein, as counsel for Clarke, forwarded a check payable to Fine Housing from Clarke for the rent due under the Lease for the year 2014 with a letter addressed to Mr. DeStaso. In that letter Mr. Goldstein stated: "Thank you for taking the time to talk to us about the

lease on the property you acquired from RRJR. At the time we sent the lease payment to the former owner, we were not aware that you held title.” (R. p. 422). This was an acknowledgement on April 7, 2014 by Clarke that Fine Housing owned the Property and that Clark knew of that ownership. The letter from Mr. Goldstein to Mr. DeStaso did not mention the Right of First Refusal.

Following the initial communication on March 21, 2014, Clarke and Mr. Destaso had other communications that resulted in Clarke’s presentation of a proposed contract to Fine Housing on April 10, 2014. It is that proposed contract that the trial court determined to be Clarke’s attempt to exercise the Right of First Refusal. However, that determination does not comport with the testimony and evidence offered at trial.

Clarke’s own testimony was that he initially chose not to exercise the Right of First Refusal. (R. p. 308, line 18 to p. 311, line 3 and p. 330, line 23 to p. 331, line 10). He made the conscious decision to offer Fine Housing Five Hundred Thousand Dollars (\$500,000.00) more than he was obligated to offer in hopes of getting quick possession of the Property and avoid potential litigation with Fine Housing. The proposed contract presented on April 10, 2014 demonstrates that Clarke was not exercising his Right of First Refusal on that date. Clarke’s attorney, Ashley Andrews, presented the contract to Fine Housing by electronic mail. Neither the electronic mail communications, nor the contract, reference the claimed Right of First Refusal. The proposed contract did not offer to take the Property in the condition that Fine Housing received it from RRJR. Rather, the contract was conditioned on Fine Housing’s ability to cure title problems in a two-year period that began on the execution of the contract; Clarke’s ability to obtain financing; zoning and permits satisfactory to Clarke; and an inspection period that lasted one hundred twenty (120) days after Fine Housing cured any title problems. The contract allowed Clarke to terminate it for any

reason or for no reason. (R. pp. 464-470). The terms, Clarke offered make it clear that he was not exercising the claimed Right of First Refusal. He was negotiating a contract to purchase the Property on wholly separate terms and for an amount of money that was more than four (4) times the price he identified as the price at which he could exercise the Right of First Refusal.

Then, on April 21, 2014, Ms. Andrews, on behalf of Clarke, sent Fine Housing a revised offer in the form of a contract. This revised contract added additional terms to the original offer. The Six Hundred Fifty Thousand Dollars (\$650,000.00) price remained the same, but other terms were added, including Clarke's ability to lease the Property prior to purchase for up to two (2) years. The revised contract and the electronic communications presenting the revised offer did not invoke or mention the claimed Right of First Refusal. Again, the revised contract and its terms are clear evidence of Clarke's conscious decision not to exercise the Right of First Refusal.

Ms. Andrews, on behalf of Clarke, and Mr. DeStaso, on behalf of Fine Housing, continued negotiations for the sale of the Property through at least July 8, 2014, with Fine Housing demanding that Clarke pay as high as One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00). None of those negotiations mentioned Clarke's Right of First Refusal.

On December 11, 2014, Mr. Goldstein, as attorney for Clarke, forwarded Fine Housing a payment of One Thousand Dollars (\$1,000.00) as "the lease payment for the parking lot for 2015." (R. pp. 423-424). In his cover letter, Mr. Goldstein specifically referred to the Lease by date and by the book and page number of the recording, but he did not invoke or mention the Right of First Refusal.

On December 22, 2014, Mr. Goldstein sent Mr. DeStaso another letter clarifying that the payment sent on December 11, 2014 was for the 2015 lease payment. Again he referred to the Lease

by reference to its recording information. Again he failed to invoke or mention the Right of First Refusal.

It was not until April 13, 2015, one (1) year and twenty-four (24) days after Clarke learned of the transfer from RRJR to Fine Housing, and after Clarke's attempts to purchase the Property failed, that Clarke first raised the Right of First Refusal. In a letter dated April 13, 2015, Mr. Goldstein, as counsel for Clarke, raised the Right of First Refusal and claimed to exercise that right by the tender of one dollar more than Fine Housing paid RRJR for the Property. (R. p. 480).

