THE STATE OF SOUTH CAROLINA
In the Supreme Court

---

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

---

Opinion No. 2019-UP-308 (S.C. Ct. App. Filed August 28, 2019)

---

Edward R. Kelly and Deirdre O. Kelly ..... Petitioners

v.

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

---

# PETITION FOR A WRIT OF CERTIORARI

---


Brian McCoy
McCOY LAW FIRM, LLC
378 East Main Street
Rock Hill, SC 29730
(803) 366-2280
Attorneys for Appellants

Other Counsel of Record:

James W. Boyd
P.O. Box 36425
Rock Hill, SC 29732
(803) 328-2600

N. Beth Ramsey Faulkner
P.O. Box 1030
York, SC 29745
(803) 818-5700

Attorneys for Respondents



RECEIVED
NOV 25 2019
S.C. SUPREME COURT

## INDEX

## CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was filed on September 12, 2109, and was finally ruled on by the Court of Appeals on October 24, 2019.

## QUESTIONS PRESENTED

I. Did the Court of Appeals err by failing to hold that the Quitclaim Deed to the son was explicitly "subject to" the FROR, which made it unnecessary for the Court of Appeals to decide whether rights of refusal are transferable otherwise?

II. Did the Court of Appeals err by holding that the FROR provision required "successors or assigns or heirs" language for it to apply to the son because of the language of the provision and because the gift by Quitclaim Deed to the son was "subject to" the FROR?

III. Did the Court of Appeals err by failing to hold that the habendum clause of the Deed to Henry includes language making the FROR applicable to his "heirs . . . successors and assigns"?

IV. Did the Court of Appeals err by failing to construe the Deed to avoid the absurd result that the FROR could be circumvented by an immediate gratuitous transfer?

## INTRODUCTION

This appeal involves important and novel questions of law relating to rights involving transfers of property in this State. The Court of Appeals' decision unnecessarily relied upon rulings in other states for an aspect of South Carolina law not yet addressed by this Court. The appeal can and should be resolved based on the plain language of the deeds involved, and the decision of the Court of Appeals should be reversed.

## STATEMENT OF THE CASE

The case involves a 1996 deed of Property from the Appellants Kellys ("Kellys") to Henry McCombs ("Henry") in which the Kellys bargained for a first right of refusal ("FROR") to repurchase the Property, which was reflected in the price of the Property. [The 1996 deed at Appendix ("Appx") pp. 084-085; R. 082-083, is referred to herein as the "Deed"]. The FROR provision reads as follows:

> 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 partial of the same.

[*Id.*] The habendum clause of the Deed provides: "TO HAVE AND TO HOLD, all and singular the said premises above-mentioned, unto Henry L. McCombs, his heirs, executors, administrators, successors, and assigns forever." [Appx. p. 085; R. 083].

In 2012, Henry Conveyed the Property to his son by a Quitclaim Deed [Appx pp.086-089; R. 084-085] (herein the "Quitclaim Deed")] for "$5 love and affection." The Quitclaim Deed includes a derivation statement that refers to the Deed to Henry, and specifically provides: "HOWEVER, subject to any Restrictions, Conditions, Covenants, Rights, Rights of Way, and Easements now of record, if any." [Appx p. 087; R. 085].

The son later sold the Property in 2015 for $125,000 without notifying the Kellys of the proposed sale, as required by the FROR. [Appx pp. 090-091; R. 088-089]. The Kellys would have exercised the FROR and would have promptly purchased the Property at the sale price. [Appx p. 074 ¶10; R. 072].

The Court of Appeals affirmed the lower court's refusal to enforce the FROR on the basis that it was enforceable only against the grantee Henry, and not against his son. [Appx. pp. 212-215 (Opinion No. 2016-UP-308)]. One of its reasons was that the FROR provision did not expressly extend the right of first refusal to Henry's successors, heirs or assigns, although a

separate provision in the Deed relating to a use restriction against multiple mobile homes was applicable to the grantee and his "successors or assigns or heirs." [Appx. p. 213]. Another reason set forth by the Court of Appeals was based on decisions of other states that in the absence of evidence of intent, preemptive rights are generally nontransferable. [Appx. p. 214]. The Court of Appeals did not consider language in the habendum clause of the Deed because it considered the assertion was not preserved for appellate review. [Appx. p. 214] The Court of Appeals found no merit to Kellys' argument that a construction of the provision would lead to the absurd result that the provision could have been immediately circumvented by a gratuitous transfer because that did not actually happen in this case. [Appx p. 214].

## ARGUMENT

### I. Did the Court of Appeals err by failing to hold that the Quitclaim Deed to the son was explicitly "subject to" the FROR, which made it unnecessary for the Court of Appeals to decide whether rights of refusal are transferable otherwise?

The Opinion of the Court of Appeals acknowledges that Henry's transfer of the Property to his son by way of the Quitclaim Deed was a gift that did not invoke the FROR. [Appx p. 213 at 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. Instead, 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 . . ." [Appx . 087 (emphasis added); R. 085]. This plain and unambiguous assumption by the son in the Quitclaim Deed should be enforced. "If the language

employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used." *City of N. Myrtle Beach v. E. Cherry Grove Realty Co.*, 397 S.C. 497, 725 S.E.2d 676 (S.C. 2012) (*quoting Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct.App.1989) (citations and internal quotation marks omitted)).

