THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Presiding Judge

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SC Court of Appeals

Appellate Case No. 2018-002161

Estate of Willie G. Weekley, Deceased, by its Personal Representative, Betty W. Denney..Appellant,

v.

L.C. Weekley, Laura Weekley Segel, Individually and as Personal Representative of the Estate of William James Weekley, Deceased, Peter Saad as Personal Representative of Mary Elizabeth Weekley Saad, Deceased, and as Trustee of the Mary Elizabeth Saad Trust,

Of whom Laura Weekley Segel, Individually and as Personal Representative of the Estate of William James Weekley, Deceased, is the..................Respondent.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE

This matter is an attempt by a former personal representative to overturn transfers of real property to which the estate is not a party and in which the estate has no legal interest. The Appellant, Betty Denney, brought this action as successor personal representative of the estate of Willie G. Weekley ("Weekley"), her father, who died in 1977 (hereinafter, called the "Estate").[1] Appellant became successor personal representative in 2006 after the deaths of the original personal representatives named by Weekley in his will[2]. On November 14, 2007, Appellant filed this action on behalf of the Estate, seeking to set aside transfers of inherited real property shares between certain beneficiaries of the Estate. (R. pp. 182-185). Weekley's Last Will and Testament ("Will") directed that, upon his death, Weekley's farm property located in Hampton County, South Carolina ("Property") be divided into thirty-three shares of ten acres each and distributed to his designated heirs in the amounts recorded in his Will. (R. pp. 117-120). Four shares attributed to forty acres of land specifically identified in his Will, and containing Weekley's home and homesite ("Homesite"), were bequeathed to all of Weekley's then living children. (R. pp. 117-118). After Weekley's death, some of his children transferred their shares to Appellant or to Appellant's late father William J. Weekley. (R. pp. 109-110, 135-136, 177, 292-303). In her Complaint filed in the Hampton County Probate Court on November 14, 2007, Appellant prayed that the Probate Court would

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[1] Mrs. Denney was removed as Personal Representative by order of the Beaufort County Circuit Court on January 17, 2017 and Carol Ruff was named Personal Representative of the Estate; however, the caption in the case was never changed. Additionally, after filing this appeal, Denney passed away on or about April 26, 2019; however, she had not brought this action in her personal capacity and her Estate has not moved to amend the notice of appeal or the caption in this matter. Despite these issues, Mrs. Denney will be referred to herein as Appellant or Mrs. Denney.
[2] Respondent Segel was the only party to Answer the original complaint filed by Mrs. Denney in this matter. All other parties named in that complaint defaulted, including those whose children now seek to intervene in this matter.

declare these share transactions, which are specifically listed in the Complaint, and hereinafter referred to as the "Disputed Transactions", invalid and order the "rescission of each challenged transaction and restitution of the various parties to their pre-conveyance status." (R. pp. 182-185). Respondent filed an Answer and Counterclaim seeking to remove the personal representative and requesting a jury trial on February 13, 2008. (R. pp. 175-181).

Appellant filed a Motion for Summary Judgment on September 24, 2009 prior to the completion of discovery and without any supporting affidavits or deposition testimony. (R. pp. 166-168). At no time did Appellant file affidavits in support of her Motion for Summary Judgment or even affidavits in reply to Respondent's affidavit. Appellant never noticed any depositions in this matter.

On August 29, 2013, almost four years after Appellant filed a motion for summary judgment, Judge Odom issued an order partially granting Appellant's Motion for Summary Judgment and granting Respondent's Motion to Remove. (R. pp. 45-55). In partially granting Appellant's Motion for Summary Judgment, the Probate Court looked only at whether the contested transactions were in accord with Weekley's testamentary intent and only cited case law pertaining to ascertaining testamentary intent. (R. pp. 51-54). On or about September 13, 2013, Appellant filed a Motion to Reconsider the Probate Court's Order dated August 29, 2013 granting partial summary judgment. (R. pp. 128-130).

On February 6, 2015, Judge Odom signed an Order Granting Appellant's Motion for Summary Judgment Upon the Motion to Reconsider and Upon a Motion Hearing on January 5, 2015. (R. pp. 21-32). Unlike the August 29, 2013 Order, the February 6, 2015 Order granted Appellant's full Motion for Summary Judgment, finding that all of the contested transactions violate the intent of Weekley's Will. (R. pp. 31-32).

Respondent timely appealed the Probate Court's February 6, 2015 Order granting summary judgment to Appellant. The Circuit Court, by order of the Honorable Perry M. Buckner, III, perpetuated the Probate Court's errors by affirming the Probate Court's order without analyzing the evidence, or lack thereof, in the record and Respondent's affirmative defenses of laches, waiver, and estoppel. (R. pp. 17-20).

On August 13, 2015, Respondent timely filed a Notice of Appeal of Judge Buckner's Order. Oral arguments on that appeal were heard on February 14, 2017. By Order dated February 17, 2017, this Court reversed and remanded the case back to Circuit Court finding (i) that the probate court did not lack jurisdiction over the matters presented in the case; (ii) that the Circuit Court erred in granting Appellant summary judgment when genuine issues of material fact existed regarding Respondent's affirmative defenses of laches and estoppel; and (iii) declining to address Respondent's remaining arguments as to why the grant of summary judgment was in error. (R. pp. 10-12).