By the time Clarke attempted to exercise his claimed Right of First Refusal, Fine Housing had made significant investment in the Property knowing that Clarke had elected not to exercise the Right of First Refusal. Fine Housing wrestled with tenant issues; worked to clear liens on the Property not resolved at closing; paid money to resolve claims that arose after the transfer to Fine Housing attributable to RRJR's conduct; invested in improvement to the Property; and paid an attorney to assist with all of these things. (R. p. 229, line 6 to p. 232, line 6) All of these efforts enhanced the value of the property beyond the Two Hundred Thirty-Two Thousand Dollars (\$232,000.00) identified by Mr. DeStaso as Fine Housing's investment in the Property.

This review of the record makes it clear that, twice, Clarke made deliberate, voluntary and intentional decisions not to exercise his claimed Right of First Refusal. The doctrine of waiver binds Clarke to these decisions and precludes him from exercising the claimed Right of First Refusal.

### III. The Doctrine Of Laches precludes Clarke's enforcement of the Right Of First Refusal.

The trial court determined that there is nothing in the record to support Fine Housing's claim that Clarke's attempt to exercise the Right of First Refusal is barred by the doctrine of laches. Instead, the trial court cited a series of facts and suggested that Clarke made his first written attempt

to exercise the Right of First Refusal on April 10, 2014, when Ms. Andrews presented Clarke's offer to purchase for Six Hundred Fifty Thousand Dollars (\$650,000.00).

In addressing the defense of laches, the trial court made the following findings of fact. The sale from RRJR to Fine Housing occurred without notice to Clarke. Clarke discovered the sale from rumors spread by friends. Clarke instructed his attorney, Ms. Andrews, to investigate the matter. Ms. Andrews' investigation led to a phone call with Mr. DeStaso. Clarke offered Mr. DeStaso money to exercise his right in the club and DeStaso promised to call Clarke back. A month passed without DeStaso calling Clarke. Clarke made a second call to DeStaso and DeStaso told Clarke that he forgot. Clarke made a determination that he could not rely on DeStaso so he turned the matter over to his attorneys. Clarke made his first written expression of his attempt to exercise the Right of First Refusal on April 10, 2014. On April 17, 2014 Clarke renewed his effort to exercise the Right of First Refusal and stated that he was ready, willing and able to purchase the Property. (R. pp. 22-23). This chronology does not line up with the testimony or the evidence presented at trial.

The trial court determined that Clarke discovered the sale of the Property from RRJR to Fine Housing on or about March 21, 2014. (R. p. 24). Following that discovery, Clarke recalls two telephone conferences with Mr. DeStaso – one in which he and Ms. Andrews gave Mr. Destaso a price of Six Hundred Fifty Thousand Dollars (\$650,000.00), and the second was a return call because Mr. DeStaso forgot to call him. (R. p. 309, line 18 to p. 309, line 13). Clarke did not recall any further conversation with Mr. DeStaso and surrendered the matter to his attorneys. *Id.* On April 10, 2014, twenty (20) days after the March 21, 2014 discovery of the transaction (not a month), Ms. Andrews forwarded a proposed contract for Six Hundred Fifty Thousand Dollars (\$650,000.00) to Mr. DeStaso. There is nothing in the record showing anything occurring on April 17, 2014 as

identified by the trial court. On April 21, 2014, one month after the discovery of the RRJR to Fine Housing transaction by Mr. Clarke, Ms. Andrews submitted a revised contract to Mr. DeStaso by electronic mail with a cover message that Clarke was ready, willing, and able to close the transaction.

As outlined in the argument concerning the defense of laches, the contract submitted by Ms. Andrews on April 10, 2014 does not mention the Right of First Refusal and its terms suggest that it was not an exercise of that right. Clarke did not advise Fine Housing of his intent to exercise the Right of First Refusal until April 13, 2015. It is the delay from March 21, 2014 until April 13, 2015 and the events that transpired during that time that afford Fine Housing the defense of laches.

