THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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SC Court of Appeals

Case No. 2016-CP-03-00286
Appellate Case No. 2019-000736

William Hunter Youmans, ... Appellant,

v.

Mark B. Tinsley and Diane E. Tinsley, ... Respondents.

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STATEMENT OF ISSUE ON APPEAL

Respondents believe the issues can be consolidated and re-stated as follows:

Whether the circuit court correctly held certain language in a deed was invalid and could not restrict an estate that had been granted in fee simple absolute.

STATEMENT OF THE CASE

This case is about whether two paragraphs in a deed are legally enforceable.

Calvin Youmans is deceased and is not a party to this litigation. In 1988, he deeded roughly 68 acres of property to his son Martin. (Compl. Ex.2). The property contains a pond as well as a "pond house" or cabin.

In September of 2015, Martin sold this property and two other properties to Mark and Diane Tinsley. (Compl.Ex.4). Martin is not deceased, but he is not a party to this case either.

The plaintiff below, and the appellant here, is Martin's brother Hunter. Hunter sued the Tinsleys in December of 2016. (Compl.). This was over a year after the Tinsleys bought the property from Martin.

Hunter sought two basic things in his lawsuit. Both of them revolved around two paragraphs in Calvin's 1988 deed to Martin.

The first of these paragraphs purported to reserve a right for Martin's brothers (including Hunter) "to use the pond house and pond." (Compl. Ex.2, p.2). This purported right of use was contingent on the brothers sharing the cost of maintaining the pond house and pond. *Id.* That contingency is not relevant to the ruling below or to the appeal.

The second paragraph at issue purported to reserve a right of first refusal or a right to be "offered" the property. This provision said that if Martin or his heirs ever decided to

sell the property, they were bound to first offer the property to Martin's brothers and their heirs at 90% of the property's fair market value. *Id.*

Based on the language noted above, Hunter sought an order compelling the Tinsleys to grant him immediate access to the pond and pond house. (Compl.pp.6-7). He also sought an order compelling the Tinsleys to sell him the property. (Compl.p.8, ¶4). Oddly, it is undisputed that Hunter knew Martin planned to sell the property to the Tinsleys long before the transaction closed. It is also undisputed that Hunter never attempted to buy the property himself and that he expressed approval of the Tinsleys buying the property before he objected to it later.

The Tinsleys filed a timely answer to Hunter's lawsuit and alleged these paragraphs in the deed were not legally enforceable. (Answer). They also alleged Hunter had ample opportunity to purchase the property, that he showed no interest in doing so, and that Hunter had repeatedly trespassed on and damaged the property. *Id.* The alleged damage included a claim that Hunter cut drainage pipes and caused water from a neighboring pond on his land to flood the Tinsleys' property after they bought it from Martin. *Id.*

The circuit court heard the Tinsleys' motion for summary judgment in October of 2018. (Oct.Tr.p.1). This was a little over two years after the case was filed.

In November of 2018 the circuit court issued a Form 4 granting summary judgment. (11/28/18 Form 4). This was confirmed in a written order filed later. (1/8/19 Or.).

The circuit court concluded the alleged rights of "use" and to be "offered" the property violated the common law rule that a deed granting an estate in fee simple absolute may not be "cut down" by subsequent words in the same instrument. (Id.p.3).

Hunter filed a timely motion for reconsideration, (Mot.), which the circuit court heard in March of 2019. (3/27/19 Tr.p.1). This was roughly two months after the court entered the written order granting summary judgment.

The circuit court entered a Form 4 denying reconsideration shortly after hearing the motion. (3/28/19 Form 4). This was confirmed in a written order filed April 8, 2019. (Or.).

STANDARD OF REVIEW

This is an appeal of a summary judgment. An appellate court evaluates summary judgment under the same standard as the circuit court. *Grinnell Corp. v. Wood*, 389 S.C. 350, 355, 698 S.E.2d 796, 798 (2010). Summary judgment is appropriate when there is no genuine dispute of material fact and when the moving party is entitled to judgment as a matter of law. *Id.* at 355, 698 S.E.2d at 789.

Whether this language is enforceable is an issue of law since "[t]he construction of a clear and unambiguous deed is a question of law[.]" *Hunt v. Forestry Comm'n*, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct. App. 2004). This Court reviews issues of law de novo.

ARGUMENT

The circuit court's rulings are correct. Precedent explains an estate that has been granted in fee simple absolute may not be cut down by subsequent words in the same instrument. It is hard to see how there is any dispute that Calvin's deed to Martin was a deed of fee simple absolute. It is equally evident that Martin's rights would have been severely restricted if these unusual rights of "use" and to be "offered" the property were given effect.