While the earlier appeal of the order granting Appellant summary judgment was pending, Respondent filed a motion to remove personal representative and for an accounting on November 23, 2016[3]. (R. pp. 115-122). A hearing on that motion was held on December 16, 2016, and Appellant was removed as Personal Representative and replaced by Carol Clayton Ruff by Order of Judge Carmen Mullen dated January 17, 2017. (R. pp. 13-16).

During the second half of 2017, Ms. Ruff performed an accounting of the Estate; however, the action was not dismissed. On May 10, 2018, in an attempt to finally bring the suit to an end after twelve years, Respondent filed a motion for summary judgment supported by two of her own

[3] Respondent had previously filed a Petition for Removal of Personal Representative on or about June 4, 2012 along with the Petition to Remove Action to Circuit Court, but the Hampton County Probate Court never scheduled a hearing on that Petition.

affidavits (dated October 13, 2010 and May 2, 2018, respectively) and the affidavit of her husband, Michael Segel, dated May 2, 2018. (R. pp. 106-113, 131-161). Although Appellant was no longer a party to the suit, the caption had not been changed and notice of the motion was provided to Appellant through her counsel as well as Ms. Ruff. (R. pp. 6, 106). On July 24, 2018, Appellant along with her daughter, Jane Denney Toles, and several nieces and nephews—William David Shinar, Elizabeth Ann Shinar, John Alexander Shinar, Jams Robert Shinar, Kathy Chakides Gaffos, John Chakides, Phillip Chakides, Danny Chakides, Mixon Zahler, Lisa Weekley Keller, and Lynn Weekley—filed a motion to intervene in this action. (R. pp. 104-105). All individuals joining Appellant in her Motion to Intervene are grandchildren of W.G. Weekley; Lisa Weekley Keller and Lynn Weekley are sisters of Respondent. (R. pp. 86, 92, 104; p. 219, line 18-25). In opposition to Respondent's Motion for Summary Judgment and in support of the motion to intervene, Appellant submitted the affidavits of William David Shinar and Lisa Weekley Keller for consideration by the Court. (R. pp. 86-103).

Appellant's counsel filed the motion to intervene as counsel to all parties listed on the motion. (R. p. 104). On October 15, 2018, Judge Mullen heard arguments regarding Respondent's Motion for Summary Judgment and Appellant's motion to intervene. (R. p. 4). Ms. Ruff attended the hearing, but did not oppose Respondent's motion for summary judgment. (R. p. 7; p. 212, line 4 – p. 214, line 14). Counsel for Appellant attended the hearing and was granted permission by Judge Mullen to argue against Respondent's motion for summary judgment although Appellant was not a party to the case. (R. pp. 4-5; p. 214, line 10-14). By Order dated November 5, 2018, Judge Mullen granted summary judgment to Respondent on the grounds that the right of first refusal in the will of W.G. Weekley was invalid as an unreasonable restraint on alienation, and that since Appellant was no longer personal representative and no other interested party intervened in the matter before the expiration of the applicable statute of

limitations, recovery by any of those parties is barred. (R. pp. 7-8). By Form 4 order dated November 5, 2018, Judge Mullen denied Appellant's motion to intervene on the grounds that it was moot. (R. p. 4, footnote 1). Appellant filed a motion to reconsider on November 15, 2018, which was denied by form order of Judge Mullen dated December 4, 2018. (R. pp. 1-3, 83-85).

Appellant filed a Notice of Appeal on December 6, 2018. (R. pp. 70-71).

STATEMENT OF FACTS

Weekley died testate on November 6, 1977. (R. pp. 5, 186). As set out in his Will dated May of 1973, Weekley left shares in the Property to his eight children: William J. Weekley, Doris Weekley Zahler, Lucas Carroll Weekley, Jasper Josiah Weekley, Margaret Weekley Shinar, Elizabeth Weekley Saad, Ruth Weekley Chakides, and Betty Weekley Denney. (R. pp. 117-119). The initial executors of the estate were William J. Weekley, Lucas Carroll Weekley, and Doris Weekley Zahler, who are all now deceased. (R. pp. 115, 186). Weekley's estate remains open. (R. p. 5).

Appellant is one of Weekley's eight children and brought this action as successor personal representative of her father's estate. She sued to set aside the Disputed Transactions of "shares" in farm property, consisting of approximately 330 acres, owned by Weekley at the time of his death. (R. pp.182-185). Weekley's eight children were each devised "shares" in the Property under his Will. (R. pp. 107, 117). In the years since Weekley's death, some of the children transferred those shares to other family members, including Weekley's granddaughter, Laura Weekley Segel. Mrs. Segel is the daughter of one of Weekley's eight children, William J. Weekley ("W.J. Weekley"), who is deceased. (R. p. 109). Appellant complained in her Complaint that the Disputed Transactions made over the course of several years did not comply with specific requirements of the Will. (R. pp. 183-185).

Weekley's estate is governed by the provisions of his Will. Section III of the Will

provides as follows: "In order to distribute my real estate among my sons and daughters in a manner I feel, after long and thorough deliberation, fair and equitable, I hereby, for the purpose of this instrument, divide my lands into thirty-three (33) shares of ten (10) acres each". (R. p. 117). Section IV then provides:

> I hereby give, devise and bequeath the shares above referred to under the terms and conditions hereinafter set forth to my children in the following proportions: William J. Weekley, eight and one-half (8 ½) shares; Doris Weekley Zahler, five (5) shares; Lucas Carroll Weekley, eight and one-half (8 ½) shares; Jasper Josiah Weekley, two and one-half (2 ½) shares; Margaret Weekley Shinar, one (1) share; Elizabeth Weekley Saad, one (1) share; Ruth Weekley Chakides, one and one-half (1 ½) shares; and Betty Weekley Denney, one (1) share. (R. p. 117).