“The equitable doctrine of laches is defined as ‘neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.’” *Robinson v. Estate of Harris*, 389 S.C. 360, 372, 698 S.E.2d 801, 807 (2010), quoting *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). “Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights.” *Robinson*, 296 S.C. at 372, 689 S.E.2d at 807, citing *Chambers of S.C., Inc. v. County Council of Lee County*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). The party alleging laches must show (1) delay, (2) the delay was unreasonable under the circumstances, and (3) resulting prejudice. *Robinson*, 296 S.C. at 372, 689 S.E.2d at 807, citing *Hallums*, 296 S.C. at 199, 371 S.E.2d at 528.

The delay from March 21, 2014 until April 13, 2015 was unreasonable given the circumstances. Clarke himself testified to the need to act swiftly to preserve the value of the Property. Instead of swift action and exercise of his Right of First Refusal, Clarke acknowledged

Fine Housing's title by repeatedly making rent payments and negotiating for a long period of time for the purchase of the Property. It was only when he did not get what he wanted and decided the time was ripe that he decided to exercise what he believed to be his Right of First Refusal. In the interim, satisfied that Clarke had abandoned any claim to the Property, Fine Housing invested time and money to enhance its value. The Two Hundred Thirty-Two Thousand Dollars (\$232,000.00) investment in the Property after the purchase from RRJR does not account for the all the time Fine Housing dedicated to the management of the Property after Clarke learned of the transfer or the attorney fees incurred by Fine Housing during that same time period. These facts fit squarely in support of the defense of laches, and Clarke should be penalized for his delay by not allowing him to exercise his claimed Right of First Refusal.

IV. Clarke is equitably estopped from asserting the Right Of First Refusal.

The trial court bunches its consideration of the equitable estoppel defense with the waiver defense. While the factors at play in analyzing of the defense of waiver are similar to those in an equitable estoppel analysis, equitable estoppel is a separate defense that affords this Court another opportunity to consider the propriety of the trial court's decision. "The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel." *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007), citing *Kelley v. Kelley*, 368 S.C. 602, 608, 629 S.E.2d 388, 392 (Ct. App. 2006). "The elements of equitable estoppel as related to the party being estopped are (1) conduct which amounts to a false representation or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party

asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance on the conduct of the party estopped; and (3) prejudicial change of position in reliance on the conduct of the party being estopped.” *Strickland*, 375 S.C. at 84-85, 650 S.E.2d at 470, *citing Boyd v. Bell South Tel. & Tel. Co., Inc.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

Clarke’s conduct in making the Lease payment for 2014, submitting an offer to purchase the property for Six Hundred Fifty Thousand Dollars (\$650,000.00), submitting an amended offer, negotiating for the purchase of the Property for a four (4) month period, and paying the 2015 Lease payment were all inconsistent with the intent to exercise his claimed Right of First Refusal. Clarke’s testimony as to why he offered to purchase the Property for Five Hundred Thousand Dollars (\$500,000.00) more than what he believed he was obligated to pay under the Right of First Refusal demonstrates that he understood his option to proceed under the Right of First Refusal and made a calculated decision not to proceed under that right.

Fine Housing relied on Clarke’s choice. It discovered the existence of the Lease and the Right of First Refusal at the same time that Clarke discovered the sale from RRJR to Fine Housing. While Fine Housing was informed of the existence of the Right of First Refusal, it did not know that Clarke would exercise the right. Fine Housing did not wait long for Clarke’s decision. From the offer Clarke made on April 10, 2014, it was clear that he did not want the Property in its existing condition; rather, he wanted the Property in the changed condition set out in the proposed contracts. Fine Housing relied on this election and had no means of knowing that Clarke intended to reserve the Right of First Refusal as a contingency plan. That intention was never expressed.

The record also demonstrates that Fine Housing changed its position in reliance on Clarke’s

decision not to exercise the Right of First Refusal. Certainly Fine Housing would not have invested the time, incurred the expense of attorney fees, and invested Two Hundred Thirty-Two Thousand Dollars (\$232,000.00) in the Property if it knew it would be required to transfer the Property to Clarke on the payment of One Hundred Fifty Thousand One Dollars (\$150,001.00).

Here the doctrine of equitable estoppel requires a finding that Clarke's conduct, and Fine Housing's reliance on that conduct, precludes Clarke from enforcing the Right of First Refusal.