Hunter's arguments for reversal rest on a mistaken view of the case and the issues. This Court should affirm.

A. The circuit court's rulings are correct.

The order granting summary judgment begins by finding that Calvin's deed to Martin conveyed Martin the full estate in land—the fee simple absolute. (1/8/19 Or.p.2). That finding was based on the fact that the deed granted the land to Martin and to "his heirs and assigns." (Id.) (quoting Compl.Ex.2). The deed also bound Calvin as well as his heirs and assigns to defend Martin's title. (Compl.Ex.2, p.2). The circuit court correctly observed that at common law, a grant to someone and their heirs signified a fee simple absolute. (1/8/19 Or.p.2) (citing *McMichael v. McMichael*, 51 S.C. 555, 557, 29 S.E. 403, 403 (1898)). This was correct. The deed does not reference any reversionary interest or remainder.

Next, the circuit court explained the common law rule that an attempt by a grantor to deprive a grantee of an incident of ownership is legally ineffective when the land has been granted in fee simple absolute. (1/8/19 Or.pp.2-3). The circuit court cited four cases involving this rule and found that the relevant paragraphs from Calvin's deed to Martin could not be read as anything other than provisions that would "cut down" or limit the interest Martin had already been granted. *Id.*

That reasoning was right as well. Each of the cases cited in the order applied the same common law rule. In *Sanford v. Sanford*, the court denied effect to language prohibiting the grantee from mortgaging the land. 106 S.C. 304, 91 S.E. 294 (1917). In *Stylecraft, Inc. v. Thomas*, the court denied effect to language limiting the land to use for a school. 250 S.C. 495, 159 S.E.2d 46 (1968). In *County of Abbeville v. Knox*, the court denied effect to language limiting the land to use for an industrial development. 267 S.C. 38, 225 S.E.2d 863 (1976). And in *Hunt v. Forestry Commission*, the court denied effect to

language limiting the land to use as a fire tower. 358 S.C. 564, 595 S.E.2d 846 (Ct. App. 2004). All of these cases denied legal effect to language that was directly inconsistent with the deed having granted the estate in fee simple absolute.

This case is governed by the same rule. As the circuit court noted, this right of "use" would grant unlimited access to and use of the land. (1/8/19 Or.p.3). The precise nature of the interest is unclear since it is first described as a "right" but later as a "privilege" subject to "revocation" based on certain conditions. (Compl.Ex.2, p.2). As far as the Tinsleys have been able to discover, this language does not implicate any sort of property interest that has been previously recognized at law. It is also completely inconsistent with the property being granted to Martin in fee simple absolute since this language, if effective, would completely prevent Martin from excluding his brothers from *his* property if he desired to do so.

The right to be "offered" the property violates the same rule, for basically the same reason. If effective, it would deprive Martin of the right to receive full value for his land and the right to sell the land to a buyer of his choice. It is a straightforward limitation on alienation and directly inconsistent with Martin holding the estate in fee simple absolute.

Hunter's argument to enforce the right to be offered the property was based on *Stroman v. S.C. Power Co.*, where the Supreme Court enforced an award of damages against a power company for violating a deed that had language requiring the power company to offer the land to two specific buyers at a specific price and within a reasonable time of the land ceasing to be used for power generation. 168 S.C. 538, 540, 167 S.E. 844, 845 (1933). *Stroman* held the deed's language was indistinguishable from an option contract and should be treated as an option even though it was written in a deed. *Id.*

This purported right to be "offered" the property is not an option. The parties involved are indeterminate—they include Martin and his heirs as well as his brothers and their heirs. The terms are indeterminate—there is no mechanism for resolving competing claims to purchase the property. And the price is indeterminate—there is no explanation of how to determine fair market value or of who determines fair market value.

Secondary sources explain that rights of first refusal are generally enforced if they call for matching a bona fide offer or appraisal and that fixed-price rights of refusal in a deed are subject to "intense scrutiny" because they prevent a landowner from taking the opportunity to sell to the highest bidder. 61 Am. Jur. 2d *Perpetuities, Etc.* §§ 109 & 110. Here, the right of refusal purports to be for less than a bone fide offer, and unlike a fixed price provision that would already draw "intense scrutiny," the provision here lacks a fixed price and would force a loss. And, already noted, limiting a property owner's right to alienate property is directly inconsistent with the grant of fee simple absolute.

The circuit court's order denying rehearing reiterated this basic reasoning. (4/8/19 Or.pp.1-2). That order also addressed additional issues that were raised on rehearing. Those issues are discussed in the next section. Here, the key point is that the court correctly determined these paragraphs were unenforceable. This Court should affirm.