Section V states:

> I hereby further devise and bequeath four (4) shares equally to all of my surviving children located immediately east and west of Salkehatchie Road at the northern extremity of my land, including my home and home site. I further direct that no part of this forty (40) acres can be sold or divided without unanimous agreement of all surviving heirs. Taxes shall be shared equally by all surviving heirs. Maintenance, use of, and physical developments that occur on this forty (40) acres must have majority agreement of all surviving heirs. In this instance, each vote shall be by surviving heirs rather than by shares owned. Upon the death of my last surviving child, provided this forty (40) acres has not been disposed of prior to that time by unanimous agreement of all surviving heirs, then I further direct that this forty (40) acres be divided equally among all of my surviving grandchildren or sold at auction to the highest bidder, and the proceeds of same be distributed equally among the surviving grandchildren. Regardless of the time of sale, prior to the death of my surviving children, or after, the proceeds of the sale of this forty (40) acres, or any part thereof shall be divided equally among my then surviving grandchildren. (R. pp. 117-118).

Section VI provides:

> **The location of each devisee's portion of land is to be determined by a majority vote of the devisees.** The vote of each devisee will be in proportion to their shares. It is my desire and intention that Jasper Josiah Weekley's portion be in the "Pine Thicket". His portion will be on the Salkehatchie Road joining the J.F. Weekley property and going back to the swamp. (Emphasis added). (R. p. 118).

The Respondent apparently premises her claims on the following provisions of Section VII:

I hereby direct that at any time after Two (2) years of my death, that the devisees agree on the location of their portion, that the property can be divided. I **further direct that any time one of the devisees desires to sell his portion of the property, that he first offer it to the remaining devisees.** Should they not be able to agree on a price for the property to be sold, then the seller would choose one appraiser and the remaining devisees one appraiser and the third appraiser would be the Palmetto State Bank of Hampton, South Carolina. Theaverage of the three appraisals would be the selling price. **The devisees purchasing the property would contribute to the purchase price according to the proportions they received in Paragraph IV, and the portion so purchased would be likewise divided.** (Emphasis supplied). (R. pp. 118-119).

Section VIII provides:

I further direct that from my death, until my entire estate has been distributed, as hereinabove set forth, that all decisions necessary to the management of the property be made by vote of the devisees. The vote of each devisee will be in proportion to their shares. Also, until divided, all profits and losses will likewisebe proportionately divided. (R. p. 119).

Section XI of the Will provides that survivors of the beneficiaries who predecease the Testator shall take their parent's share *per stirpes*. (R. p. 119).

The Disputed Transactions are comprised of the following instruments appearing in the public record:

a) Mary Elizabeth Weekley Saad transferred her one (1) share in the farm to the Mary Elizabeth Weekley Saad Trust on October 7, 1997. This deed is filed in the Hampton County Deed Book 242 at page 112. (R. pp. 296-299).

b) Lucas Carroll Weekley ("L.C. Weekley") gave W.J. Weekley a general warranty deed dated December 20, 1999 for all of his interests in certain property in consideration for payment of $132,000.00. L.C. Weekley's interests included: eight and one-half (8 ½) shares inherited under Section IV of the Will and a sibling's portion under the statute of descent and distribution from the estate of Jasper Joseph Weekley, who died intestate and without children. (R. p. 117, 135). The conveyance from L.C. Weekley to W.J. Weekley was recorded on

December 20, 1999 in Hampton County Deed Book 236 at Page 293. (R. pp. 300-303).

c) Additionally, the Mortgage from W.J. Weekley to L.C. Weekley for the purchase price also dated December 20, 1999 is recorded in the Hampton County Mortgage Book 260 at page 271. (R. p. 184).

d) On September 12, 2000, Mary Elizabeth Weekley Saad, as trustee of the Mary Elizabeth Weekly Saad Trust, transferred her share to Respondent by general warranty deed in consideration for payment of $15,000. (R. pp. 292-295).

Respondent is personal representative of her father's estate, and inherits his shares in the Property, which include his original eight and one-half (8 ½) shares and the shares he purchased from L.C. Weekley, following his death in 2003. (R. pp. 109, 135, 175).

Appellant Denney petitioned the Probate Court to become the personal representative on May 1, 2006 and was appointed personal representative of the Estate on July 14, 2006. (R. pp. 56, 186-188). Mrs. Denney seeks in this case to have the Disputed Transactions that resulted in W.J. Weekley and Laura Weekley Segel purchasing additional shares from family members in exchange for monetary consideration declared invalid. (R. pp. 166-167, 182-185,).