V. The Trial Court's calculation of the price at which to exercise the Right of First Refusal is not supported by the record.

The trial court determined that Clarke could exercise the Right of First Refusal by paying Fine Housing Three Hundred Fifty Thousand Dollars (\$350,000.00). To reach that number the trial court started with the combined price that Fine Housing paid RRJR for the Property (\$150,000.00) and that Fine Housing paid Robin Robinson for the Sol Legare Property (\$700,000.00). From that \$850,000.00 figure, the trial court subtracted the amount for which Fine Housing was able to resell the Sol Legare Property (\$500,000.00) to calculate the \$350,000.00 exercise price. Clarke claims no interest or right in the Sol Legare Property. The Court offered no explanation why it factored the purchase and resale of the Sol Legare Property into its equation. It likewise failed to explain why it found that Clarke exercised his Right of First Refusal by offering to pay Six Hundred Fifty Thousand Dollars (\$650,000.00) for the Property in April 2014, but must only pay Three Hundred Fifty Thousand Dollars (\$350,000.00) to exercise that right as of September 2017.

The trial court's decision as to the price for which Clarke can exercise the Right of First Refusal rewrites the agreement between Clarke and Group Investment. Courts may not add or modify terms in a contract to make it enforceable or comport with public policy. *See Poynter v.*

*Century Builders of Piedmont*, 387 S.C. 583, 694 S.E.2d 15 (2010); *Stonhard, Inc. v. Carolina Flooring Spec., Inc.*, 366 S.C. 156, 621 S.E.2d 352 (2005). Doing so “would essentially re-write the parties’ contract, a service the courts of South Carolina do not perform.” *MailSource, LLC v. M. A. Bailey & Assocs.*, 356 S.C. 363, 369, 588 S.E.2d 635, 639 (Ct. App. 2003).

This preclusion from judicial re-writing of contracts is an additional justification for the requirement that, in the creation of a right of first refusal, the method of determining price must be certain and the process for notification and exercise must be certain.

The trial court’s arbitrary determination of the price at which Clarke can exercise the Right of First Refusal should be set aside.

### **CONCLUSION**

Clarke initiated this action to enforce the Right of First Refusal as to the Property purportedly given to him by Group Investment in the Lease. He sought to enforce the Right of First Refusal against owners in the Property’s chain of title that took from Group Investment. Clarke believed that he can do this because the Lease that contains the Right of First Refusal was recorded. However, the Right of First Refusal language in the Lease lacks the detail required to be an enforceable interest in real estate. Because of the lack of detail in the language creating the Right of First Refusal as to the encumbered property, price for exercising the right, and procedures for exercising the right, the Right of First Refusal is an improper and unreasonable restraint on alienation that violates the public policy of the State of South Carolina. It therefore has no effect.

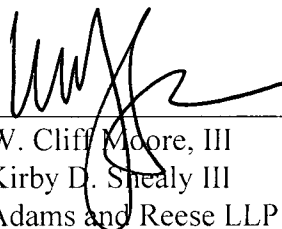
Even if the Court could determine that the Right of First Refusal is enforceable, Clarke’s actions upon learning of transactions that triggered the right demand the conclusion that Clarke waived his right to enforce the Right of First Refusal and that any such enforcement would violate

the doctrines of laches and equitable estoppel. In his own words, Clarke explained that he took the calculated risk that Fine Housing would accept what he believed to be an offer that was half a million dollars more than Clarke believed he was required to pay. He was wrong. His actions cost him the ability to claim the Right of First Refusal.

The record established at trial should lead this Court to find, in accordance with its own view of the preponderance of the evidence that (1) the Right of First Refusal is an improper and unreasonable restraint on alienation that violates the public policy of the State of South Carolina and has no effect; (2) even if the Right of First Refusal were enforceable, Clarke waived the right to enforce it, and (3) Clarke is precluded by the doctrines of laches and equitable estoppel from enforcing the Right of First Refusal.

May 7, 2018

Respectfully submitted,



---

W. Cliff Moore, III  
Kirby D. Srealy III  
Adams and Reese LLP  
Post Office Box 2285  
Columbia, S.C. 29202  
P: 803-254-4190  
Attorneys for Appellant/Respondent