Because in this case the FROR was expressly included in the Quitclaim Deed from Henry to his son, the Court of Appeals erred by its reliance on decisions of other states that have held that "*absent evidence of intent*, preemptions are generally construed to be nontransferable." [Appx. p. 214 (emphasis added)]. Here, the intent of the son to assume the FROR is plainly stated in the Quitclaim Deed. Thus, the decisions from other states cited by the Court of Appeals are not applicable, and it should not have reached that proposition of law because it was not applicable or necessary to the decision of this appeal. Under the circumstances of this case, the FROR applied to the son, and the Kellys should have been provided their rights under the FROR when the son sold the Property.

## II. The Court of Appeals erred by holding that the FROR provision required "successors or assigns or heirs" language for it to apply to the son because of the language of the provision and because the gift by Quitclaim Deed to the son was "subject to" the FROR.

For the same reasons, the absence of "successors or assigns or heirs" 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, the Quitclaim Deed to the son was expressly "subject to" the FROR. Thus, the issue of the necessity of the "successors, heir or assigns" language in the absence of an express assignment is not reached in this appeal.

The Court of Appeals' erred by relying on the fact that a separate restriction in the Deed relating to multiple mobile homes includes "successors, heirs or assigns" language. [see Appx. 213]. That provision has no relevance whatsoever, and it is important to examine the language of each provision. The language of that *use* restriction against multiple mobile home includes the language because it also specifies the "grantee" (Henry) by stating that "neither grantee nor his successors or assigns or heirs . . ." [Appx p. 084; R.082]. In contrast, the language of the FROR does not refer to a grantee at all. 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. "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). This demonstrates the illogic of the holding that the FROR was personal to Henry.

### III. The Court of Appeals erred by failing to hold that the habendum clause of the Deed to Henry includes language making the FROR applicable to his "heirs . . . successors and assigns"

The language of the Deed itself *does* make it binding on Henry's heirs and assigns. A review of the entire Deed demonstrates that 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." [Appx p. 085; R.083]. *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").

Because the Deed itself includes the "heirs, successors and assigns" language, the entire premise of the Court of Appeals' ruling is faulty. The Court of Appeals failed to address this obvious fault in its analysis based on the incorrect assertion that the issue was not preserved for

appeal. [Appx p. 214]. However, the issue was raised at the trial court [*see* Appx pp. 008-013 (Complaint *passim*); Appx. 142-145], and the lower 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. [Appx p. 006]. It cannot be seriously contended that the language of the Deed as a basis for relief for the Kellys was not argued and ruled on below. Thus, the issue was preserved for appeal, and the language in the habendum clause of the Deed itself is decisive.

## IV. The Court of Appeals erred by failing to construe the Deed to avoid the absurd result that the FROR could be circumvented by an immediate gratuitous transfer.

The Opinion finds "no merit" to the argument that the ruling below could lead to absurd results because under the construction Henry could have circumvented the bargained-for FROR by gratuitously transferring the Property immediately after receiving the Deed. [Appx p. 214]. 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) (same). Following that rule of construction, an interpretation that *could* lead to absurd results, as here, should be avoided[1]. Instead it was adopted.

The Court of Appeals' reasoning misunderstands the basis for the rule of construction. Its Opinion points to the fact that sixteen years *actually* passed before Henry's Quitclaim Deed to

[1] There 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).

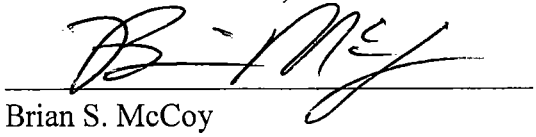
his son instead of the immediately transfer that was possible. [Appx p. 214]. However, because the construction adopted by the Court of Appeals *could* result in an immediate transfer to circumvent the FROR is a reason not to construe it in that manner. The fact that it did not actually occur in that time frame is irrelevant.

## CONCLUSION

For the reasons stated, the Opinion of the Court of Appeals fails to apply the plain language of both the Deed and the Quitclaim Deed, which both make the FROR applicable and enforceable on the son's sale of the Property. The language of the FROR makes the non-inclusion of "successors or assigns or heirs" language irrelevant, and the inclusion of such language in a separate provision also is irrelevant. The Court of Appeals simply misconstrued the doctrine of construction under South Carolina law to avoid absurd results. The Court of Appeals should be reversed, and the case remanded to the court of common pleas.

Respectfully submitted,

McCOY LAW FIRM, LLC



Brian S. McCoy
SC Bar No. 2155
378 East Main Street
Rock Hill, SC 29730
803-366-2280
Attorney for Appellants

November 25, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
NOV 25 2019
S.C. SUPREME COURT

---

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

---

Opinion No. 2019-UP-308 (S.C. Ct. App. Filed August 28, 2019)

---

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

v.

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

---

PROOF OF SERVICE

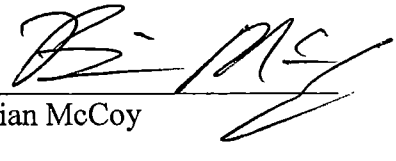
---

I certify that I have served a copy of the Petition for a Writ of Certiorari to the counsel of record for Respondents as indicated below on the date indicated by First Class United States Mail, postage prepaid, addressed as follows:

James W. Boyd
P.O. Box 36425
Rock Hill, SC 29732
(803) 328-2600

N. Beth Ramsey Faulkner
P.O. Box 1030
York, SC 29745
(803) 818-5700

McCOY LAW FIRM, LLC



Brian McCoy

November 25, 2019
Rock Hill, South Carolina