Although Appellant brought this action on behalf of the Estate, the Estate was not a party to the Disputed Transactions, all of which took place many years after the original personal representatives distributed the shares to Weekley's devisees. (R. pp. 6, 292-295, 296-299, 300-303,). Appellant did not claim that the original distribution of shares was inappropriate or failed to meet the intent of Weekley. Rather, Appellant sought to overturn the Disputed Transactions on the ground that these interfamily transfers, that took place long after the initial distribution of shares, were not in accord with Mr. Weekley's testamentary intent as set forth in his Will and that the devisees were not all allowed to vote on, participate in, or share in profits from the Disputed

Transactions when they took place as required by a clause providing for a right of first refusal to the beneficiaries as follows:

> I hereby direct that at any time after Two (2) years of my death, that the devisees agree on the location of their portion, that the property can be divided. I **further direct that any time one of the devisees desires to sell his portion of the property, that he first offer it to the remaining devisees.** Should they not be able to agree on a price for the property to be sold, then the seller would choose one appraiser and the remaining devisees one appraiser and the third appraiser would be the Palmetto State Bank of Hampton, South Carolina. Theaverage of the three appraisals would be the selling price. **The devisees purchasing the property would contribute to the purchase price according to the proportions they received in Paragraph IV, and the portion so purchased would be likewise divided.** (Emphasis supplied). (R. pp. 118-119).

The record supports Respondent's assertion that all of the devisees were aware of the transactions and declined to participate. (R. pp. 6, 107-108, 135-137). Although Appellant claims in her Complaint that she only learned of the Disputed Transactions upon hiring a title abstractor while acting as personal representative of the Estate, all of the transactions were filed and became part of the public record between 1997 and 2000. (R. pp. 183-184, 292-295, 296-299, 300-303). Additionally, there is at least an inference that Appellant had actual knowledge of the transactions based on the names listed on the lease agreement for the Farm Property signed by Appellant in 2002 and rent payments distributed according to the ownership interest. (R. pp. 145-153). Beginning in the year 2001, and continuing through the pendency of this case, the Property has been leased to an unrelated third party for farming. (R. pp. 145-153). In August of 2002, all parties holding an ownership interest signed a formal Lease Agreement between Weekley Farms et. al. and Paragon Produce Corporation (the "Lease Agreement"). (R. pp. 145-151). Laura Weekley Segel's name is on the Lease Agreement, and she, along with the other heirs, including Appellant, signed it. (R. pp. 145-151). Neither L.C. Weekley nor a representative of Mary Elizabeth Weekley Saad is mentioned in the Lease Agreement, as they

no longer held any ownership interests as a result of the Disputed Transactions. (R. pp. 145-151).

Even more telling, from the year 2001 and continuing through the initiation of this action, rents were collected from the tenant of the Farm Property by the majority shareholder – first W.J. Weekley and then Laura Weekley Segel – and distributed in accordance with the number of shares owned by each individual shareholder as calculated in accordance with the transfers. (R. pp. 6, 110, 154-161). All shareholders received summaries of the distributions. (R. 6, 110). On every summary of distribution, Laura Weekley Segel is shown as receiving her distribution inaccordance with her shares. (R. pp. 110, 154-161). Every summary of distribution shows that L.C. Weekley did not receive distributions after the sale of his shares to W.J. Weekley. (R. pp. 136, 154-161). W.J. Weekley received the distributions that would have been paid to L.C. Weekley but for the transfer. (R. pp. 135-136, 154-161). After the deathof W.J. Weekley in 2003, Laura Weekley Segel began receiving those distributions. (R. pp. 135-136). The Lease Agreement together with the distribution summaries that were delivered annually to every shareholder gave notice of the transfer of the shares. In addition, in or around 2003 the shareholders met to discuss how to divide the property. (R. pp. 110, 113). Appellant and Respondent were present at that meeting as shareholders; however, the other individuals who sought to intervene in the suit in 2018, all grandchildren of Weekley, were not. (R. pp. 6, 110, 113, 217). Although Appellant sought to overturn the Disputed Transactions as personal representative of the Estate, she never sought to overturn them in her individual capacity before or after being removed as personal representative. Ms. Ruff, the current personal representative, does not seek to overturn the Disputed Transactions and agrees that the right of first refusal contained in the Will is an

invalid restraint on alienation. (R. pp. 7, 203, 212-213,). Although Weekley's Estate has been open since 1977, no individual shareholder and no party to the real estate transactions that are the subject of this suit has ever challenged the Disputed Transactions.

STANDARD OF REVIEW

In reviewing the grant of summary judgment, this Court applies the same standard as the court below. *Boyd v. Bellsouth Tel. & Tel. Co.*, 369 S.C. 410, 415, 633 S.E.2d 136, 138 (2006). A party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *see also Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). When the motion for summary judgment is supported by affidavits or deposition testimony, the "adverse party may not rest upon the mere allegations or denials of his pleadings, but his response . . . must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), SCRCP. All evidence and all inferences must be viewed in the light most favorable to the non-moving party. *Koester v. Carolina Rental Center, Inc.* 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper." *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976).

In deciding a motion for summary judgment, only competent evidence that would be admissible at trial may be considered. *Hansen v. DHL Laboratories, Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994), *Clarified by, affirmed by* 319 S.C. 79, 459 S.E.2d 850 (1995). In deciding a motion for summary judgment, a court must not try issues of fact, but must discern whether genuine issues of fact exist to be tried. *Rothrock v. Copeland,* 305 S.C. 402,

405, 409 S.E.2d 366, 367 (1991).

ARGUMENT

There are no genuine issues of material fact that preclude Judge Mullen's grant of summary judgment, and summary judgment was properly granted to Respondent.

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT BECAUSE THE RIGHT OF FIRST REFUSAL CONTAINED IN THE WILL OF W.G. WEEKLEY IS AN UNREASONABLE RESTRAINT ON ALIENATION AND INVALID AS A MATTER OF LAW.