B. The arguments for reversal seem to rest on mistaken views of the case and the issues.

Hunter's brief seems to offer four arguments for reversal. He alleges summary judgment was premature because discovery motions were pending, he claims the circuit court retroactively applied a statute when construing Calvin's deed to Martin, he says the circuit

court failed to view the facts in his favor, and he argues the circuit court abused its discretion in granting summary judgment when there was no evidence Hunter signed a release or waived his alleged right to be offered the property. All of these arguments are mistaken.

i. There is no outstanding discovery and discovery is not relevant to the issues on appeal.

Discovery has nothing to do with whether the deed's language was legally enforceable. As noted above, in the standard of review, that question is a question of law. Hunter agreed it was a question of law at the summary judgment hearing. (10/8/18 Tr.p.32, line 25 - p.33, line 11). The summary judgment order noted this. (1/8/19 Or.p.2).

Also, the discovery issues in this case were addressed over a year before the summary judgment hearing. The transcript from that prior hearing discloses that the issues were Hunter's requests for discovery from the attorney who closed Martin's sale to the Tinsleys, to have an agent inspect the pond house, and to confirm the Tinsleys had disclosed all evidence they intended to use in proving Hunter knew about their purchase of the property. (6/21/17 Tr.p.19, line 6 - p.24, line 19). These issues have already been resolved and are irrelevant to the question whether these paragraphs in the deed had any legal effect.

ii. The circuit court did not retroactively apply any statute.

Hunter claims the circuit court retroactively applied a 1993 statute that abrogated South Carolina common law and codified a presumption that all deeds after 1993 pass title in fee simple absolute. See S.C. Code Ann. § 27-5-130 (Supp. ____).

The Tinsleys do not understand this argument. Nobody mentioned this statute until Hunter brought it up for the first time in his memorandum supporting his motion for

reconsideration. (Memo). The circuit court did not mention it in the order granting summary judgment. (1/8/19 Or.pp.1-6). The court explained in the order denying reconsideration that it did not apply this statute (or any statute) in determining the language in Calvin's deed to Martin was language of fee simple absolute.

iii. The circuit court did not fail to view the facts in Hunter's favor.

The Tinsleys also do not understand the argument that the circuit court failed to view facts in Hunter's favor. First, the validity of this language is a question of law, not fact. Second, the circuit court asked Hunter to identify what facts were in dispute and had not been viewed in his favor and Hunter's response was that the question whether this language gave him any "vested" rights was a jury question. (3/27/19 Tr.p.13, lines 12-25). That seems plainly wrong since, as already noted, "[t]he construction of a clear and unambiguous deed is a question of law[,]" not a question of fact. *Hunt,* 358 S.C. at 568, 595 S.E.2d at 848.

iv. The circuit court did not err in granting summary judgment without evidence of a written release from Hunter.

Hunter's argument here is foreclosed by the same reasoning that controlled several of the prior arguments. The question whether these paragraphs have any legal effect is a question of law. If the paragraphs do not have legal effect, it simply does not matter whether Hunter signed a waiver or release.

***

As is probably true in most cases, the broader background is more extensive than what has been described in this brief. For example, the transcript from the discovery hearing

describes that Martin and Hunter did not get along with each other and were in a lengthy dispute with one another over how to divide assets they owned jointly around the time this transaction closed. (6/21/17 Tr.p.8, line 17 - p.14, line 23). That transcript also describes how Hunter initially encouraged the Tinsleys to buy this property before taking actions that caused the Tinsleys to believe Hunter was trying to stall this transaction as a way to try and put pressure on Martin. *Id.*

This information is listed here only as an example to show that although there is lots more to this case's background, that information simply does not matter to the issues on appeal. The appeal is a straightforward question of whether language in a deed is enforceable at law. The circuit court correctly found it was not.

CONCLUSION

For the foregoing reasons this Court should affirm.

Respectfully submitted,

September 30, 2019

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellant with a copy of the *Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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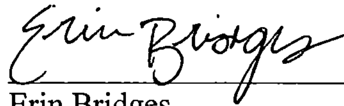

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VIA HAND DELIVERY
The Honorable Jenny Kitchings
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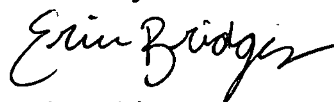
RE: William Hunter Youmans v. Mark B. Tinsley
Appellate Case No.: 2019-000736

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal in reference to this matter. I have also enclosed a Proof of Service upon counsel for the Appellant. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,



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