THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

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SC Court of Appeals

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Case No. 2016-002176

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Edward R. Kelly and Deirdre O. Kelly ..... Appellants

v.

Allen S. McCombs and Benjamin James Russell ..... Respondents

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APPELLANTS' PETITION FOR REHEARING

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Pursuant to Rule 221, SCACR, Appellants Edward R. Kelly and Deirdre O. Kelly ("Kellys" or "Appellants") hereby petition for rehearing of this Court's August 28, 2019 Unpublished Opinion No. 2019-UP-308 ("the Opinion") in the above-captioned appeal. The Court should grant rehearing, consider any remaining issues not addressed in the Opinion, and issue a revised opinion reversing the decision of the lower court and remanding the case to the court of common pleas, as set forth herein.

**Introduction**

The case involves a 1996 deed of Property from the Kellys to Henry McCombs ("Henry") in which the Kellys bargained for a first right of refusal ("FROR"), which was reflected in the price of the Property. (The 1996 deed at Record pp. 082-083 is referred to herein as the "Deed"). In the Opinion, this Court affirmed the lower court's refusal to enforce the FROR solely on the basis that it was enforceable only against the grantee Henry. One basis for

the conclusion is that the specific FROR provision itself did not contain the language "successors, heirs or assigns" following the grant of the FROR to the Kellys, whereas a separate provision in the Deed contains a restriction on mobile homes did include "successors or assigns or heirs." [Opinion at p. 2]. Another basis in the Opinion to affirm is based on decisions from other states that limit the transferability of rights of refusal [Opinion at p. 3]. However, in this case, both the language of the Deed to Henry and language of the Quitclaim Deed gift of the Property from Henry to his son indicate no intention to limit the FROR to Henry, and the Quitclaim Deed expressly includes an assumption the FROR by the son. Under the circumstances of this case, the FROR applied to the son, and the Kellys were entitled to exercise it when he sold the Property.

## Law/Analysis

### I. The Intent of the Parties Was to Create a Valid FROR in favor of Kellys.

The can be no doubt that in the Deed from Kellys to Henry the parties intended for the Kellys to retain a first right of refusal relating to a future sale of the Property. Under South Carolina law, "[w]hen interpreting a deed, the primary rule of constructing the deed is to ascertain and effectuate the parties' intentions, unless that intention contravenes some well-settled rule of law or public policy." *Williams v. Tamsberg*, 425 S.C. 249, 259, 821 S.E.2d 494, 500 (Ct. App. 2018). *See also, Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965) ("in construing a deed it is elementary that the cardinal rule of construction is to ascertain and effectuate the intention of the parties, unless that intention contravenes some well settled rule of law or public policy").

The entirety of the FROR provision in the Deed reads:

> The 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 or parcel of the same.

[Deed, R. p. 082]. The language of the FROR avoids any reference to the "grantee" or to Henry, thereby reflecting the intent that it be binding on anyone acquiring the Property other than by "sale" mentioned in the provision. "Effect must be given to all the words and clauses in an instrument if that be possible in reason, so that each is made operative and effective to some purpose." *Wilson v. Poston*, 111 S.E. 873, 875 (S.C. 1922). Thus, the conclusion of the lower court that the obligation was personal to Henry fails to follow the rules set forth by our Supreme Court. The law of South Carolina should be followed and the intent of the parties, as determined by the language used in the Deed, should be enforced.

## II. Henry's son expressly assumed the FROR in the Quitclaim Deed.

The Opinion acknowledges that Henry's transfer of the Property to his son by way of Quitclaim Deed [R. pp. 084-086 (herein the "Quitclaim Deed")] was a gift that did not invoke the FROR. [Opinion at p. 2 fn 1]. The Kellys agree, as stated in the Opinion. [Id.] Thus, the Kellys did not have the right to match the $5 consideration set forth in the Quitclaim Deed to exercise the FROR and repurchase the Property at that price. The FROR simply did not apply to the gift.

It follows that the FROR remained in effect. In fact, the conveyance of the property from Henry to his son by Quitclaim Deed transferred the FROR by expressly stating that the property conveyed is "subject to any *Restrictions, Conditions*, Covenants, *Rights*, Rights of Way, and Easements now of record . . ." [R. p. 085 (emphasis added)]. Because in this case the FROR was expressly included in the Quitclaim Deed from Henry to his son, this appeal does not require the Court to decide whether a conveyance in the absence of such language would have conveyed the FROR. Here, through the Quitclaim Deed, Henry assigned the FROR and it was expressly assumed by his son. Therefore, the FROR being enforced by the Kellys is the one Henry's son

assumed in the Quitclaim Deed, and it applies to the son's sale of the property. After the date of the Quitclaim Deed from Henry to his son, Henry was no longer relevant to the FROR.