The Circuit Court correctly held that the right of first refusal set out in the Will creates an unreasonable restraint on alienation and is, therefore, invalid. (R. pp. 7-8). In construing a will, the court should strive to determine and give effect to the testator's intent. *May v. Riley*, 279 S.C. 248, 305 S.E.2d 77 (1983); *In re Estate of Fabian*, 326, S.C. 349, 483 S.E.2d 474 (Ct. App. 1997). However, pre-emptive rights regarding real property, such as rights of first refusal, are subject to the rule against restraint of alienation of interest in land. *See Page v. Page*, No. 2004-UP-110 (Ct. App. Feb. 24, 2004) (citing 61 Am. Jur. 2d Perpetuities and Restraints on Alienation § 110 (2002)). "A right of first refusal . . . is not a restraint on alienation, as long as both the price that the designated person must pay, and the time allowed for the exercise of the right of first refusal are reasonable". *Id.* When the length of time of the right of first refusal remains open and cannot be established, the restraint on alienation is unreasonable, and the restraint is therefore violative of public policy of this state and has no force and effect. *Page v. Page*, No. 2004-UP-110, (Ct. App. Feb. 24, 2004); *McCravey v. Otts*, 90 S.C. 447, 452, 74 S.E. 142 (1912) (holding that a provision of a will stating that certain real property could not be sold "until such time as they may all agree with my sister" is an unreasonable restraint on alienation and against public policy); *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.d2d 412, 415 (Ct. App. 1984) (stating that, in examining a will, unreasonable limitations on the power of alienation is against public policy and must be

construed as having no force or effect). In addition to requiring that a right of first refusal set a length of time to remain open in order to be valid, South Carolina law also requires that the right of first refusal set forth a specific price to be paid for the properties. *Webb v. Reames*, 326 S.C. 444, 446, 485 S.E.2d 384, 385 (Ct. App. 1997).

In granting summary judgment, Judge Mullen relied upon both the clear language of the will and the Testator's intent in finding that, as a matter of law, the right of first refusal was invalid as an illegal restraint on alienation. The court should read the testator's language to effectuate the testator's intent, unless than intent contravenes some well settled rule of law or public policy. *Miller v. Rogers*, 246 S.C. 438, 443 144 S.E.2d 485 (1965). Moreover, the rules of construction are of secondary importance to the need to ascertain what the testator meant by the terms used in the written instrument itself, and each provision of the will must be considered in relation to the other provisions. *Allison v. Wilson*, 306 S.C. 274, 278, 411 S.E.2d 433 (1991). Because the intent of the testator was for his children to have a right of first refusal for any sale of the properties in question in perpetuity and with no set price for payment, that specific intent by the Testator in and of itself made the right of first refusal invalid as a matter of law. *See Webb*, 485 S.E.2d at 386.

Additionally, the clause in the Will granting beneficiaries a first right of refusal when any beneficiary wishes to divest his or her property right improperly requires that _any_ time one of the devisees desires to sell his portion of the property, he first offer it to the remaining devisees no matter how long he may hold the property. (R. pp. 7-8, 118-119). W.G. Weekley died in 1977 and the disputed transactions occurred between 30 to 33 years later. Appellant sought to unwind these transactions as being invalid, alleging that they violated the right of first refusal in the Will. (R. pp. 183-185). Granting Appellant's prayer would be an unreasonable restraint on alienation that "runs counter to the commonly acknowledged concept in this state that one of the attributes

of fee simple ownership is the ability to freely convey it with few if any restrictions". *McCravey v. Otts*, 90 S.C. at 452; *Wise v. Poston*, 281 S.C. at 579. W.G. Weekley's heirs took the property upon his death and this unlawful restriction does not and should not restrict any beneficiaries' transfer of his or her property 40 years in the future. Therefore, summary judgment was properly granted to the Respondent and should be upheld.

Appellant's argument that the Court erred in granting Respondent summary judgment because Respondent's motion did not provide notice that Respondent believed the right of first refusal was invalid as a matter of law is insufficient to overturn the grant of summary judgment to Respondent. It is well established in South Carolina that prior notice of all arguments to be made at a motions hearing is not required. *See Pye v. Estate of Fox ex rel. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (S.C. 2006) (finding an issue preserved where it was raised for the first time at the summary judgment hearing); *see also Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (S.C. 2000) (finding that a party can effectively raise a claim at the summary judgment hearing although it was not pled).

The case cited by Appellant, *Resolution Trust Corp. v. Eagle Lake and Golf Condominiums*, 310 S.C. 473, 427 S.E.2d 646 (S.C. 1993) is not instructive on the issue of raising unpled issues for the first time at a summary judgment hearing because the facts of the case are very different. In *Resolution Trust Corp*, the defendant had filed a counterclaim and general denial in response to the plaintiff's action to foreclose a mortgage, but the defendant failed to raise any affirmative defenses in that response. 310 S.C. at 475. Defendant then attempted to raise a number of affirmative defenses, previously not asserted in any pleadings, at the hearing on plaintiff's motion for summary judgment. Failing to plead affirmative defenses is not analogous to arguing additional legal grounds in support of a motion for summary judgment, particularly where the

individual complaining about lack of notice is not even a party to the case. Appellant does not contest that Respondent argued the issue of the validity of the right of first refusal on the record at the hearing on the motion and Respondent's motion specifically stated that Respondent's motion relied on arguments made in the motion and at the hearing. (R. p. 108). Accordingly, Appellant's sour grapes are insufficient to overturn the grant of summary judgment to Respondent.

Appellant also argues that Judge Mullen's Order granting summary judgment on the issue of the validity of the right of first refusal improperly relies on an unpublished opinion. (Appellant's Initial Brief at 19). Although an unpublished opinion does not establish precedent, a trial court commits no impropriety considering such opinions when making decisions. Moreover, a full reading of the Order shows that the Court also relied upon multiple published opinions and other legal primary sources to support its holding that the right of first refusal in the Will is an unreasonable restraint on the beneficiaries' alienation. (R. pp. 7-8) (*citing May v. Riley*, 279 S.C. 248, 305 S.E.2d 77 (1983); *In re Estate of Fabian*, 326 S.C. 349, 483 S.E.2d 474 (Ct. App. 1997); *McCravey v. Otts*, 90 S.C. 447, 452, 74 S.E. 142 (1912); *Wise v. Poston*, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct. App. 1984); 61 Am. Jur. 2d Perpetuities and Restraints on Alienation § 110 (2002)).

The right of first refusal contained in the Will does not contain a limit of time for execution and does not set the price for the property to be transferred pursuant to the clause. (R. pp. 6-8, 118-119). The right of first refusal is an unreasonable restraint upon the alienation of the property and invalid. Therefore, Appellant's attempt to overturn the Disputed Transaction on the grounds that they did not comport with the right of first refusal contained in the Will fails as a matter of law and summary judgment was properly granted to the Respondent.

II. NO QUESTIONS OF FACT PRECLUDED THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT TO RESPONDENT.

Contrary to Appellant's assertion, no genuine issues of material fact remain in this matter that should preclude the grant of summary judgment to the Respondent. Appellant argues that the Circuit Court was somehow constrained in deciding this matter due to this Court's holding that the Circuit Court previously erred in granting summary judgment to Appellant Denney when there were genuine issues of material fact with regard to Respondent Segel's affirmative defenses of laches and estoppel, which were both based on the fact that Mrs. Segel or her father had provided notice to the other beneficiaries owning shares in the property long before Mrs. Denney filed this action in 2007. In this Court's order in *Estate of Willie G. Weekley, Deceased by its Personal Representative Betty W. Denney v. L.C. Weekley*, Op. No. 2017-UP-208, the Court of Appeals reversed and remanded the Order of Judge Perry M. Buckner, III mentioned above, stating the following:

> 2. The circuit court erred in granting summary judgment when genuine issues of a material fact existed regarding Appellant's [Ms. Segel's] affirmative defenses of laches and estoppel.

(R. pp. 11-12). This Court then remanded the case for further proceedings.

In the three years since that order to remand, the parties have engaged in discovery. The fact that there were questions of fact regarding Respondent's affirmative defenses in 2015 has no bearing on whether the Circuit Court could rule as a matter of law in favor of Respondent in 2018 on the grounds that the first right of refusal created an unreasonable restraint on the rights of the beneficiaries who inherited shares of the property in 1977. The Circuit Court granted Respondent's motion for summary judgment because the right of first refusal in the Will is invalid, Appellant is no longer personal representative of the Estate, and the statute of limitations has expired precluding recovery by any new party. (R. pp. 7-8). Since the current personal representative of the Estate did not contest Respondent's motion for summary judgment, Judge

Mullen's order should have ended this matter. Even if there were unresolved questions of material fact related to Respondent's affirmative defenses of estoppel and laches, these would not preclude the court from deciding, as it did, that summary judgment should be granted to Respondent.

In any event, although the Circuit Court declined to rule on Respondent's argument that Appellant's claims were barred by the doctrines of laches and estoppel, the two affidavits Appellant submitted in opposition to the motion for summary judgment do not create material issues of fact. (R. pp. 7-8). Respondent Segel argued that all of the property owners, including specifically Mrs. Denney, were provided notice of the Disputed Transactions multiple times more than three years before Appellant initially filed this suit in 2007. On May 2, 2019, Respondent Segel and her husband Michael Segel submitted affidavits in support of Respondent's motion for summary judgment, setting out their personal knowledge of family meetings in which the Disputed Transactions were discussed. (R. pp. 110, 113). As stated in the affidavits, Mrs. Denney was both present at the family meeting and provided notice of the Disputed Transactions as early as 2003. (R. pp. 110, 113). Judge Mullen reviewed Mr. and Mrs. Segels' May 2, 2019 affidavits and Respondent's October 13, 2010 affidavit, as well as the affidavits of William David Shinar and Lisa Weekley Keller that Appellant submitted in opposition to the motion for summary judgment, before granting summary judgment to Respondent. (R. pp. 86-103, 106-113, 131-161). Appellant did not personally appear at the hearing on Respondent's motion for summary judgment and submitted no personal affidavit in opposition to the motion contesting the statements made by Mr. and Mrs. Segel. Although Appellant claims in this appeal that the affidavits of Shinar and Keller create genuine issue of material fact as to whether other beneficiaries of the Estate of W.G. Weekley had notice of the Disputed Transactions, neither Shinar nor Keller – as set out in their affidavits – were present at, or had personal knowledge of, the family meeting discussed in the

Segels' affidavits. (R. pp. 86-103, 109-113). In their affidavits, neither William David Shinar nor Lisa Weekley Keller claim to be present at the meeting referenced by Respondent and Mr. Segel. (R. pp. 86-103). Rather, they assert that they were provided no notice of the disputed transactions was given at the meeting. However, the Will does not require notice be provided to individuals, like grandchildren, which no ownership interest in the property. (R. pp. 117-119).