### III. Presence or absence of "successors, heirs or assigns" language is not relevant.

For the same reasons, the absence of "successors, heirs or assigns" language in the FROR provision itself is not relevant. South Carolina law does not prevent the FROR from being assigned and expressly assumed by another. Here, it was not only assigned by Henry, but expressly assumed by the son. Thus, the issue of the necessity of the "successors, heir or assigns" language in the absence of an express assignment and acceptance is not reached in this appeal.

The fact that a separate restriction on the Property to permit no more than one mobile home includes "successors, heirs or assigns" language has no relevance whatsoever. The language of that *use* restriction includes the language because it also specifies the "grantee" (Henry) by stating that "neither grantee nor his successors or assigns or heirs . . ." [Deed, R. p. 083]. In contrast, the language of the FROR does not refer to a grantee at all, as set forth above. Instead, it intentionally is not specific to the grantee, thereby making it apply to subsequent owners who did not obtain title by a sale. Because the grantee (Henry) is not mentioned in the FROR provision, there is no place for "successor" language and it is not necessary. This demonstrates the illogic of the holding that the FROR was personal to Henry.

Further, the language of the Deed *does* make it binding on Henry's heirs and assigns. A review of the entire Deed demonstrates that the premise of the holding below is faulty. In the habendum clause of the Deed it states that the "premises above mentioned" are conveyed to "Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever." [*Id.*][1]

[1] The Opinion finds that this contention was not preserved for review. [Opinion at p. 3]. However, the issue was raised at the trial court [*see* Transcript, R.pp. 140-143], and the lower

*See, First Carolinas Joint Stock Land Bank v. Deschamps*, 171 S.C. 466, 172 S.E. 2d 622, 624 (1934) ("the court will look to the entire deed to obtain the intention as to the meaning of the words used"). Accordingly, the premise of the lower court's decision is faulty because the entire deed, including the FROR provision, is expressly binding on Henry's heirs, successors and assigns.

## IV. The construction of the language should avoid absurd results.

The Opinion finds "no merit" to the argument that the ruling below could lead to absurd results because Henry could have circumvented the bargained-for FROR by transferring the Property to his son immediately after receiving the Deed. [Opinion at p. 3]. However, the absurd result in the hypothetical obviously *could* have occurred under the interpretation adopted by the court. The fact that in this case it did not happen because sixteen years actually passed between the Deed to Henry and the Quitclaim Deed to his son does not change the policy of the rule of interpretation. The South Carolina rule of contract interpretation is based on whether the construction could lead to absurd results. If so, then such a construction is to be avoided. *Charleston & W. Carolina Ry v. Joyce*, 231 S.C. 493, 99 S.E. 2d 187 (1957) ("it is the policy of the Court to give a reasonable and equitable construction to a contract and avoid giving a construction that will bring about absurd results"). *See also, Douglas v. Medical Investors, Inc.*, 256 S.C. 440, 446, 82 S.E.2d 720, 722 (1971). Following that rule of construction under South Carolina law, an interpretation that could lead to absurd results, as here, should be avoided. Instead it was adopted.

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court's holding that the Deed on its face contains no language making it binding on the heirs or assigns of Henry constitutes a ruling on the issue by the trial court. [Order, R. p. 4].

## Conclusion

Rehearing is required in this matter. For the reasons stated, the Opinion fails to follow existing South Carolina law in its interpretation of the language of the Deed. The Opinion should be revised to hold that the decision of the lower court should not be affirmed on the basis that the FROR was personal to Henry, and this Court should consider any remaining issues not addressed in the Opinion. After consideration of any remaining issues, the decision of the lower court should be reversed, and the case remanded to the court of common pleas.

Respectfully submitted,

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September 12, 2019

**THE STATE OF SOUTH CAROLINA**
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**v.**

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## CERTIFICATE OF SERVICE

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The undersigned certifies that Appellants' Petition for Rehearing was served upon the Respondents by depositing same in the United States Mail, with sufficient postage affixed and addressed as follows:

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September 12, 2019.

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September 12, 2019



VIA HAND DELIVERY BY COURIER

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

***RE: Edward and Deirdre Kelly v. Allen McCombs and Benjamin Russell***
***Case No.: 2016-002176***

Dear Ms. Kitchings:

Enclosed please find:

(1) An original and 7 copies of Respondents' Petition for Rehearing;

(2) A Certificate of Servie; and

(3) A check that includes $50 for the filing fee for the Petition.

Please file the originals and return the filed, stamped copy with the courier.

By copy hereof, we are serving counsel of record for Appellant. Thank you.

Very Truly Yours,

McCOY LAW FIRM, LLC

Brian S. McCoy

BSM:cjm
Enclosures

CC: N. Beth Ramsey Faulkner, Esq.
James W. Boyd, Esq.