Additionally, neither Shinar nor Keller owned any shares in the property when this suit was filed in 2007 and, therefore, did not receive any of the reports that went to the property owners as described in the Segels' affidavits. (R. pp. 110, 113, 136-137, 145-161). Frankly, the Shinar and Keller affidavits have no bearing on whether notice was provided to the shareholders and, since the Circuit Court did not grant summary judgment based on Respondent's affirmative defenses of laches and estoppel, are irrelevant to this appeal. Therefore, the Circuit Court's grant of summary judgment to Respondent should be upheld.

III. APPELLLANT DID NOT HAVE STANDING TO ARGUE AGAINST RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AT THE TIME OF THE HEARING AND DOES NOT HAVE STANDING TO BRING THIS APPEAL.

"In order to have standing to present a case before th courts of this State, a party must have a personal stake in the subject matter of the lawsuit." *Duke Power v. South Carolina Public Service Comm'n*, 284 S.C. 81, 98, 326 S.E.2d 147 (1985) (*citing Furman University v. Livingston*, 244 S.C. 200, 136 S.E.2d 254 (1964). Although the caption in this matter still incorrectly names Appellant as a party, Mrs. Denney was no longer a party to the action when the motion for summary judgment was filed or when it was argued. (R. pp. 6, 8, 106, 214). On January 17, 2017, Judge Mullen removed Mrs. Denney as personal representative of the estate due to her lack of performance. (R. pp. 13-16). The Court appointed Carol Ruff, Esq. as personal representative of the Estate. (R. pp. 15-16). At the hearing on Mrs. Segel's motion for summary judgment, Ms. Ruff agreed that the right of first refusal contained in the Will was an invalid and unreasonable

restraint upon the beneficiaries' alienation and that summary judgment on the validity of the Disputed Transactions should be granted to Mrs. Segel. (R. pp. 7, 203, 212-213). Judge Mullen allowed counsel for Ms. Denney to argue against the motion; however, there was no question that Mrs. Denney was not a party to the lawsuit at that time. (R. pp. 4-5, 214). This is the reason Mrs. Denney had filed a motion to intervene prior to the hearing that ultimately was denied by Judge Mullen. (R. pp. 4, footnote 1; 104-105).

Judge Mullen's order states in part that because Appellant is no longer the Estate's personal representative and did not move to intervene prior to the expiration of the statute of limitations, she could not recover in this action. (R. pp. 7-8). Appellant did not appeal the Circuit Court's holding that the statute of limitations had run precluding Appellant from recovering in this matter. (Appellant's Initial Brief at 1). Appellant filed a motion for reconsideration regarding the grant of summary judgment to Mrs. Segel, which was denied, and filed this appeal; however, there is no question that Appellant was no longer a party to the lawsuit at the trial court at the time that the motion for summary judgment was filed or argued. (R. pp. 1-3, 83-85, 106-108, 214). Having no standing at the circuit court level, Appellant can have no standing to contest the grant of summary judgment here. Accordingly, the Circuit Court's grant of summary judgment to Respondent Segel should be upheld.

IV. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S UNTIMELY MOTION TO INTERVENE.

The Circuit Court properly denied Appellant's untimely motion to intervene as moot[4]. As

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[4] Appellant filed her motion to intervene in her individual capacity. Jane Denney Toles, William David Shinar, Elizabeth Ann Shinar, John Alexander Shinar, James Robert Shinar, Kathy Chakides Gaffos, John Chakides, Phillip Chakides, Danny Chakides, Mixon Zahler, Lisa Weekley Keller, and Lynn Weekley also filed the motion to intervene. Respondent argued at the motions hearing that the motion to intervene was untimely, barred by the equitable doctrines of laches and estoppel as outlined below, and barred by the statute of limitations. (R. p. 6). No one but Appellant filed for reconsideration of the order denying the motion to intervene and only Appellant

an initial matter, it is unclear whether Appellant appealed the Circuit Court's order denying Appellant's motion to intervene. Appellant's Notice of Appeal states that Appellant is appealing the orders attached to the Notice and no order regarding the motion to intervene is attached to the Notice. (R. pp. 57-58, 70-71). Additionally, although Appellant's Notice of Appeal states that it is being brought by Appellant in her individual capacity as well as in her capacity as Personal Representative of the Estate – which she is not – it also states that it is on behalf of Jane Denney Toles, William David Shinar, Elizabeth Ann Shinar, John Alexander Shinar, James Robert Shinar, Kathy Chakides Gaffos, John Chakides, Phillip Chakides, Danny Chakides, Mixon Zahler, Lisa Weekley Keller, and Lynn Weekley. However, Appellant's Initial Brief does not mention any appellant aside from Mrs. Denney in her capacity as personal representative of the Estate. Accordingly, Respondent does not believe that Judge Mullen's denial of Appellant's motion to intervene is properly before this Court.

In any event, Appellant's argument that the Circuit Court's denial of the motion to intervene was in error because the court provided only a Form 4 order stating that the motion was moot is incorrect. Judge Mullen had already notified the parties from the bench that she was granting summary judgment to Appellant and had allowed counsel for Appellant to argue against the motion for summary judgment even though Appellant was no longer a party to the case. Accordingly, the Court correctly denied the motion to intervene on the grounds that the motion was moot and Appellant was not prejudiced by the decision. "Not all stipulations require a detailed order, and the trial court's form order may be sufficient if the appellate court can ascertain the basis for the trial court's ruling from the record on appeal". *Porter v. Labor Depot*, 372 S.C. 560,

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filed a notice of appeal. (R. pp. 57-58, 83-85). Appellant obviously had notice of this action in 2007 since she was the petitioner in her capacity as personal representative of the Estate. (R. pp. 182-185).

567-68, 643 S.E.2d 96, 100 (Ct. App. 2007). As in *Porter*, the basis for the trial court's ruling can be easily ascertained from the record on appeal.

Appellant is incorrect in asserting Rule 24, SCRCP provides her an unqualified right to intervene. Rule 24, SCRCP provides that upon "*timely* application anyone shall be permitted to intervene in an action when (1) a statute confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties". Rule 24, SCRCP (emphasis added). South Carolina courts analyze several factors in determining whether a motion to intervene is timely under Rule 24, SCRCP, including the time that has passed since the applicant knew or should have known of his or her interest in the suit, the reason for the delay, and the stage to which the litigation has progressed. *See, e.g. Ex parte Reichlyn*, 427 S.E.2d 661, 664, 310 S.C. 495, 500 (S.C. 1993) (holding that the stage to which the litigation had progressed and the prejudice to the original parties supported a conclusion that Appellant's motion to intervene as of right was untimely where intervention would delay the proceedings and where the Appellant's interest in preserving assets for his own benefit was not a sufficient interest to require intervention pursuant to Rule 24).

At the time of the hearing on Respondent's motion for summary judgment, Appellant was the only living child of W.G. Weekley and the only beneficiary named in the Will. Appellant filed this action in her capacity as Personal Representative of the Estate on November 14, 2007, more than a year after she was named Personal Representative on July 14, 2006. She did not file the action in her individual capacity. (R. p. 182). On or about January 17, 2017, Appellant was removed as Personal Representative by Order of the Circuit Court. Appellant Denney did not

contest her removal and made no attempt to join the case in her individual capacity from 2007 to 2018. (R. pp. 8, 210-211, 214). She filed her motion to intervene on June 24, 2018, almost two months after Respondent Segel filed her motion for summary judgment. (R. pp. 104-15, 106-108). Although Mrs. Denney sought to intervene in this action, she filed no personal affidavit in opposition to Respondents' motion for summary judgment.

As set out in the record, Respondent had notice – actual notice according to the affidavits of Mr. and Mrs. Segel and their exhibits and constructive notice from the public records regarding the Disputed Transfer – years before she was named Personal Representative in 2006 and filed this lawsuit. (R. pp. 109-113, 131-151). However, she never contested the transactions as an individual in the years prior to being appointed or during the eleven years she was the plaintiff in this litigation. Therefore, even if mootness was not sufficient grounds, Appellant's extreme delay in bringing an individual claim, the stage to which the litigation had progressed, and the expiration of the statute of limitations all support Judge Mullen's denial of the motion to intervene.[5]

Moreover, since Appellant's counsel was provided an opportunity to argue against Respondent's motion for summary judgment although Appellant was not a party to the suit, Appellant was not prejudiced even if the Order denying the motion to intervene was in error. Since summary judgment was properly granted to the Respondent, Appellant's motion to intervene was moot as well as untimely and summary judgment should be upheld.

CONCLUSION

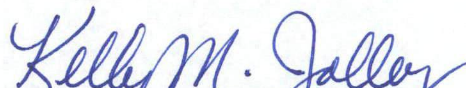
The Circuit Court properly granted summary judgment to Respondent where the right of first refusal contained in the will is invalid as a matter of law, Appellant was no longer a party to

[5] Respondent agrees with the Personal Representative that the individuals named in the motion to intervene have the right to participate in the final hearing for distribution of the Estate of W.G. Weekley; however, that hearing is separate from this litigation.

the action, and the applicable statute of limitations barred any recovery by Appellant. For these and the foregoing reasons, and any other reason supported by the Record, the Circuit Court's Order granting Respondent summary judgment in this matter should be UPHELD.

Respectfully submitted,

JOLLEY LAW GROUP, LLC



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Date: September 5, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Presiding Judge

RECEIVED
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SC Court of Appeals

Appellate Case No. 2018-002161

Estate of Willie G. Weekley, Deceased, by its Personal Representative, Betty W. Denney...Appellant,

v.

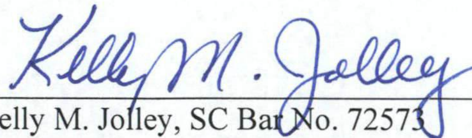
L.C. Weekley, Laura Weekley Segel, Individually and as Personal Representative of the Estate of William James Weekley, Deceased, Peter Saad as Personal Representative of Mary Elizabeth Weekley Saad, Deceased, and as Trustee of the Mary Elizabeth Saad Trust,

Of whom Laura Weekley Segel, Individually and as Personal Representative of the Estate of William James Weekley, Deceased, is the.................Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent's Final Brief complies with Rule 211(b), SCACR.

JOLLEY LAW GROUP, LLC



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